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Vol. I

PY. 164

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940 1941

No. 421 10

CITY OF INDIANAPOLIS, ET AL., PETITIONERS,

vs.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., ET AL.

No. 422 11

CITY OF INDIANAPOLIS, ET AL., PETITIONERS,

vs.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., ET AL.

No. 423 12

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., PETITIONER,

vs.

CITIZENS GAS COMPANY OF INDIANAPOLIS, ET AL.

No. 424 13

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., PETITIONER,

vs.

THE INDIANAPOLIS GAS COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONS FOR CERTIORARI FILED SEPTEMBER 12, 1940.

CERTIORARI GRANTED OCTOBER 28, 1940.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. .....

THE CITY OF INDIANAPOLIS, ET AL.,

Petitioners,

vs.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., ET AL.,

Respondents.

Two Causes—C. C. A. Nos. 7143-7144.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

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For the Seventh Circuit

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Plaintiff-Appellant,

7143 *vs.*

CITIZENS GAS COMPANY OF INDIANAPOLIS, ET AL.,

Defendants-Appellees.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC.,

Plaintiff-Appellee,

7144 *vs.*

THE INDIANAPOLIS GAS COMPANY,

Defendant-Appellant.

Appeals from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

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IN THE

United States Circuit Court of Appeals
For the Seventh Circuit

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC.,

Plaintiff-Appellant,

7143 *vs.*

CITIZENS GAS COMPANY OF INDIANAPOLIS, ET AL.,

Defendants-Appellees.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC.

Plaintiff-Appellee,

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Defendant-Appellant.

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The Chase National Bank of the City of New York, Trustee,
vs.
Citizens Gas Company of Indianapolis, *et al.*
} No. 1844 in Equity.

In accordance with Item No. 1 of the stipulation as to the parts of the record to be included in the record on appeal, the printed Transcript of Record in cause No. 6472 in this cause in the United States Circuit Court of Appeals for the Seventh Circuit is included in this transcript on appeal and is as follows:

TRANSCRIPT OF RECORD

IN THE

United States Circuit Court of Appeals

For the Seventh Circuit

No. 6472

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE,

Plaintiff-Appellant,

vs.

CITIZENS GAS COMPANY OF INDIANAPOLIS, THE CITY OF INDIANAPOLIS, A MUNICIPAL CORPORATION, THE INDIANAPOLIS GAS COMPANY, ET AL.,

Defendant-Appellees.

Counsel for Plaintiff-Appellant:
MR. HOWARD F. BURNS,
MR. NEWTON D. BAKER,
MR. WILLIAM L. TAYLOR,

Counsel for Defendants-Appellees:
MR. PAUL Y. DAVIS,
MR. WILLIAM G. SPARKS,
MR. WILLIAM H. THOMPSON,
MR. ALBERT L. RABB,
MR. LOUIS B. EWBANK,

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

TRANSCRIPT OF RECORD FILED DEC. 4, 1937.
PRINTED RECORD.

IN THE

United States Circuit Court of Appeals

For the Seventh Circuit

No. 6472

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE,

Plaintiff-Appellant,

vs.

CITIZENS GAS COMPANY OF INDIANAPOLIS, THE CITY OF INDIANAPOLIS, A MUNICIPAL CORPORATION, THE INDIANAPOLIS GAS COMPANY, ET AL.,

Defendant-Appellees.

Counsel for Plaintiff-Appellant:
MR. HOWARD F. BURNS,
MR. NEWTON D. BAKER,
MR. WILLIAM L. TAYLOR.

Counsel for Defendants-Appellees:
MR. PAUL Y. DAVIS,
MR. WILLIAM G. SPARKS,
MR. WILLIAM H. THOMPSON,
MR. ALBERT L. RABB,
MR. LOUIS B. EWBANK.

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1 Pleas of the District Court of the United States for the Southern District of Indiana, at the United States Court House in the City of Indianapolis, in said District, before the Honorable Robert C. Baltzell, Judge of said District Court. Placita.

The Chase National Bank of the City of New York, Trustee
vs.
Citizens Gas Company of Indianapolis, *et al.*
} 1844 Equity.

Be It Remembered that heretofore to wit: at the April Term of said Court, on the 8th day of June, 1936, before the Honorable Robert C. Baltzell, Judge of said Court, the following proceedings in the above cause were had, to wit:

Comes now the plaintiff, by its solicitors, and files bill of complaint in the above entitled cause, which is as follows:

Filed June 8, 1936. 2

Filed June 8, 1936.

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Southern District of Indiana,

Indianapolis Division.

The Chase National Bank of the City of New York, Trustee,
Plaintiff,

vs.

Citizens Gas Company of Indianapolis, a corporation, The City of Indianapolis, a municipal corporation, The Indianapolis Gas Company, a corporation, William J. Mooney, Sr., A. Dallas Hitz, Alfred M. Glossbrenner, Edward W. Harris, and Charles S. Rauh, as members of the Board of Trustees for Utilities of the City of Indianapolis, Henry L. Dithmer, Broadhurst Elsey, Fred W. Jungclaus, Roy Sahm, David J. Angus, Isaac E. Woodward, and Russell J. Ryan, as members of the Board of Directors for Utilities of the City of Indianapolis,
Defendants.

In Equity Cause No. 1844.

BILL OF COMPLAINT.

William L. Taylor,
State Life Building,
Indianapolis, Indiana,
Newton D. Baker,
Raymond T. Jackson,
Union Trust Building,
Cleveland, Ohio,
Solicitors for Plaintiff.

4 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—1844) * *

BILL OF COMPLAINT.

The plaintiff brings this its bill of complaint against the above named defendants and each of them and respectfully shows to this Court the following statements of the grounds upon which the jurisdiction of this Court depends, and of the ultimate facts upon which it asks relief, all of which said facts it is informed and believes and, therefore, duly alleges to be true:

1. Plaintiff, The Chase National Bank of the City of New York, is a corporation existing under and by virtue of the banking laws of the United States with its principal place of business in the City of New York in the State of New York, and is engaged in and authorized to engage in a general banking and trust business. It is a resident and citizen of the State of New York within the meaning of the Judicial Code of the Laws of the United States.

Defendants, The Indianapolis Gas Company and Citizens Gas Company of Indianapolis, are each corporations existing under the laws of the State of Indiana with their principal places of business in the City of Indianapolis, State of Indiana, and are each residents and citizens of said State of Indiana.

Defendant, the City of Indianapolis, is a municipal corporation existing by virtue of the laws of the State of Indiana, and is located in the Southern Federal Judicial District of Indiana.

Defendants, William J. Mooney, Sr., A. Dallas Hitz, Alfred M. Glossbrenner, Edward W. Harris and Charles S. Raub, as members of the Board of Trustees of Utilities for the City of Indianapolis, and Henry L. Dithmer, Broadhurst Elsey, Fred W. Jungclaus, Roy Sahm, David J. Angus, Isaac E. Woodward, and Russell J. Ryan, as members of the Board of Directors for Utilities of the City of Indianapolis, and each of them, are residents of the City of Indianapolis, State of Indiana, and citizens and residents of the State of Indiana.

2. The grounds upon which the jurisdiction of this Court rests in this suit is the diversity of citizenship between the plaintiff herein and each and all of the defendants as herein above named. This cause is of a civil nature and the matter

in controversy herein exceeds, exclusive of interest and costs, the sum or value of three thousand dollars ($3,000.00).

3. Plaintiff brings this suit as Trustee under a deed of trust executed on the 1st day of October, 1902, by defendant, The Indianapolis Gas Company, to secure the payment of the principal and interest of certain first mortgage bonds of said The Indianapolis Gas Company, and for and in behalf of the holders and owners of said bonds and pursuant to the rights granted to the original trustees and their successor or successors under said deed of trust, and at the specific instance and request of the holders and owners of $415,000.00 in principal amount of said bonds. The plaintiff seeks a declaratory judgment to determine and fix the rights of the plaintiff as mortgagee and as trustee as aforesaid, and to determine the rights of the plaintiff and the obligations of the several defendants under or growing out of a certain lease indenture, hereinafter more particularly described, executed by and between the defendants, The Indianapolis Gas Company and Citizens Gas Company of Indianapolis on September 30, 1913, which said lease indenture, and the property leased thereunder, is part and parcel of the property of this trust of which this plaintiff is trustee, and plaintiff seeks further relief by way of injunction to preserve and protect the said property and the corpus of its trust, to prevent loss, waste, and damage to the same, and to prevent irreparable loss and damage to the holders of said bonds. Plaintiff further alleges that there exists a real and actual controversy as to the validity and as to the rights and obligations under said lease, all as more particularly hereinafter set out. Plaintiff has no plain, complete or adequate remedy at law, and adequate relief can only be administered in a court in equity.

4. On the 1st day of October, 1902, defendant, The Indianapolis Gas Company, duly bargained, sold and conveyed under said mortgage deed of trust all of its property, both real and personal, presently owned and thereafter to be acquired, to The Trust Company of America, a banking corporation then existing and doing business in the City of New York and one Ferdinand Winter, a citizen of the City of Indianapolis, Indiana, as trustees to secure the payment of principal and interest of an authorized first mortgage bond issue in the amount of Seven Million Five Hundred Thousand Dollars ($7,500,000.00), said bonds being described and designated as The Indianapolis Gas Company first consolidated mortgage five percent gold bonds. The Trust Company of

America at the time of the execution of the mortgage deed of trust and at all times hereinafter mentioned, up to and including February 24, 1912, was duly authorized and empowered to hold in trust the property transferred and conveyed in trust to it and to execute the trusts thereby created and became and was until February 24, 1912 the duly acting and qualified corporate trustee under the mortgage deed of trust. On February 24, 1912, The Trust Company of America was duly merged pursuant to the laws of the State of New York with The Equitable Trust Company of New York. Said The Equitable Trust Company of New York was on February 24, 1912, and at all times hereinafter mentioned, up to and including May 31, 1930, duly authorized and empowered to hold in trust the property transferred and conveyed in trust to it and to execute the trusts created by said mortgage deed of trust and became and was until May 31, 1930, the duly acting and qualified corporate trustee under the mortgage deed of trust. On May 31, 1930, The Equitable Trust Company of New York was duly consolidated with the plaintiff. The plaintiff was on May 31, 1930, and at all times hereinafter mentioned, and still remains, duly authorized and empowered to hold in trust the property transferred and conveyed in trust to it and to execute the trusts created by said mortgage deed of trust and became and is now the duty acting and qualified corporate trustee under the mortgage deed of trust. Said Ferdinand Winter died in March, 1935, and plaintiff is now the sole acting and qualified trustee under said mortgage deed of trust, a copy of which is herein set out, made a part of this bill of complaint and marked Exhibit A.

Of the total authorized issue of said first mortgage bonds, bonds in the principal amount of Six Million Eight Hundred Eighty-One Thousand Dollars ($6,881,000) have now been authenticated and delivered by the trustee and are in the possession and ownership of numerous and widely scattered individuals and corporations. All and each of the bonds of said authorized issue become due and payable on the 1st day of October, 1952.

5. Prior to the 30th day of September, 1913, defendants, The Indianapolis Gas Company and Citizens Gas Company of Indianapolis, were both and each separately engaged in the manufacture and distribution of gas to the inhabitants of Indianapolis. On said 30th day of September, 1913, the said The Indianapolis Gas Company executed and delivered to defendant, Citizens Gas Comany of Indianapolis, an inden-

ture of lease covering the gas plants, systems, easements, franchises and rights theretofore operated and owned by it, all of which said property was covered by and included in the aforesaid mortgage deed of trust of which plaintiff
6 is the present trustee. A true copy of said indenture of lease is hereby made a part of this bill of complaint, is set out herein and marked Exhibit B.

Said lease is for a term of ninety-nine (99) years commencing October 1st, 1913, and provides that the lessee, its successors and assigns, during the term of said lease shall maintain and operate the leased property, making all necessary repairs, renewals, replacements, and extensions, so that the efficiency and value of said property shall not become impaired; provides that the lessee may require the lessor to obtain from the trustee of said mortgage deed of trust the authentication and delivery of additional bonds of said The Indianapolis Gas Company for the purpose of reimbursing the lessee for capital expenditures made on account of extensions and betterments to the plant and system of The Indianapolis Gas Company; provides that upon the maturity of the mortgage bonds theretofore or thereafter issued under said mortgage deed of trust, the lessee shall refund the same or provide for their extension or refunding by appropriate action in which the lessor shall join; and said lease further provides that the lessee during the term of said lease shall pay directly to the trustee of said mortgage deed of trust, now this plaintiff, as part of the rental thereunder, without relief from valuation or appraisement laws, and with attorneys' fees, the interest on all five percent fifty year gold bonds secured by said deed of trust, so long as the said bonds or any of them shall be outstanding, and also the interest as it shall from time to time fall due on any bonds which may be issued in refunding, renewing or extending the bonded indebtedness of the lessor under the provisions of said lease.

6. The said Citizens Gas Company of Indianapolis, lessee under the aforesaid 99-year lease, was organized in 1905 under the general laws of the State of Indiana, providing for the incorporation of manufacturing and mining companies. Although organized as a corporation for profit, it was and is actually a quasi-public corporation, its purposes and objects being fixed and controlled by a certain franchise and contract granted and entered into on the 25th day of August, 1905, by and between the City of Indianapolis and three individual citizens, viz., Alfred F. Potts, Frank D. Stalnaker and Lorenz

Schmidt. A true copy of said franchise and contract, together with the Articles of Incorporation of said company and all amendments thereto, is hereby made a part of this bill, set out herein and marked Exhibit C.

Said franchise and Articles provided, among other things, that all the capital stock of said company should be held by Trustees, one of whom should be named by the Mayor of Indianapolis, which said Board of Trustees should have full, complete and irrevocable power during the life of the corporation to hold the stock and vote the same as fully and completely as if they were the owners thereof and to name and select members of the Board of Directors; provided that owners of said stock should hold only a certificate for said share or shares, which said certificates were assignable and entitled the holders thereof to all dividends declared and paid by said company on said share or shares; provided that upon the expiration of 25 years and when said certificate holders had received an amount equal to the face value thereof with a certain specified interest, the said certificates should all be deemed fully paid and cancelled and the Trustees and Directors should then convey to said City of Indianapolis all the right, title and interest of said company in its said property and gas plant, subject to all legal obligations of the company, to be held and owned by said City for the use and benefit of its inhabitants; and said franchise and articles contained other appropriate provisions respecting the management of the company's property and means and methods for its transfer to the City of Indianapolis under certain specified conditions, all as more fully appears in said Exhibit C to which reference is hereby made.

Said Citizens Gas Company of Indianapolis has at all times continued to exist and operate under the provisions of said franchise and its Articles which embodied the terms of said franchise, and said Articles have only been amended to permit the increase of its capital stock and the issuance of first mortgage bonds.

As hereinabove set forth all rights, property and assets acquired by said Citizens Gas Company of Indianapolis were as a matter of law and equity acquired for the benefit of the inhabitants of the City of Indianapolis, subject to a charge in favor of the stockholders, creditors and other persons having valid claims and rights against said corporation or its
7 property, and at all times from its creation of said company was the trustee of a public charitable trust for the

benefit of the inhabitants of the City of Indianapolis, said trust being subject to only such charges in favor of stockholders and creditors as above described.

7. On May 21, 1913, prior to the execution of the aforesaid lease, the parties thereto, to wit, said Citizens Gas Company of Indianapolis and The Indianapolis Gas Company, made joint petition to the Public Service Commission of Indiana for leave to execute the same and for approval thereof, all in conformity with the statutes of the State of Indiana which authorize a public utility to acquire by purchase or lease the property of a competing utility, and in conformity with the policy of said state as announced therein. Said joint petition showed:

That said companies, since the completion of the plant of the Citizens Gas Company, had been active and aggressive competitors with consequent duplication of lines, waste and inefficiency;

That the interests of the public generally required unified management of both properties to eliminate future duplications of facilities and to eliminate the expense and waste of dual operation; and

That the Citizens Gas Company of Indianapolis being a "co-operative institution" organized for the purpose of affording to the public the benefits of cheap gas with limited dividends to the stockholders, and providing for an ultimate transfer of the property on certain conditions to the City of Indianapolis for the benefit of the entire public, the proposed lease would promote the realization of the purposes of the organization of said company.

Upon the filing of said joint petition one Frank S. Fishback, a citizen of Indianapolis and a stockholder of the Citizens Gas Company of Indianapolis, filed with said Public Service Commission an intervening petition opposing the approval of the proposed lease from The Indianapolis Gas Company to the Citizens Gas Company of Indianapolis on the following grounds:

(a) That the rental provided therein was greatly excessive;

(b) That The Indianapolis Gas Company had no power to enter into the proposed lease under its charter and had no franchise to occupy the streets; and

(c) That the Citizens Gas Company of Indianapolis had no power to enter into the proposed lease for the following reasons, namely:

That the term of the proposed lease was for a period longer than the Lessee's corporate life;

That the City of Indianapolis was the true owner of the Lessee's property and that said Lessee Company had only the right to the use thereof until the charges for money invested therein and other obligations were paid and discharged; and

That the approval of three-fourths of the capital stock of the Lessee's Company was required under the law, which said requirement had not been complied with.

Said joint petition and said intervening petition of said Fishback came on for hearing before said Public Service Commission of Indiana, and said Commission having heard the evidence thereon did on October 1st, 1913, make a certain finding and order in which the value of the plant and property of The Indianapolis Gas Company was found to justify the proposed rental and in which the execution of said lease, the same being found to be in the public interest, was duly affirmed, ordered and approved. A true copy of said finding and order is hereto attached, made a part hereof and marked Exhibit E.

8. Following the approval by the Public Service Commission of Indiana as hereinabove recited, the said lease from The Indianapolis Gas Company to the Citizens Gas Company of Indianapolis was duly executed and delivered and thereafter, before the said lease became operative, the said Frank S. Fishback filed a petition for rehearing and contended:

That the performance of the terms of the lease would render impossible the fulfillment of the contract of the Citizens Gas Company of Indianapolis with the City of Indianapolis as the same related to the taking over of said property and plant of the said Citizens Gas Company by said City; and

That the City of Indianapolis had not given its consent to said lease.

8 On the 28th day of November, 1913, the Public Service Commission of Indiana overruled the aforesaid petition for a rehearing, and immediately thereafter the Citizens Gas Company took possession and control of the plant and system and all of the other property of The Indianapolis Gas Company described in said lease and covered by the mortgage deed of trust of which this plaintiff is the successor trustee.

In all of the proceedings before the Public Service Commission of Indiana, upon the joint petition of the Citizens Gas Company of Indianapolis and The Indianapolis Gas Company, upon the intervening petition of the said Frank S. Fish-

back, and upon the petition for a rehearing filed by the said Frank S. Fishback, the defendant, the City of Indianapolis, was duly served with notice to appear and through its duly appointed and authorized counsel did in fact appear and participate therein. No objection by petition to said Commission or otherwise was ever made by said City of Indianapolis either to the execution of said lease or to the orders made by said Commission, and said City has never, by any proceeding, act or suit, sought in any court to have set aside or vacated the determinations or orders of said Public Service Commission of Indiana, or to enjoin the enforcement thereof, or to prevent in any way such orders or determinations from being effective.

9. Following the proceedings and orders in and of said Public Service Commission of Indiana, said Frank S. Fishback did file an action in equity against the Public Service Commission of Indiana, the Citizens Gas Company of Indianapolis, The Indianapolis Gas Company and the City of Indianapolis in the Superior Court of Marion County, Indiana, asking that said 99-year lease executed with approval and upon order of said Public Service Commission of Indiana be declared null and void and that the defendants be restrained and enjoined from carrying out the provisions thereof upon the following grounds, among others, to wit:

(a) That the defendant, Public Service Commission of Indiana, was without power or authority to order or permit the parties to enter into said lease;

(b) That the Citizens Gas Company of Indianapolis was without power or authority under the law to enter into the lease for the reason that consent thereto had not been obtained from three-fourths of the capital stock of said company;

(c) That the City of Indianapolis had not given its consent to such lease, and it had not granted any right to the Citizens Gas Company of Indianapolis to operate the plant and system of The Indianapolis Gas Company as therein provided;

(d) That the payment of rentals as provided in said lease was of such an amount as would render the Citizens Gas Company of Indianapolis unable to pay thereafter the dividends and other payments to its stockholders as required in its Articles of Incorporation and by-laws;

(e) That the said lease constitutes a lien and encumbrance upon the property and earnings of the Citizens Gas Company

of Indianapolis, thereby impairing the obligation of the contract existing between said company and its stockholders and the City of Indianapolis.

(f) That the trustees, directors and officers of the Citizens Gas Company of Indianapolis were not by law or otherwise authorized to enter into said lease for a period of ninety-nine (99) years; and

(g) That said lease was void upon other grounds which had been raised and presented by said Fishback in his petition to the Public Service Commission of Indiana and his petition for rehearing there filed.

Before said cause came on to be heard the defendant, the City of Indianapolis, through the Board of Public Works thereof had formally accepted and recognized said lease by requiring extensions to be made in the lines and mains of The Indianapolis Gas Company, as provided in subsection 6 of section 27½ of said lease, which provision had been inserted in said lease at the instance of the City of Indianapolis, and these facts, together with the fact that the City of Indianapolis had appeared before the Public Service Commission and through its counsel participated in the proceedings before such Commission, were duly set forth in a joint answer filed by the several defendants in said suit. Thereupon plaintiff filed nine additional paragraphs of complaint amplifying the contentions originally made by him as hereinabove set forth.

9 To the answer of defendants the plaintiff filed a demurrer, and to each of the nine additional paragraphs of the complaint the defendants, respectively, filed demurrers. The demurrer to the answer was overruled and each of the demurrers to said additional paragraphs of the complaint was sustained, and each party declining to plead over, final judgment was rendered that plaintiff take nothing and that the defendants recover their costs. Thereupon the plaintiff undertook to perfect an appeal to the Supreme Court of Indiana, which appeal upon final hearing was dismissed by that Court on the ground that same had not been duly perfected as required by law; and the judgment of the Superior Court ever since has been and now is in full force and effect.

10. At the time of the execution and delivery of said 99-year lease $4,833,000 face amount of Indianapolis Gas Company First Mortgage Bonds had been issued and were outstanding. Subsequent thereto and subsequent to the proceedings hereinabove set forth upon the request of The Indianapolis Gas Company, additional bonds in the principal

amount of $2,048,000 were authenticated and delivered by the Trustee, and were delivered in turn by The Indianapolis Gas Company to the Citizens Gas Company of Indianapolis pursuant to the provisions of said lease to reimburse said company for capital expenditures on account of extensions and betterments to the plant and system of the Indianapolis Gas Company, theretofore made by it as lessee, all or substantially all of which bonds were sold by the Citizens Gas Company of Indianapolis as provided by said lease. The aforesaid additional bonds were widely sold and distributed and were acquired and purchased in reliance that the same were secured by a valid and enforceable 99-year lease to a responsible corporation, that said corporation, its successors and assigns, was legally obligated to pay the interest thereon as a part of the rental under said lease, and that the validity of said lease had been judicially and finally determined by the Public Service Commission of Indiana and by the courts of Indiana.

11. From and after November 28, 1913, the plant and property of The Indianapolis Gas Company was operated by the Citizens Gas Company of Indianapolis under the aforesaid 99-year lease and was continuously so operated by said Company until possession thereof, in September, 1935, was delivered as hereinafter alleged to the defendant, the City of Indianapolis. During all of that period of time and for more than twenty-one years, the Citizens Gas Company of Indianapolis accepted and enjoyed the profits and use of the property as granted under said 99-year lease, it was relieved from the waste and expense of competition and duplication of facilities, and it operated and maintained the leased plant and property as a unified part of its own plant and system without regard to the preservation of the leased property as an independent, separable and competitive system. The City of Indianapolis and the residents and inhabitants thereof have had the full benefit and advantage of such operations, and of the profits produced thereby and of the protection thus given to the public charitable purposes to which the property of the Citizens Gas Company of Indianapolis were dedicated.

12. On March 20, 1929, the City of Indianapolis, through its Board of Public Works, adopted a resolution in which, after reciting the terms of the franchise and Articles of Incorporation of said Citizens Gas Company of Indianapolis, demand was made on said Company to mortgage its property, pay off the bonded indebtedness and certificate holders for both common and preferred stock and then to convey its

property to the said City, reserving to the City the right to furnish funds for such purpose.

13. Subsequent to the giving of said foregoing notice, one Newton Todd, a stockholder of the Citizens Gas Company of Indianapolis, filed a bill of complaint in this Court seeking to restrain and enjoin the transfer of its property by the said Citizens Gas Company to the City of Indianapolis upon the following grounds, among others, to wit:

(a) That the charter of the Citizens Gas Company and the contract with the City of Indianapolis, pursuant to which said Company was organized, did not create a public charitable trust;

(b) That the City of Indianapolis could not validly acquire the property of said Citizens Gas Company without a vote of its inhabitants and the consent of the Public Service Commission; and

(c) That the stockholders of the Citizens G .s Company were not estopped from asserting the invalidity of the contract and agreement of August 25, 1905, between the City of Indianapolis and the incorporators of the Citizens Gas Company.

The City of Indianapolis was made a party defendant in the aforesaid cause and filed its separate Answer alleging, among other things:

(a) That a public charitable trust was created in favor of the citizens and gas consumers of Indianapolis through the execution of the contract and franchise between said City and incorporators of said Citizens Gas Company; and

(b) That the Act of the General Assembly of Indiana of March 11, 1929, which said Act affirmed and validated all of the provisions of said franchise and Articles of said Citizens Gas Company, did not violate any constitutional rights of the owners of stock of the said Citizens Gas Company.

The issues thus joined were heard by this Court and the relief prayed for was denied and on appeal of said cause to the United States Circuit Court of Appeals for the Seventh Circuit, said latter Court affirmed the decision of this Court and held and adjudged that the property of said Citizens Gas Company was a public charitable trust in favor of the inhabitants of the City of Indianapolis and that upon the extinguishment of the charge against said property in favor of the certificate holders to the extent of their investment said property might then be conveyed to the City of Indianapolis

as a continuance of the trust, the City being the successor to the said Citizens Gas Company as Trustee thereof.

14. In the meantime, after said action by Newton Todd had been commenced but before it was decided by the United States District Court, one Allen G. Williams had brought suit as a resident and taxpayer of the City of Indianapolis on behalf of himself and other resident taxpayers of said City in the Marion Superior Court of Indiana to establish a trust in all of the property devoted to the manufacture, sale or distribution of artificial gas in the City of Indianapolis, to recover the property from alleged delinquent and insolvent Trustees, and for the appointment of a receiver to administer said trust until such time as it should be turned over to its lawful beneficiaries. The defendants, the City of Indianapolis, the Citizens Gas Company of Indianapolis, The Indianapolis Gas Company, and your petitioner and Ferdinand Winter, Trustees under the mortgage deed of trust from The Indianapolis Gas Company, were made defendants in this cause of action and each of said defendants appeared therein and filed a demurrer to the Bill of Complaint, which demurrer was duly sustained, and final judgment was rendered in favor of the defendants. The plaintiff, on appeal to the Supreme Court of Indiana, made, among others, the following contentions:

(a) That the lease between the Citizens Gas Company and The Indianapolis Gas Company was invalid;

(b) That the action of the Public Service Commission of Indiana in approving said lease was an unlawful and invalid exercise of its power; and

(c) That the Act of the Indiana General Assembly creating and defining the powers granted to said Public Service Commission was an invalid denial of the plaintiff's constitutional rights.

The decision of the Supreme Court of Indiana, sustaining said decision and overruling all of the foregoing contentions of the Appellant, held that the lease executed between the Citizens Gas Company of Indianapolis and The Indianapolis Gas Company was valid and that both the parties thereto had the power to execute the same and that, by reason of the approval and the judgment upon said lease by the said Public Service Commission, there was no basis presented for any claim of invalidity.

15. Subsequent to the final decree in the foregoing suits and on or about June 1, 1935, the defendant, the City of Indi-

anapolis, for the purpose of obtaining funds with which to acquire the property and assets of the said Citizens Gas Company of Indianapolis, in accordance with the right reserved in the resolution adopted on March 20, 1929, as hereinbefore alleged, offered for sale and sold $8,000,000 face amount of City of Indianapolis Gas Plant Revenue 4½% Bonds and in the public offering thereof represented among other things:

(a) That said bonds were issued to provide funds to permit the said city to exercise its franchise rights to acquire property owned by Citizens Gas Company of Indianapolis;

(b) That upon the consummation of this acquisition the said City will control a business supplying the entire
11 domestic and commercial gas requirements of the City of Indianapolis and its suburbs;

(c) That said Citizens Gas Company held a lease for 99 years covering the properties and business of The Indianapolis Gas Company, thereby giving to it the control of the entire gas business of the City of Indianapolis and its environs;

(d) That the property covered by said lease from The Indianapolis Gas Company had a depreciated physical value of $9,181,960 and a reproduction value of $12,730,490, as against which the capital value of said company's outstanding first consolidated mortgage 5% gold bonds was $6,881,000 and the capital value of its outstanding stock was $2,000,000; and

(e) That upon the acquisition of the property operated by the Citizens Gas Company the City of Indianapolis would cause the same to be continuously operated as a gas system in an efficient manner and at reasonable cost, and would use all reasonable efforts to resist competition and maintain the exclusive right to serve gas in the City of Indianapolis and in Marion County and the towns therein.

16. Following the sale of the aforesaid bonds, and prior to September 9, 1935, the City of Indianapolis paid, or provided for payment, direct to the holders of the common stock of the Citizens Gas Company of Indianapolis the sum of $3,125,000 in full satisfaction of their interest in the property and assets of said Company; paid, or provided for payment, direct to the holders of preferred stock of the Citizens Gas Company of Indianapolis the sum of $1,050,000 in full satisfaction of their interest in the property and assets of said Company; and paid, or provided for payment, direct to the holders of outstanding bonds of the Citizens Gas Company the sum of $2,858,500 representing the full face amount of such outstand-

ing bonds, all of which was done with full knowledge of the obligations of the Citizens Gas Company of Indianapolis under the aforesaid 99-year lease, with full knowledge that after the retirement of all of its capital stock said company would be without means for meeting or paying its said obligations and without notice to the plaintiff herein or to the holders of bonds of The Indianapolis Gas Company for whom plaintiff is Trustee.

17. On or about September 9, 1935, the Citizens Gas Company of Indianapolis transferred all of its property to the defendant the City of Indianapolis as successor trustee and executed and delivered to said City an instrument of transfer and assignment, a copy of which is hereto attached, marked Exhibit E and made a part hereof, setting forth that the City of Indianapolis had taken all of the necessary steps in the exercise of its right to acquire, take over and administer as a public charitable trust all of the property of the Citizens Gas Company of Indianapolis; that the said assignment was made subject to all legal obligations of the Citizens Gas Company of Indianapolis, including the legal obligations of said company under a certain lease dated September 30, 1913, from The Indianapolis Gas Company; and that the Citizens Gas Company of Indianapolis would make and execute any and all further instruments necessary to carry out and execute the public charitable trust as aforesaid, including proper conveyances covering said company's real property and leasehold interests. On the same date, namely September 9, 1935, the Citizens Gas Company of Indianapolis executed and delivered to the defendant, the City of Indianapolis, an assignment of lease covering the aforesaid 99-year lease dated September 30, 1913, from The Indianapolis Gas Company to the Citizens Gas Company, a copy of which assignment is hereto attached, marked Exhibit F and made a part hereof.

18. Upon the receipt of the foregoing instruments of assignment, the defendant, the City of Indianapolis, through its department of utilities, accepted the assignment and transfer under the terms and conditions set forth in Exhibit E, but adopted a resolution purporting to reject the assignment of the lease from The Indianapolis Gas Company to the Citizens Gas Company of Indianapolis, and caused public notice of such purported rejection to be recorded in the office of the Recorder of Marion County, Indiana, a copy of which resolution and notice is made a part hereof, set out herein and marked Exhibit G. At the same time the defendant, the City

of Indianapolis, adopted a resolution, which plaintiff is informed and therefore alleges, recited that in order to prevent an interruption of service to the consumers in the territory theretofore served by the Citizens Gas Company of Indianapolis, the City would use and operate the plant and system of The Indianapolis Gas Company for a temporary pe-
12 riod without prejudice to its alleged right to reject the said 99-year lease and repudiate the lessee obligations thereunder. The City thereupon did take possession of all and singular the properties of said Citizens Gas Company of Indianapolis and all of the properties of said The Indianapolis Gas Company covered by the terms of said lease and continued the operation of all said gas system and is now so operating the same. Plaintiff is further informed and therefore alleges, that following the aforesaid resolution, the City of Indianapolis sought to enter into negotiations with The Indianapolis Gas Company for a revision or cancellation of said lease, and that for at least a part of the period subsequent to said resolution the possession and operation by the City of Indianapolis was consented to by defendant, The Indianapolis Gas Company, but without any waiver by said company of any of its rights, which condition was expressly stipulated to by the parties. All of the aforesaid acts by the City of Indianapolis and by The Indianapolis Gas Company, however, were done without notice to the plaintiff herein and without the knowledge or consent of the plaintiff or of the holders of bonds for whom plaintiff is Trustee.

19. Upon the execution and delivery of the 99-year lease to the Citizens Gas Company of Indianapolis as authorized and approved by the Public Service Commission of Indiana, the same became, in accordance with the provisions thereof, subject to the mortgage deed of trust of which this plaintiff is the successor trustee; and further, in accordance with the provisions of said mortgage deed of trust, became a part of the trust estate thereunder and subject to all of the terms and provisions thereof, as fully and completely as though said lease had been executed and delivered prior to the execution and delivery of the aforesaid mortgage deed of trust; and the provisions of said 99-year lease, requiring the lessee to pay interest as the same should fall due upon the then outstanding bonds and upon the bonds which might thereafter be issued under said original mortgage deed of trust, were made for the benefit of the mortgage trustee and the bondholder beneficiaries of the mortgage estate, and upon the execution and

delivery of said 99-year lease the mortgage trustee, its successors and assigns became vested with a distinct and independent right to require the lessee, its successors and assigns, to recognize and perform all of the lessee's obligations and engagements thereunder in so far as the same should directly affect the property rights of the holders of bonds issued under said original mortgage deed of trust, of which the plaintiff is successor trustee.

20. By virtue of the findings and orders of the Public Service Commission of Indiana, the final decree and judgment in the case of *Fishback* v. *Public Service Commission of Indiana, et al.*, the final decree and judgment in the case of *Todd* v. *Citizens Gas Company of Indianapolis, et al.* and the final decree and judgment in the case of *Williams* v. *Citizens Gas Company of Indianapolis, et al.*, all as hereinbefore set forth, the defendants are each and severally estopped to deny that the aforesaid 99-year lease, from the date of its execution, was and still is a valid obligations of the Citizens Gas Company of Indianapolis, its successors in trust and assigns.

21. By reason of the operations of the Citizens Gas Company of Indianapolis, the acceptance by it and by the City of Indianapolis for more than 21 years of all of the benefits under said 99-year lease including the benefits of consolidated operation of the leased property, and by reason of the acts of the defendants in causing the Trustee under the aforesaid mortgage deed of trust to authenticate and deliver additional bonds to reimburse the Citizens Gas Company of Indianapolis for capital expenditures on account of extensions and betterments to the plant and system of The Indianapolis Gas Company theretofore made by it as lessee, and by reason of the other acts of the several defendants in causing said bonds to be sold and distributed as bonds secured by a valid 99-year lease to the Citizens Gas Company of Indianapolis, its successors in trust and assigns, all as hereinbefore more fully set forth, the defendants are each and severally estopped to deny that the aforesaid 99-year lease, from the date of its execution was and still is a valid obligation of the Citizens Gas Company of Indianapolis, its successors in trust and assigns.

22. By reason of the acts of the City of Indianapolis in exercising its franchise rights to acquire all of the property and assets of the Citizens Gas Company of Indianapolis, by the resolution adopted March 20, 1929, by the sale of revenue

bonds in the amount of $8,000,000, by representations
13 made in connection with the sale of said bonds, by acceptance of the assignment hereinbefore referred to which is marked Exhibit E and made a part hereof, and by the retirement by the said City of all the common and preferred stock of the Citizens Gas Company of Indianapolis by direct payment for said stock to the holders thereof without notice to the plaintiff herein or its bondholders and with full knowledge of the obligations of the Citizens Gas Company under said 99-year lease and with full knowledge that said Company would thereby become unable itself to meet or pay the rentals thereafter accruing under said lease, all as hereinbefore more fully alleged, the said defendant is estopped to deny, and in equity and good conscience may not deny, that it is directly and primarily liable for all of the debts and obligations of the Citizens Gas Company of Indianapolis including the obligations under the aforesaid 99-year lease and the obligation to pay to the plaintiff herein direct the interest due and to become due upon all bonds now issued and outstanding and which may hereafter be issued under the said mortgage deed of trust of The Indianapolis Gas Company.

23. The City of Indianapolis, through its department of utilities, at the time it refused to accept the assignment of said lease, all as aforesaid, nevertheless denied and does now deny its obligation as successor to and assignee of said Citizens Gas Company of Indianapolis of any and all liability for the obligations of the lessee under the terms and provisions of said lease. Plaintiff is informed and therefore alleges, that on September 30, 1935, said City of Indianapolis, through its board of directors for utilities, did advise by letter to the said The Indianapolis Gas Company that it was ready to undertake the negotiation of a new lease and that pursuant to said letter certain negotiations have been in progress between defendant, the City of Indianapolis, and The Indianapolis Gas Company, which this plaintiff believes and alleges look toward a cancellation of said lease and the destruction and waste of the valuable security and rights belonging to this trust and all to the damage thereof.

24. Plaintiff is informed and believes and therefore alleges that on or about March 2, 1936, the City of Indianapolis and The Indianapolis Gas Company entered into a further written contract whereby said defendants have undertaken to agree that the City shall continue to operate said gas properties without being bound or agreeing to be bound by any of the

covenants of said 99-year lease, that during the continuation of said agreement the City of Indianapolis shall not be required to pay to plaintiff the interest upon The Indianapolis Gas Company bonds as required under said 99-year lease, that in lieu of paying rent for the use of said gas properties the City shall pay to the Indiana National Bank of Indianapolis, Indiana, a sum equal to the rental stipulated under said 99-year lease, and that the funds so deposited by the City shall be held until such time as the City and The Indianapolis Gas Company may agree upon their disposition or until the obligations of the City shall be finally determined in a suit between the parties the character of which is not set forth. By said agreement of March 2, 1936, the plaintiff and the bondholders for whom plaintiff is Trustee are deprived of valuable property rights, and are threatened with default in the payment of interest hereafter payable under said mortgage deed of trust and under said 99-year lease; and the mortgaged property and its good will and going concern value are threatened as a result of the continued denial by the City of Indianapolis of its obligations under the aforesaid 99-year lease, all of which has impaired and injured and threatens to further impair and injure the value of the outstanding bonds of The Indianapolis Gas Company, of which the plaintiff is Trustee.

25. This plaintiff is informed and therefore alleges, that defendants, The Indianapolis Gas Company and the City of Indianapolis, through its directors for utilities, are now negotiating toward an agreement for the use of said property of said The Indianapolis Gas Company covered by said mortgage deed of trust and said indenture of lease under terms and conditions which deprive this plaintiff and the holders of said first mortgage bonds of their rights, all as set out and provided in said mortgage deed of trust and in said indenture of lease, all to the irreparable damage and injury to the trust and the owners of said first mortgage bonds of The Indianapolis Gas Company, for whom this plaintiff brings this action.

Wherefore Plaintiff Prays:

1. That process issue against the defendants requiring them and each of them to answer this bill, but not under oath or affirmation, the benefit whereof being hereby expressly waived by the plaintiff.

14 2. That this Court by judgment and decree declare said lease to be a valid and binding obligation in all its

terms and conditions upon the defendants, The Indianapolis Gas Company, the Citizens Gas Company of Indianapolis, the City of Indianapolis and the trustees and directors for utilities of said City and upon all the property formerly owned by said the Citizens Gas Company of Indianapolis, which is now owned and operated by the City of Indianapolis, through its board of directors for utilities.

3. That this Court by judgment declare that said lease is in equity and law the property of plaintiff, as trustee under the mortgage deed of trust, and is part of the security for the full and faithful performance of the obligations thereunder of the said The Indianapolis Gas Company.

4. That pending a hearing and final judgment in this cause, said defendant, The Indianapolis Gas Company, be by order of this Court restrained and enjoined from making or entering into any contract or agreement or performing any contract which may already have been entered into or doing any act or thing to impair, rescind or modify the aforesaid lease to the Citizens Gas Company of Indianapolis or to alter the obligations of the lessee thereunder.

5. That pending a hearing and final judgment in this cause, said defendant, the City of Indianapolis, being in possession of the leased property, be directed and enjoined by mandatory order of this Court to maintain and preserve the leased property as provided and required under the terms of said lease.

6. That pending a hearing and final judgment in this cause, said defendant, the City of Indianapolis, be ordered to pay direct to this plaintiff all of said interest payments as they become due and payable in accordance with the provisions of said lease, or in the alternative to pay the aforesaid sums to the Clerk of this Court to be held and disbursed by him subject to the further orders of this Court.

7. That this Court in its final decree enter judgment against the defendants who shall be found liable therefor in the amount of all unpaid interest payable under said lease to the plaintiff herein, together with interest thereon from the several dates upon which such interest payments accrued at the rate of six per centum per annum, and that the defendant, the City of Indianapolis, be ordered to observe and perform all of the lessee obligations in said lease set forth and to promptly and regularly pay direct to this plaintiff all of the interest payments as they shall thereafter become due and payable in accordance with the provisions of said lease.

8. That the reasonable expenses of the plaintiff in and

about the bringing and prosecution of this suit, including reasonable attorneys' fees for plaintiff's solicitors, be determined and that judgment for the same be entered against defendants, and each of them.

9. That all and such other and full relief as may be proper and equitable in the premises be given.

Wm. L. Taylor,
State Life Building,
Indianapolis, Indiana,
Newton D. Baker,
Raymond T. Jackson,
Union Trust Building,
Cleveland, Ohio,
Solicitors for Plaintiff.

State of New York }
County of New York } ss.:

G. A. Kinney, being duly sworn, deposes and says: That he is a Vice President of The Chase National Bank of the City of New York, the plaintiff named in the above-entitled action; that he has read the forefoing bill of complaint and knows the contents thereof, and that the allegations therein contained are true as he verily believes.

G. A. Kinney.

Subscribed and sworn to before me this 6th day of June, 1936.

C. E. Van Name,
(Seal) *Notary Public.*

C. E. Van Name
Notary Public, Richmond County
Certificates Filed in
New York County Clerk's No. 15
Register's No. 7-V-8
Queens County Clerk's No. 1172
Register's No. 4768
Commission Expires March 30, 1937

15 EXHIBITS.

16 EXHIBIT A.

Deed of Trust of The Indianapolis Gas Company, to The Trust Company of America and Ferdinand Winter, Trustees.

17 This Indenture, made and entered into this first day of October, A. D. 1902, between The Indianapolis Gas Company, a corporation organized and existing under the laws of the State of Indiana, party of the first part, hereinafter referred to as the Gas Company, and The Trust Company of America, a corporation organized and existing under the laws of the State of New York and Ferdinand Winter of Indianapolis, Marion County, in the State of Indiana, hereinafter referred to as the Trustees, party of the second part, Witnesseth:

Whereas, the Gas Company is authorized to borrow money for its corporate purposes, and is duly authorized to mortgage any of its property or franchises to secure the payment of money so borrowed; and

Whereas, the Gas Company has outstanding obligations, some of which are in the form of bonds secured by mortgage upon its property and franchises, and others of which are in the form of promissory notes, or are otherwise evidenced; and

Whereas, the Gas Company, deeming the same necessary and expedient, has duly resolved to exercise the borrowing power conferred upon it by the laws of the State of Indiana, and to issue from time to time its corporate bonds for the purpose of funding the aforesaid obligations into one general debt payable at a later period, and for the purpose of paying for the property already acquired by it and for other property that may hereafter from time to time be acquired by it, and for adding to, improving, enlarging, extending, developing or equipping its artificial gas system and plants and other corporate property and for constructing, carrying on or extending its system, plants and works; and for said purposes the Gas Company has, by resolution of its Board of Directors, duly approved, ratified and confirmed at meetings of said

Board of Directors duly convened and held, authorized and directed its President and Secretary to execute in its corporate name its corporate bonds, to be designated First Consolidated Mortgage Five Per Cent. Gold Bonds, in the aggregate amount of seven and one-half million dollars, to be issued and used for the purpose of refunding and consolidating the bonded and other outstanding obligations of, and for paying for, property already acquired by the Gas Company, and for paying for other property which may from time to time be acquired by the Gas Company, and for adding to, improving, enlarging, extending, developing or equipping the artificial gas system and plants and other property of the Gas Company, and for constructing, carrying on or extending its works; and for the purpose of securing the payment of all of said bonds together with the interest thereon, has authorized and directed its President and Secretary to execute in its corporate name and on its behalf and under its corporate seal, and to deliver to said Trustees a mortgage in the form hereby made, bearing date the first day of October, A. D. 1902, conveying by way of mortgage to the said The Trust Company of America and Ferdinand Winter as Trustees, and to their successors in said trust, all the property, rights, franchises, easements, privileges and immunities of the Gas Company, of whatever and every name and nature, real, personal and mixed, in possession or expectancy, now owned or possessed by the Gas Company, together with all the tolls, incomes and revenues and rents, issues and profits thereof; and

Whereas, each of said bonds is to be in the words and figures following, subject only to the necessary variation as to the numbers and dates thereof, each of said bonds being for the sum of one thousand dollars, and numbered consecutively from one (1) upwards, to wit:

No. $1,000.

UNITED STATES OF AMERICA

STATE OF INDIANA

The Indianapolis Gas Company
(Of Indianapolis).

First Consolidated Mortgage Five Per Cent. Gold Bonds.

The Indianapolis Gas Company, for value received, hereby acknowledges itself indebted unto the bearer hereof in the sum of One Thousand Dollars, which sum it promises to pay to the holder of this bond on the first day of October, in the year one thousand, nine hundred and fifty-two, in Gold Coin of the United States of America, of the present standard 18 of weight and fineness, at the office of The Trust Company of America in the State of New York, with interest thereon from the first day of October in the year one thousand, nine hundred and two at the rate of five per cent. per annum, payable in like gold coin at the aforesaid office of said Trust Company semi-annually; that is to say, on the first day of April, and of October, in each year after the date hereof, upon the presentation and surrender of the annexed coupons respectively.

In case of default in the payment of any half-yearly instalment of interest which shall become payable and which shall have been demanded by presentation at the office of said The Trust Company of America, and a continuance of such default for a period of six months after such demand, the principal of this bond shall become due, in the manner and with the effect and subject to the conditions provided in the Indenture of Mortgage securing the payment of the same hereinafter mentioned.

There shall be no recourse to the stockholders and officers of said The Indianapolis Gas Company for the payment of this bond under any law now in force or which may hereafter be enacted and any such recourse is hereby expressly waived.

This bond is one of a series of bonds of like amount, tenor and effect, and numbered consecutively from and including number one (1) upwards, issued and to be issued by The Indianapolis Gas Company, under and in accordance with the terms and conditions of a certain indenture of mortgage,

dated October 1st, A. D. 1902, made and executed under authority of the Board of Directors of the said The Indianapolis Gas Company to the said The Trust Company of America and Ferdinand Winter as Trustees, by the terms of which the issue of said bonds is limited to seven and one-half million dollars, of which four million dollars in amount are now issued. The remainder of the bonds secured by said mortgage may be issued from time to time as required by said The Indianapolis Gas Company for the acquisition of additional property, real or personal, and for improvements, extensions, enlargements, equipment or betterments, and for constructing, carrying on or extending its artificial gas system and plants and works at a rate not exceeding ninety per cent. of the cost thereof. None of said bonds can be issued in excess of said four million dollars in amount, except upon proof to The Trust Company of America, Trustee, required in and by said indenture of mortgage. Of said bonds now issued, there have been deposited with said The Trust Company of America, Trustee, bonds to the amount of three million two hundred thousand dollars which, or the proceeds thereof, so far as may be necessary, are to be held in reserve by said The Trust Company of America, Trustee, for the purpose of redeeming and retiring all former issues of bonds of this Company now outstanding. Any of said bonds not needed for that purpose and the remainder of the bonds now issued, or the proceeds thereof, are to be used to fund or pay the outstanding indebtedness, other than bonded, of the company and to pay for property heretofore purchased or contracted to be purchased.

The payment of each and of all the bonds of this series so issued or to be issued by the said The Indianapolis Gas Company, is equally secured without preference, priority or distinction as to the lien, or otherwise, of one bond over another, and without reference to the time of the actual issue of said bonds or any part thereof, by a certain indenture of mortgage, bearing date the 1st day of October A. D. 1902, executed and delivered by the said The Indianapolis Gas Company to The Trust Company of America and Ferdinand Winter, as Trustees, of all the property, rights and franchises, tolls, incomes and revenues of the said The Indianapolis Gas Company owned or possessed by it at the date of said mortgage, or which may at any time thereafter be acquired by said The Indianapolis Gas Company, and more particularly described and set forth in said indenture of mortgage.

This bond shall pass by delivery or by transfer upon the books of the Central Trust Company of New York, the Transfer Agent of this Company, at its office in New York City. After a registration of ownership, certified hereon by the Transfer Agent of the Company, no transfer shall be valid except upon the books of the Transfer Agency, unless the last transfer be to bearer, which shall restore transferability by delivery. But this bond shall continue subject to successive registrations and transfers to bearer, as aforesaid, at the option of each holder.

This bond shall not become obligatory until authenticated by the certificate of the aforesaid Trustee, The Trust Company of America.

19 In Witness Whereof, The said The Indianapolis Gas Company has caused its corporate seal to be hereunto affixed, and these presents to be executed by its President and Secretary, this first day of October, in the year one thousand nine hundred and two.

President.

Secretary.

Coupon.

$25.00

The Indianapolis Gas Company will pay to the bearer, at the office of The Trust Company of America in the City of New York, Twenty-five dollars in gold coin of the United States of America, on the first day of , being six months' interest on its First Consolidated Mortgage Five Per Cent. Gold Bond No. .

Treasurer.

Trustee's Certificate.

It is hereby certified that the within is one of the bonds described in the mortgage within mentioned, and the holder hereof is entitled to the benefit of the trust therein created.

The Trust Company of America,

Trustee.

By

Vice-President.

Now, Therefore, it is covenanted that no bonds shall be issued hereunder except such as shall be certified, as herein provided, by the said The Trust Company of America, Trustee, one of the parties of the second part hereto, or its successor in this trust, and under the following conditions:

First: The said The Trust Company of America as Trustee, hereunder, shall upon the execution and delivery and recording of this mortgage, certify an issue of said bonds to the amount of four million dollars for the purpose aforesaid, and deliver to the Gas Company eight hundred thousand dollars thereof; and the said The Trust Company of America shall retain bonds to the amount of three million two hundred thousand dollars to be held in reserve by said The Trust Company of America for the purpose of redeeming and retiring all former issues of bonds of the Gas Company now outstanding. Said three million two hundred thousand dollars in amount, of bonds so held in reserve by the said The Trust Company of America may be delivered to the Gas Company, or on its order, upon proof being given to the reasonable satisfaction of the said The Trust Company of America that said former issues of bonds have been duly redeemed or retired by the Gas Company.

Second: The remainder of said bonds, being three and one-half million dollars in amount, shall from time to time be authenticated and delivered by said Trust Company, Trustee, or the then existing trustee hereunder, successor to said Trust Company in the trusts hereof to the Gas Company, as hereinafter stated, after detaching and cancelling all matured coupons, for ninety per cent. of the amount that may from time to time be actually expended or for which liability may have been actually incurred by the Gas Company in acquiring additional property, real or personal, or for improvements, extensions, enlargements, equipment, or betterments, or for constructing, carrying on or extending its artificial gas systems and plants and works.

The said Trust Company, Trustee, or the then existing Trustee hereunder, successor to said Trust Company, shall from time to time authenticate and deliver to the Gas Company the said remainder of said bonds, in such amounts as may be required for the purposes mentioned above under the title "Second," upon demand therefor in writing signed by the President of the Indianapolis Gas Company, stating the amount required and accompanied by his affidavit stating the purpose of the expenditure or liability and the cost thereof;

and in the case of a demand for bonds for the purchase of real estate, there shall also be exhibited to such trustee a deed conveying the same to the Gas Company, together with an abstract of title certified to by the attorney of the Gas Company as showing a good merchantable title in fee in the grantor named in said deed.

The amount of such First Consolidated Mortgage Five Per Cent. Gold Bonds that may be issued hereunder, is limited to seven and one-half million dollars, and no such bonds in excess of that amount shall be authenticated by such trustee or shall be valid.

It is the intention hereof and it is so hereby declared that all of the bonds, together with the interest thereon, to be issued as hereinbefore provided, shall be equally in all respects secured by these presents upon all the property hereinafter described and mentioned, without preference, priority or discrimination on account of and without reference to the time of the actual issue of said bonds or any thereof.

And in consideration of the premises and in consideration of the sum of one dollar to the Gas Company, in hand paid by the Trustees, the party of the second part hereto, the receipt whereof is hereby acknowledged, the said The Indianapolis Gas Company hath granted, bargained, sold, assigned, conveyed and transferred, and by these presents does hereby grant, bargain, sell, assign, convey, transfer and warrant unto the said Trustees, and to their successors in this trust, all and singular, the following described property, situate in the counties of Marion, Hamilton, Tipton, Grant and Madison, in the State of Indiana, to wit:

Lots one (1), two (2), three (3), and four (4), in square one (1), in S. A. Fletcher, Jr's., Northeast Addition to the City of Indianapolis, in said County of Marion.

Also, lots one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20), and twenty-one (21), in Washington Hall Company's subdivision of square ninety-eight (98), in the City of Indianapolis, subject to the right of way of the Union Railway Company over and across said lots five (5), six (6), seven (7) and eight (8).

Also, lots one (1), two (2), three (3), four (4), seven (7), nine (9), ten (10), eleven (11), twelve (12) and thirteen (13),

in James M. Ray's subdivision of the east half of square ninety-eight (98), in said City of Indianapolis.

Also, those parts and parcels of the east half of square ninety-eight (98), in said City of Indianapolis, described as follows, to wit: Beginning at a point on the west line of Delaware street two hundred and eighty-two (282) feet north of the northwest corner of Delaware and South streets as originally platted, thence north on the west line of Delaware street two hundred (200) feet, thence west one hundred and eighty-five (185) feet, thence south two hundred (200) feet, thence east one-hundred and eighty-five (185) feet to the place of beginning; also, beginning at a point on the west line of Delaware street four hundred and eighty-two (482) feet north of the northwest corner of Delaware and South streets as originally platted, thence north on the west line of Delaware street, one hundred and twenty-four (124) feet and nine (9) inches, thence west one hundred and eighty-six (186) feet and six (6) inches, thence south one hundred and twenty-four (124) feet and nine (9) inches, thence east to the place of beginning, subject, however, to the right of way of the Union Railway Company over and across the same; also, beginning on the east line of said square, and west line of Delaware street, at a point five hundred and ninety-six (596) feet and nine (9) inches north of the southeast corner of lot nine (9) in James M. Ray's subdivision of the east half of said square ninety-eight (98), thence running west parallel with South street one hundred and sixty-nine (169) and six-tenths (6-10) feet to a point two (2) feet at right angles to the south rail of the Union Railway track, thence northeastwardly parallel with and two (2) feet south of the south rail of said track, one hundred and eighty and seven-tenths (180.7) feet to the east line of said square ninety-eight (98), thence south sixty-two and twenty-five hundredths (62.25) feet to the place of beginning, subject to the right of way of the Union Railway Company, containing three thousand five hundred and sixty and eight-tenths (3560.8) square feet, more or less, exclusive of such right of way.

Also, lots one (1), two (2) and three (3), in the Indianapolis Insurance Company's subdivision of lots one (1) and two (2) in square sixty-four (64) in said City of Indianapolis, as appears of record May 3, 1869 (see plat book three [3] page
21 101). Also, that part of lot three (3) in square sixty-four (64) in said City of Indianapolis, described as fol-

lows, to wit: Beginning on the southwest corner of said lot three (3), thence east on the north line of Maryland street thirty-nine (39) feet, thence north eighty-six (86) feet, to a point, thence west thirty-nine (39) feet, to the west line of said lot three (3), thence south on said west line eighty-six (86) feet to the place of beginning.

Also, part of out lots one hundred and sixty-six (166), one hundred and sixty-seven (167), and one hundred and sixty-eight (168), in said city of Indianapolis, described as follows: Commencing at a point on the north line of Pratt street, at the intersection of the west line of that part of said out-lot one hundred and sixty-eight (168), owned by the LaFayette & Indianapolis Railroad Company (now the Cleveland, Cincinnati, Chicago & St. Louis Railway Company), thence north along the west line of said part of said out-lot owned by said railway company one hundred and fifty (150) feet, thence west and parallel with said Pratt street to the center of the Central Canal, thence southeast along the center of said canal to the north line of said Pratt street, at its intersection with said canal, thence east along the north line of said Pratt street to the place of beginning, saving and excepting the easement for canal purposes over and upon the same, of the Central Canal.

Also, part of said out-lots one hundred and sixty-seven (167) and one hundred and sixty-eight (168) in said city of Indianapolis, described as follows: Commencing at a point in the west line of the land owned and occupied by the Cincinnati, Indianapolis, St. Louis & Chicago Railway Company (now the Cleveland, Cincinnati, Chicago & St. Louis Railway Company), in said out-lot one hundred and sixty-eight (168), one hundred and fifty (150) feet north of the north line of Pratt street, thence running north fifty (50) feet to a point, thence west parallel with said Pratt street, to the Indiana Central Canal, thence in a southeasterly direction, with the line of said canal, to a point west of the place of beginning and one hundred and fifty (150) feet north of said Pratt street, thence east parallel with said Pratt street to the place of beginning.

Also, lot forty-five (45) in Lazarus & Pierce's Meridian Place addition to said city of Indianapolis.

Also, lots numbered sixty-seven (67) and sixty-eight (68) in Long and Harlan's Cottage Home Addition to said city of Indianapolis.

Also, two hundred and thirteen (213) in Bradley, Denny and Atkinson's east Washington Addition to said city of Indianapolis.

Also, part of the southeast quarter of section twenty-four (24) township sixteen (16) North of range three (3) east, beginning at a point ten hundred and ninety-five (1095) feet, south of the north line of said quarter section, and thirty (30) feet east of the west line of said quarter section, running east parallel with the north line of said quarter section, one hundred and thirty-one (131) feet, thence south parallel with the west line of said quarter section one hundred (100) feet, thence west parallel with the north line of said quarter section one hundred and thirty-one (131) feet, thence north parallel with the west line of said quarter section, one hundred (100) feet to the place of beginning. Also another part of the same quarter section, beginning at a point, eleven hundred and ninety-five (1195) feet, south of the north line of said quarter section, and one hundred and seventy-six (176) feet east of the west line of said quarter section running east parallel with the north line of said quarter section one hundred and thirty-one (131) feet, thence south, parallel with the west line of said quarter section, one hundred (100) feet, thence west parallel with the north line of said quarter section, one hundred and thirty-one (131) feet, thence north parallel with the west line of said quarter section, one hundred (100) feet to the place of beginning.

Also, part of the southeast quarter of section twenty-four (24), township sixteen (16) north of range three (3) east, beginning at a point ten hundred and ninety-five (1095) feet south of the north line of said quarter section and one hundred and seventy-six (176) feet east of the west line of said quarter section, thence running east parallel with the north line of said quarter section one hundred and thirty-one (131) feet, thence south parallel with the west line of said quarter section, one hundred (100) feet, thence west, parallel with the north line of said quarter section one hundred and thirty-one (131) feet, thence north parallel with the west line of said quarter section, one hundred (100) feet to the place of beginning.

22 Also, part of the southeast quarter (¼) of section twenty-four (24) in township sixteen (16) north of range three (3) east, bounded as follows: Beginning at a point eleven hundred and ninety-five (1195) feet south of the north

line and thirty (30) feet east of the west line of said quarter section, thence running east parallel with the north line of said quarter-section one hundred and thirty-one (131) feet, thence south parallel with the west line of said quarter section one hundred (100) feet, thence west, parallel with the north line of said quarter section one hundred and thirty-one (131) feet, thence north parallel with the west line of said quarter section and along the east side of Central avenue one hundred (100) feet to the place of beginning.

Also, a part of the southwest quarter (¼), section twenty-eight (28), township sixteen (16) north, range four (4) east, as follows, to wit: Beginning at a point on the east line of Brightwood avenue one hundred and fifty (150) feet south of the south line of the Pendleton Gravel Road, thence north along the east line of Brightwood avenue one hundred and fifty (150) feet to the south line of the Pendleton Gravel Road, thence northeasterly with the south line of the Pendleton Gravel Road one hundred and fifty (150) feet to a point thence south and parallel with the east line of Brightwood avenue two hundred and thirty-two and two one-hundredths (232.02) feet more or less to a point at right angles and opposite to the place of beginning, thence west one hundred and twenty-five and five-tenths (125.5) feet more or less to the place of beginning.

Also, Block B. Langsdale Estate partition subdivision of the south half of the south-west quarter section 26, township 16, range 3, in the City of Indianapolis, particularly described as follows, to wit:

Commencing on the south line of said half quarter section at a point 794.75 feet west of the south-east corner thereof, thence west on said south line 198 feet to the center of the Cleveland, Cincinnati and Chicago Railway Company's right of way; thence north-westwardly along the center of said right of way 1875 feet to the north line of said half quarter section; thence east on said north line 1040 feet to the center of Fall Creek; thence south 39¼ degrees, east 500 feet; thence south 77¼ degrees, east 300 feet; thence south 11 degrees, west 900 feet to the commencing point, containing 26 acres, subject to the right of way of said Railway Company.

All in Marion County, in the State of Indiana.

Also, all the buildings, gas works, gas holders, reducing stations, fixtures and machinery, situate on or appertaining to the above-described real estate.

Also, the pumping station and plant owned by said Gas Company and all the machinery and appurtenances thereunto belonging and the leasehold interest in real estate upon which the same is situated in section one (1) Township nineteen (19) north, Range five (5) east, in Hamilton County, Indiana.

Also, the pumping station and plant owned by said Gas Company and all the machinery and appurtenances thereunto belonging and the real estate upon which the same is situated, to wit:

Part of the north-west quarter (¼) of the south-west quarter (¼) commencing at the north-west corner of the said north-west quarter (¼) running south along the public road forty (40) rods or 660 feet; thence east forty (40) rods or 660 feet; thence north forty (40) rods or 660 feet; thence west forty (40) rods or 660 feet to the place of beginning. Said described tract containing ten (10) acres, all in section thirty-two (32) township twenty-two (22) north, range seven (7) east, in Madison County in the State of Indiana.

Also, all the artificial gas mains and pipes of said party of the first part, laid and lying in and throughout said city of Indianapolis and its vicinity, amounting in all at this time to about one hundred and forty (140) miles, besides connecting pipes, together with all meters, machinery and appurtenances, of whatever name or description, appertaining to or used in connection with the artificial gas works and plant of said party of the first part, and any and all renewals and improvements, additions to or extensions of the said mains and pipes, meters, machinery and appurtenances, that may at any time hereafter be made.

Also, all the high-pressure wrought iron natural gas pipe lines and mains of said Gas Company, described as follows:

1. A line of twelve (12) inch pipe extending in a northerly direction from the intersection of Meridian and Twenty-
23 first streets in the city of Indianapolis, Marion County, Indiana, through said Marion County and into Hamilton County, Indiana, a distance of about twenty-two (22) miles to the reducing station near Noblesville in said Hamilton County.

2. A line of ten (10) inch pipe extending in an easterly and northeasterly direction from the intersection of South and Pennsylvania streets in said City of Indianapolis, through said Marion County and into Hamilton County, Indiana, a distance of about nineteen (19) miles to Fisher's Station in said Hamilton County.

3. A line of ten (10) inch pipe extending east and north from the intersection of West and Morris streets in said city of Indianapolis, through Marion, Hamilton and Madison counties, Indiana, a distance of about fifty (50) miles to a point in Section 11, Township 22 North, Range 7 East, about one (1) mile south of the Grant county line.

4. A line of eight (8) inch pipe extending in a northeasterly direction from the reducing station near Noblesville, Hamilton county, Indiana, through Hamilton and into Tipton county, Indiana, a distance of about fourteen (14) miles, to a point in Section 30, Township 21 North, Range 6 East.

5. A double line of eight (8) inch pipe extending east from the reducing station near Noblesville, Hamilton county, Indiana, in Hamilton county, a distance of about five (5) miles to a point in Section 27, Township 19 North, Range 5 East.

6. A double line of eight (8) inch pipe extending northeast from the pumping station owned by the Gas Company, in Section 1, Township 19 North, Range 5 East, where it connects with the ten (10) inch line described at No. 3, a distance of about two and one-half (2½) miles to a point in Section 32, Township 20 North, Range 6 East, and from thence a single line of eight (8) inch pipe extending northeast and north of about seven and one-half (7½) miles to a point between Sections 26 and 35, Township 21 North, Range 6 East, where it again connects with said ten (10) inch line. All in Hamilton and Madison counties, Indiana.

7. A line of eight (8) inch pipe extending northwest from the pumping station aforesaid where it connects with the ten (10) inch line described at No. 3, a distance of about two (2) miles to a point in Section 35, Township 20 North, Range 5 East, where it connects with the eight (8) inch line first described.

8. A line of eight (8) inch pipe extending west a distance of about five (5) miles from a point between Sections 26 and 35, Township 21 North, Range 6 East, to a point between Section 30, Township 21 North, Range 6 East, and Section 25, Township 21 North, Range 5 East, where it connects with the eight (8) inch line first described.

9. A line of six (6) inch pipe extending East a distance of about five (5) miles from Fisher's Station, Hamilton county, Indiana, where it connects with the ten (10) inch line described at No. 2, to a point in Section 36, Township 18 North, Range 5 East, and thence north and northeasterly a distance

of about two and one-half (2½) miles to a point between Sections 19 and 30, Township 18, North, Range 5 East.

10. A line of six (6) inch pipe extending north from a connection with the (10) inch line described at No. 3, at a point between Sections 31 and 32, Township 22 North, Range 7 East, a distance of about two and one-half (2½) miles to a point between Sections 19 and 20, Township 22 North, Range 7 East.

11. A line of six (6) inch pipe extending north from a connection with the ten (10) inch line described at No. 3, at a point in Section 15, Township 22 North, Range 7 East, a distance of about one (1) mile to a point in Section 10, Township 22 North, Range 7 East.

12. A line of six (6) inch pipe extending from a connection with the ten (10) inch line described at No. 3, at the intersection of Sherman Drive and Washington street in the city of Indianapolis, east in Washington street, a distance of about four (4) miles to Line street, in the town of Irvington, Marion County, Indiana.

Also, all the lines of four (4), three (3) and two (2) inch pipe owned by said Gas Company—about forty-two (42) miles—by which the above described pipe lines are connected with each other and with natural gas wells in the natural gas field in the counties of Marion, Hamilton, Tipton, Madison and Grant, in the said State of Indiana.

24 Also, the certain telephone line now erected and used in connection with the said natural gas pipe-lines, with its stations, machinery, fixtures, instruments and appurtenances, together with all rights of way upon which said pipe-lines are laid, and said telephone line constructed; and all the leases and grants of real estate, and licenses touching the same, in the said counties of Marion, Hamilton, Tipton, Madison and Grant, or elsewhere in said State of Indiana, now held or hereafter to be taken and held by said Gas Company for the purpose of sinking and maintaining natural gas and oil wells, for exploring for natural gas and oil, and securing and transporting such natural gas to said pipe-lines, or any pipe-line hereafter laid, or to any reducing station of the party of the first part, now or hereafter constructed in or near said city of Indianapolis, together with any and all natural gas and oil wells, with the machinery and appurtenances thereunto belonging now, held or which may hereafter be held by said Gas Company.

Also, all the natural gas pipe-lines and systems of the party of the first part—about one hundred and sixty-five (165) miles—embracing the high and low pressure systems lying and being in said city of Indianapolis, and in the towns of Irvington and Woodruff Place, and villages of Mapleton, Millersville and Malott Park, in said County of Marion; and also, all the street regulators, safety escapes, service pipes and street boxes, connected with the said natural gas pipe-lines and systems. Also, any and all renewals and improvements of each and every said natural gas mains, pipe-lines and systems, and all additions to and extensions of each and every said natural gas mains, pipe-lines and systems, that may at any time hereafter be made. Also, all coal, pipe and other supplies, tools, machinery and materials and other personal property of said Gas Company, that are or may be on hand.

Also, all the appurtenances connected with all and singular the above described property, and all corporate and other franchises, rights, easements, privileges and immunities, contracts and property, of whatever name or description, now belonging to or held, or which may hereafter be acquired or held by said Gas Company, together with the rents, issues, income, tolls and profits arising therefrom; it being the intention hereof to include herein all the property of the Gas Company, real, personal and mixed, in possession or expectancy, now owned or hereafter in anywise acquired, together with all and singular the tenements, hereditaments, rights, franchises, easements, privileges, immunities and appurtenances of such property, and premises hereinbefore expressed to be conveyed, or which may in any manner hereafter be acquired by said Gas Company, belonging or in anywise appertaining, or at any time hereafter held or enjoyed by the Gas Company, and the reversion and reversions, remainder and remainders, tolls, incomes, revenues, rents, issues and profits thereof, and also the estate, right, title and interest, property, possession, claim and demand whatsoever, as well as in equity as in law, of the Gas Company, in and to the same and any and every part thereof; it being intended and it is hereby agreed that all the property of every kind, now owned or which may hereafter be in anywise acquired by the Gas Company, shall be as fully embraced within the provisions hereof and subject to the lien hereby created for securing the payment of all of said bonds, so to be from time to time issued, together with the interest thereon, as if the said property were now owned by the Gas

Company and were specifically described herein and conveyed hereby.

To Have and to Hold all and singular the above mentioned and described property, acquired, and to be hereafter acquired, tenements, hereditaments, rights, franchises, easements, privileges, immunities and appurtenances, and all the other property above mentioned, as intended to be conveyed, and the tolls, incomes, revenues, rents, issues and profits thereof, unto, and to the use of said The Trust Company of America and Ferdinand Winter, as Trustees, and their successors in trust, according to the nature, tenor and quality thereof, respectively, upon and for the trusts, intents and purposes, hereinafter expressed, of and concerning the same. And for further carrying into effect the conveyance, hereinbefore expressed to be made, the Gas Company does hereby appoint the Trustees, or their successors in said trust, the attorney of the Gas Company, to ask and receive payment and delivery of all and every the sums of money, goods, chattels and effects, hereinbefore expressed to be assigned and transferred to said Trustees, and to give effectual releases and discharges therefor, and for all and any of the purposes aforesaid, or in this instrument expressed, to appoint an attorney or attorneys, or agent or agents, and from time to time to revoke such appointments, and to use the name of the Gas Company, and generally to act in relation to the premises as such Trustees or their successors shall think fit.

And it is Hereby Agreed and Declared, that the Trustees, or their successors, for the time being in said trust, shall respectively stand possessed of and entitled to all and singular the premises, property and rights hereinbefore expressed to be conveyed and intended to be conveyed, and shall be entitled to exercise the powers herein granted only upon and for the trusts, intents and purposes, and subject to the powers and conditions following, that is to say:

1. If the said bonds and the interest thereon shall be well and truly paid at the times and in the manner therein and herein expressed, then and in such case, the estate, right, title and interest of the Trustees shall cease, determine and become void, and upon proof being given to the reasonable satisfaction of the Trustees that all of the said bonds entitled to the benefit of the trust hereby created, have been so paid off, or satisfied, and upon payment of all costs, charges and expenses incurred by the Trustees in relation thereto, the Trustees

shall, at the request and expense of the Gas Company, reconvey and transfer and redeliver to it the property conveyed and transferred to the Trustees hereunder.

II. So long as the interest on the said bonds shall be duly and punctually paid when and as the same shall become due and payable, and so long as the covenants, terms and conditions thereof and of this indenture are faithfully paid, kept, preserved and performed, the Gas Company and its successors shall be entitled to possess, manage, operate and enjoy all the lands, premises, property, rights, franchises, easements, privileges and immunities hereinbefore described as conveyed, and intended to be conveyed hereby, and to receive, take and use the tolls, incomes, revenues, rents, issues and profits thereof, in the same manner and with the same effect as if this deed had not been made.

III. If any default shall be made in the payment of any installment of interest on any of the said bonds hereby secured according to the tenor of the coupons annexed hereto, when and as the same shall become payable and demanded, and such default shall continue for the space of six months, and, if any default shall be made in the performance of any other covenant herein contained to be performed by the Gas Company, and such default shall continue for the space of six months after notice thereof to the Gas Company and demand being made for the due performance thereof upon the Gas Company by said Trustees, then, and in every such case, the Trustees may in their discretion, and shall upon the request in writing of the holder or holders of a majority in amount of said bonds hereby secured then outstanding, and upon receipt of indemnity satisfactory to said Trustees declare the principal of all said bonds to be forthwith due and payable on notice to the Gas Company or its assigns. Such request may be evidenced by an instrument in writing, duly executed, by the holders of a majority in amount of said bonds then outstanding or by their representatives thereunto duly authorized in writing. If the principal of said bonds shall become due and payable, either as aforesaid, by reason of default and demand, or upon maturity, and shall not be paid according to the tenor thereof, and such default shall continue for six months after demand of the payment thereof, the Trustees may, and upon the request in writing of the holder or holders of the majority in amount of said bonds hereby secured and then outstanding, or by their represen-

tatives thereunto duly authorized in writing, and upon a tender of indemnity satisfactory to said Trustees for counsel fees and for reasonable expenses, shall personally or by their attorneys forthwith proceed and are hereby authorized and empowered to take possession of and sell, call in and convert into money, all and singular the property hereby conveyed, or intended to be conveyed, at public auction according to law. Such sale shall be made to the highest bidder, and the Trustees shall upon compliance by it with the conditions hereof assign, transfer and deliver to such bidder the said property so sold free from all the trusts hereof. Such sale and transfer shall be an absolute and final bar against the Gas Company, its successors and assigns, and against all right and equity of redemption in and to the said property so sold and against all persons claiming or to claim the same, under the Gas Company. After deducting from the proceeds of such sale or sales just allowances for all expenses in effecting
26 the same, as well as compensation for its own services, the Trustees shall apply the said purchase money to the payment of the interest on said bonds hereby secured in the order in which the installments of such interest shall have become due, but without interest upon such interest, ratably to the persons holding the coupons evidencing the right to such interest, and after paying all such interest shall then apply the balance of such purchase money ratably to the payment of the principal on said bonds. If after the payment of the principal and interest of all of the said bonds any surplus shall remain, the Trustees shall pay over to the Gas Company any such surplus or remainder.

At any sale of the said property so conveyed, or intended to be conveyed hereunder, made to enforce the security of these presents pursuant to the power hereby granted, or by judicial authority, the Trustees may at their option, and shall, if thereunto requested in writing by the holders of one-fourth in nominal amount of said bonds then outstanding, and if furnished with indemnity satisfactory to said Trustees, bid for and purchase, or cause to be bidden for and purchased, on behalf of the holders of all the bonds then outstanding, in the proportion of the respective interests of such holders, the said property so sold, provided that the price at which the purchase hereby authorized may be made shall not, in aggregate, exceed the amount of all said bonds hereby secured and then outstanding, and the interest accrued thereon and unpaid

to the time of sale, together with the costs and expenses of such sale.

Nothing herein contained shall in anywise prohibit or forbid any of the holders of said bonds from bidding at such sale, or from purchasing said property upon such sale; but any of said holders may purchase said property at any such sale, and in the event of such purchase by them, they shall be allowed a credit as and for so much cash on account of the purchase money payable by them, of a sum equal to the amount to which such purchasers, as holders of the bonds of the Gas Company, would otherwise have been entitled to upon a distribution of the net proceeds of the sale among the bondholders.

The Trustees may, however, in their discretion, resort to any proceedings, legal or equitable, in their judgment necessary or expedient for the enforcement of the lien hereby created upon all or any part of the property hereby conveyed, or intended to be conveyed, or for the collection and conversion into money of any part of the trust estate.

Pending any proceeding for a sale to be made by it, as hereinbefore provided, the Trustees, in their discretion and for the common benefit, may carry on the business of the Gas Company, and for the purpose of the said business may employ such agents on such terms as they may deem proper, and generally may do, or cause to be done, all such acts or things, in respect to the premises, as the Gas Company might have done or caused to be done. The Trustees shall, after deducting the expenses which they may deem necessary, expedient or proper to incur for the carrying on of said business, including just compensation for their own services, apply the residue of the income of the trust estate, and of the revenues of said business, in the manner herein provided with respect to the moneys which might arise on any sale of the trust estate by it under any of the provisions hereof.

IV. It shall be competent for the Gas Company, in case it shall have made default in any of the covenants or agreements herein contained other than those for the payment of the principal or interest of said bonds, to place itself in the same position respecting this mortgage which it occupied prior to such default, by performing the covenants and agreements of this mortgage as hereinbefore stipulated, if such performance be then possible, and the payment of all costs and charges and satisfactory indemnity against all liabilities incurred by the Trustees.

V. If at any time the Gas Company shall, for the purpose of changing the location of any — its works, or for the reason that any of the property hereby conveyed or intended to be conveyed is no longer necessary for its corporate purposes, desire to sell the same, it may, upon written assent thereto of the Trustees, and the payment to the Trust Company of America as Trustee of the purchase price, sell and convey any or all of the property, now owned or hereafter acquired by it and hereby conveyed, or intended to be conveyed, for the securing of the payment of the principal and interest of said bonds, and the Trustees shall thereupon, upon receipt by said Trust Company of such purchase money, release
27 from the lien of this mortgage the property so sold and conveyed by the Gas Company, and the money so received by the said Trust Company, Trustee, shall be paid out of it, or under its direction, in the purchase, improvement and equipment of other property which may be purchased or acquired by the Gas Company, or in the extension of its mains and service pipes, or in the construction or extension of its works, provided that no such purchase shall be made by the Gas Company to be paid for out of such money, except upon the approval of the Trustees, nor shall the Gas Company use any of the said moneys in payment for improvements or equipments of the property so purchased, or in payment for the extension of mains and service pipes, or for the construction or extension of works, except such payments are made with the approval of the Trustees; and all the property so purchased, acquired or constructed by the Gas Company shall immediately be and become, without any other act or conveyance on the part of the Gas Company, subject to the operation and lien of this mortgage.

And so much of said money so received by the Trust Company, Trustee, as shall not in any reasonable time be required by the Gas Company for the purchase, improvement or equipment of other property, or the extension of its mains and service pipes, or the construction or extension of its works, shall be applied by the Trustees to the purchase or redemption of the bonds and coupons hereby secured and then outstanding, which bonds shall, when so purchased or redeemed, be cancelled by the Trustees and surrendered to the Gas Company.

It is further agreed that the Gas Company may, at its option, sell, assign, grant, or convey, reconvey, release, sur-

render, or permit to lapse any of the leases, licenses, easements, grants, or contracts for natural gas and oil lands or for gas and oil wells, and for rights of way, constituting parts of its natural gas system and plant, and the same shall thereupon be withdrawn from the lien of this trust mortgage, and upon request of the party of the first part to be made in writing, said Trustees shall execute proper releases of the same from such lien: Provided, however, that said option shall not be exercised in such manner or to such extent, to be determined exclusively by the Trustees, as to impair the efficiency or value of the said natural gas pipe lines. systems and plants, for the uses and purposes for which they were constructed.

VI. The Gas Company shall and will from time to time hereafter, upon the demand of the Trustees, grant, convey, assign, transfer and set over unto the Trustees all real estate, which it may hereafter acquire, and all personal estate and other property, corporate rights and franchises which it shall hereafter in any manner acquire for its corporate uses and purposes, and shall and will also make, do, execute, acknowledge, seal and deliver to the Trustees, or cause to be made, done, executed, acknowledged, sealed and delivered to the Trustees, all and every such further acts, matters, things, deeds, conveyances and assurances in the law, for the better assuring, conveying and confirming unto the Trustees all and singular, the premises, estates, property, rights, easements and franchises, privileges and immunities, hereby conveyed or intended so to be, or which may hereafter be acquired by the Gas Company, as the Trustees, under the advice of counsel learned in the law, may desire and request, for the better effectuating and carrying out the provisions, objects and purposes of this mortgage, and securing the principal and interest of the bonds intended to be hereby secured; all of which estates and property shall be held by the Trustees under and upon the several and respective trusts, and for the uses and purposes and subject to the powers and authorities herein mentioned, declared, given and expressed.

VII. The action of the Trustees in regard to the enforceing, to any extent or in any manner, the lien created by this mortgage, either by taking possession, sale at auction, or by resort to judicial proceedings, or by any means authorized and contemplated hereby, and any and every suit, bill or proceeding in equity, or other action which may in any manner be had or taken for enforcing the lien hereby created for the securing the payment of the said bonds and coupons, or for

enforcing any of the trusts of this instrument, shall be at all times subject to the control of the holders of a majority in amount of said bonds then outstanding, their wishes being expressed in writing.

And it is further agreed that in case of any proceeding as hereinbefore authorized by reason of any default that may have occurred and continued as aforesaid, a majority in interest of the bond-holders, for the time being, shall have the
28 right to agree upon a plan or scheme for reorganization, which plan or scheme, when so agreed upon in writing and signed by such majority in interest, shall be in all respects binding and obligatory upon all the holders of such bonds or coupons.

VIII. And the Gas Company, for itself, its successors, and assigns, covenants and agrees to and with the said party of the second part, and its successors in the trust hereby created, that it will promptly and in apt time pay or cause to be paid all taxes and assessments that may be levied, assessed or imposed upon all and any of its property above described, or hereby conveyed or intended to be conveyed; that it will not allow or suffer any execution upon any judgment or decree of any court of record to be levied upon any of its property, and that it will not do or refrain from doing any act which shall render it liable to any suit or suits in equity for its dissolution, or for any remedy under any provision of any law of the State of Indiana at the time in force; and that it will keep alive the franchise of said Company to be a corporation, either by renewal, extension or other lawful proceedings until all of the bonds hereby secured shall have become due and payable either by declaration and notice, as herein provided or upon maturity.

IX. And the Gas Company for itself, its successors and assigns, in consideration of the premises, further covenants and agrees to and with the said party of the second part and its successors in said trust, that said party of the first part and its successors shall and will, at all times hereafter, provide for and pay the principal and interest of and upon the bonds hereinbefore recited and described, as the same shall become due and payable, and that it will at all times hereafter cause an office to be kept open in the City of New York, in the State of New York, for the transfer and registration of said bonds, and that any and every default in the due performance of this covenant shall be deemed and taken to be a waiver of due presentment and of a demand for payment of

:il and any of the bonds and coupons aforesaid which may become payable during the continuance of such default.

X. The Gas Company for itself, its successors and assigns, further covenants and agrees, that it will keep the property hereby mortgaged, liable to be injured or destroyed by fire, reasonably insured, and in case of destruction or damage by fire, all insurance money derived from such insurance shall be by it properly applied to replace, restore, or repair such property as may have been injured or destroyed, or to the purchase of other property needed for the maintenance or operation of its said natural and artificial gas plants, and such replaced or restored property shall immediately become subject to the lien of this mortgage.

XI. The Gas Company for itself, its successors and assigns irrevocably waives all benefit of any present or future valuation, stay, extension or redemption laws, and hereby irrevocably waives all right to have the mortgaged property and franchises marshalled upon any sale thereof, and consents that the same may be sold as one property.

XII. For the debt and bonds secured hereby the Gas Company is liable in personam, and any deficiency, after exhausting the mortgage security, may be enforced against the Gas Company, but not against its officers, directors, or stockholders individually; and it is expressly agreed between the parties hereto, and by every person who shall take or hold any bond or bonds issued hereunder, that no persons who are now or who may hereafter become officers, directors, or stockholders of the Gas Company shall in anywise be held liable for the payment of either the principal or interest of the bonds secured hereby, and any such liability is hereby expressly waived.

XIII. If any bond issued hereunder shall be mutilated, lost, or destroyed, the Gas Company may, under terms and conditions prescribed by its board of directors, issue and deliver in lieu thereof a new bond of like tenor, amount, and date, and bearing the same serial number, which bond, when so issued, shall be certified by the Trust Company, Trustee, upon due proof of such mutilation, loss, or destruction, and upon receiving indemnity satisfactory to the Trustees.

XIV. The Trustees agree to execute the trusts of these presents upon the following terms and conditions:

The Trustees may employ agents or attorneys in fact to aid it in the execution of said trust, and provided they shall

have exercised reasonable prudence and care in the selec-
29 tion and employment of such agent or agents for any such purposes, they shall not be responsible for loss or damages in the premises caused by the act, neglect or default of such agent or agents.

All the covenants, conditions, provisions and agreements herein contained may be specifically enforced by any court of competent jurisdiction.

The Gas Company shall and will indemnify and save harmless the Trustees against any loss and damage to which it may be subjected by the execution of this trust not caused by the personal misconduct or neglect of the Trustees.

The right of action under this indenture is vested exclusively in the Trustees, and under no circumstances shall any bondholder or bondholders have any right to institute an action or other proceeding under this indenture for the purpose of enforcing any right herein and hereby provided, or of foreclosing this mortgage, except in case of refusal on the part of the Trustees to perform any duty imposed on them by this indenture, and all actions and proceedings for the purpose of enforcing the provisions of this indenture shall be instituted and conducted by the Trustees according to their sound discretion, but the Trustees shall be under no obligation to institute any such suit or to take any proceedings under this indenture, or to enter any appearance or in any way defend any suit in which they may be made defendant, or to do anything whatever as Trustees until they shall be indemnified to their satisfaction against any and all costs and expenses, outlays and counsel fees and other reasonable disbursements, and against all claims for damages for which they may become liable or responsible on proceeding to carry out such request or demand. The Trustees may nevertheless begin suit or appear in and defend any suit or to do any act in their judgment proper to be done by them as such Trustees, without such indemnity, and in such case it shall be compensated therefor from the trust fund.

The Trustees shall be under no obligations to recognize any person as owner or holder of any bond secured hereby, or to do or refrain from doing any act pursuant to the request or demand of any persons, until such supposed holder or owner shall produce such bonds and deposit the same with the Trustees.

It shall be no part of the duty of the Trustees to file or record this indenture as a mortgage of conveyance of real estate, or as a chattel mortgage, or to renew such mortgage, or to procure any further, other or additional instruments of

further assurance, or to do any other act which may be necessary or proper to be done for the continuance of the lien hereof, or for giving notice of the existence of such lien, or for extending or supplementing the same, nor shall it be any part of their duty to effect insurance against fire or other damage on any portion of the mortgaged property or to renew any policies of insurance or to keep themselves informed or advised as to the payment of any taxes or assessments, or to require such payment to be made, but the Trustees may in their discretion do any or all of the matters and things in this paragraph set forth, or require the same to be done; they shall only be responsible for reasonable diligence in the performance of the trust. They shall be entitled to be reimbursed for all proper outlays of every kind by them incurred in the discharge of their trust, and to receive a reasonable and proper compensation for any services that they may at any time perform in the discharge of the same; and such compensation and disbursements shall constitute a lien on the mortgaged property and premises.

In case at any time it shall be deemed necessary by the Trustees of the Gas Company to make any investigation respecting any fact relative to any proposed action of or by such Trustees, the certificate of the Gas Company under its corporate seal, attested by the signature of its President and the affidavit of one or more of its Directors, shall be conclusive evidence of such fact for the purpose of protecting the Trustees in any action that they may take by reason of the supposed existence of such fact.

All recitals, statements of fact and representations herein contained are made on behalf of the Gas Company, and the Trustees assume no responsibility as to the correctness of the same, nor are the Trustees to be understood as making any representations as to the character, extent or value of the above-described property, or in reference to the title thereto, or the right or power of the Gas Company to mortgage the same.

The Trustees may resign and discharge themselves of the trusts created by these presents, upon a notice in writing to the Gas Company given three months before such resignation shall take effect, or upon such shorter notice as may be accepted by the Gas Company as adequate notice, and upon due execution of proper conveyances and assignments.

The Trustees may also be removed upon reasonable notice, with or without cause, upon the written request of the holders of a majority of said bonds, evidenced by an instrument or

concurrent instruments in writing, executed under the hands and seals of the said holders of a majority in amount of the bonds secured hereby and then outstanding. In the event of the failure of not less than a majority as aforesaid to agree upon new trustees, the same may be appointed by the judge of the Circuit Court of Marion County, in the State of Indiana, upon application made by the Gas Company, or by the holders of a majority of said bonds, and upon such notice as such judge may prescribe. Any vacancy in the office of the Trustees hereunder, however arising, may be permanently filled in such manner as may be agreed upon by and between the Gas Company and the holders of such majority of said bonds; or in the event of their failure to agree, may be filled by the judge of the Circuit Court aforesaid upon application made as above.

XV. And the Gas Company doth covenant with the Trustees, as follows:

First: That the Gas Company will execute further and necessary assurance of the title to said premises, and will forever warrant said title.

Second: That all the covenants, stipulations and agreements of this indenture shall extend to the successors and assigns, or other legal representatives of the parties hereto, respectively.

In Witness Whereof, said party of the first part, The Indianapolis Gas Company, has caused these presents to be executed by its President, sealed with its corporate seal, and attested by its Ass't Secretary, and the said The Trust Company of America, party of the second part, has caused these presents to be executed by its Vice-President, sealed with its corporate seal, and attested by its Secretary, the day and year herein first written; and the said Ferdinand Winter has also subscribed his name hereto.

The Indianapolis Gas Company,
By F. S. Hastings,
[Seal.] *President.*
Attest:
Edw. Beers,
Ass't Secretary.

The Trust Company of America,
By Wm. H. Leupp,
[Seal.] *Vice-President.*
Attest:
Raymond J. Chatry,
Secretary.

F. Winter. [Seal.]

State of New York,
City and County of New York, } ss.:

I, John H. Bogardus, a notary public in and for said City and County of New York, in the State of New York, do hereby certify that on this 17th day of October, A. D. 1902, personally appeared before me, Frank S. Hastings, personally known to me to be the President of The Indianapolis Gas Company, and acknowledged that he had executed the foregoing mortgage as the mortgage of the said The Indianapolis Gas Company and that he had signed the same and caused to be affixed thereto the corporate seal of the said The Indianapolis Gas Company, in his official capacity on behalf of said company, as the mortgage of said company, and had delivered the same, for the uses and purposes therein expressed, as his free and voluntary act for and on behalf of said corporation, and as the free and voluntary act of said corporation.

31 In Witness Whereof, I have hereunto set my hand, and affixed my official seal on the day and year aforesaid, at New York, in said County of New York.

John H. Bogardus,
(Seal) *Notary Public, Kings County.*

(Certificate filed in New York County.)

State of New York,
County of New York, } ss.:

I, John H. Bogardus, a notary public in and for said County and State, do hereby certify that on this 17th day of October, A. D. 1902, personally appeared before me, Edward Beers, personally known to me to be the Assistant Secretary of The Indianapolis Gas Company, and acknowledged that he had executed the foregoing mortgage as the mortgage of the said The Indianapolis Gas Company, and that he had signed the same and affixed the corporate seal of the said The Indianapolis Gas Company to the same in his official capacity on behalf of said company, as the mortgage of said company, and had delivered the same, for the uses and purposes therein expressed, as his free and voluntary act for and on behalf of said corporation, and as the free and voluntary act of said corporation.

In Witness Whereof, I have hereunto set my hand and

affixed my official seal on the day and year aforesaid, at the City and County of New York, in the State of New York.

John H. Bogardus,
(Seal) *Notary Public, Kings County.*

(Certificate filed in New York County.)

City of New York, }
State and County of New York, } ss.:

I, Charles J. Gunther, a notary public in and for the said City of New York, in the County of New York, in the State New York, do hereby certify that on this 18th day of November, A. D. 1902, personally appeared before me, William H. Leupp and Raymond J. Chatry, personally known to me to be the identical persons whose names are attached to the foregoing mortgage as having executed the same on behalf of the Trust Company of America, Trustee, and the said William H. Leupp, also personally known to me to be the Vice-President, and the said Raymond J. Chatry, also personally known to me to be the Secretary of the said Trust Company of America, and acknowledged that they had executed the foregoing mortgage and had signed the same and had affixed the corporate seal of the said Trust Company of America to the same in their official capacity, on behalf of the said Trust Company of America, for the uses and purposes therein expressed, as their free and voluntary act for and on behalf of said corporation, and as the free and voluntary act of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal on the day and year aforesaid, at the City of New York, in the County of New York.

Chas. J. Gunther.
(Seal) *Notary Public (No. 89), City and County of New York.*

State of New York, }
County of New York, } ss.:

I, Thomas L. Hamilton, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify, that Charles J. Gunther, whose name is subscribed to the Certificate of the proof or acknowledgment of the annexed instru-

ment and thereon written, was, at the time of taking such proof or acknowledgment, a Notary Public in and for the County of New York, dwelling in the said County, commissioned and sworn, and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such Notary, and verily believe that the signature to the said certificate of proof or acknowledgement is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 18th day of November, 1902.

Thos. L. Hamilton,
(Seal) *Clerk.*

32 State of Indiana, }
Marion County, } ss.:

Before the undersigned Charles Russell Leas, a Notary Public in and for said County and State, this 20th day of October, 1902, personally came Ferdinand Winter and acknowledged the execution of the foregoing mortgage or deed of trust.

Witness my hand and notarial seal.

Charles Russell Leas,
(Seal) *N. P.*

(My Commission expires Oct. 1, 1906.)

33 EXHIBIT B.

Agreement of Lease by and Between

The Indianapolis Gas Company

and

Citizens Gas Company of Indianapolis.

34 Agreement of Lease, made and entered into the 30th day of September, 1913, by and between The Indianapolis Gas Company, a corporation duly organized and acting under and pursuant to the laws of the State of Indiana, party of the first part, and hereinafter referred to as the "Lessor," and Citizens Gas Company of Indianapolis, a corporation duly organized and acting under and pursuant to the laws of the State of Indiana, party of the second part, and hereinafter referred to as the "Lessee."

This Indenture Witnesseth, That the said parties each for itself, its successors and assigns, and each in consideration of the covenants and agreements herein made by the other, have covenanted and agreed and do hereby covenant and agree each with the other and its successors and assigns as follows, to-wit:

The Lessor doth hereby grant, demise and lease unto the Lessee all and singular the real estate, buildings, machinery and equipment owned and possessed by the Lessor and used by it in or useful for the manufacture, storage and distribution of gas and the by products resulting from the manufacture of gas and all other business incidental thereto, all pipe lines, mains, connections, gate valves, regulators, vaults, manholes, and other parts of the system of the Lessor used in or useful for the distribution of gas in the City of Indianapolis and the community about said city, and meaning hereby to include all property, real, personal or mixed, franchises, rights and privileges, respecting the manufacture and sale of gas which are owned or otherwise controlled by the Lessor and all contracts made by it with all persons or corporations, together with all the rights, privileges, easements and appurtenances thereto belonging, including the right to demand and receive to the Lessee's own use all the tolls, rents, revenues, income and profits of all the property leased, and particularly including the following described real estate situate in the County of Marion, State of Indiana:

Part of out-lots one hundred and sixty-six (166), one hundred and sixty-seven (167), and one hundred and sixty-eight (168), in the said City of Indianapolis, described as follows: Commencing at a point on the north line of Pratt Street, at the intersection of the west line of that part of said out-lot one hundred and sixty-eight (168), owned by the Lafayette & Indianapolis Railroad Company (now the Cleveland, Cincinnati, Chicago & St. Louis Railway Company), thence north along the west line of said part of said out-lot owned by said railway company one hundred and fifty (150) feet, thence west and parallel with said Pratt street to the center of the Central Canal, thence southeast along the center of said canal to the north line of said Pratt street, at its intersection with said canal, thence east along the north line of said Pratt street to the place of beginning, saving and excepting the easement for canal purposes over and upon the same, of the Central Canal.

Also, part of said out-lots one hundred and sixty-seven

(167) and one hundred and sixty-eight (168) in said city of Indianapolis, described as follows: Commencing at a point in the west line of the land owned and occupied by the Cincinnati, Indianapolis, St. Louis and Chicago Railway Company (now Cleveland, Cincinnati, Chicago and St. Louis Railway Company), in said out-lot one hundred and sixty-eight (168), one hundred and fifty (150) feet north of the north line of Pratt street, thence running north fifty (50) feet to a point, thence west parallel with said Pratt street, to the Indiana Central Canal, thence in a southeasterly direction, with the line of said canal to a point west of the place of beginning and one hundred and fifty (150) feet north of said Pratt Street, thence east parallel with said Pratt street to the place of beginning.

Also, Block B, Langsdale Estate partition subdivision of the south half of the southwest quarter section 26, township 16, range 3, in the city of Indianapolis, particularly described as follows, to-wit:

Commencing on the south line of said half quarter section at a point 794.75 feet west of the southeast corner thereof, thence west on said south line 198 feet to the center of the Cleveland, Cincinnati and Chicago Railway Company's right of way; thence northwesterly along the center of said right of way 1875 feet to the north line of said half quarter section; thence east on said north line 1040 feet to the center of Fall Creek; thence south 39¼ degrees, east 500 feet; thence south 77¼ degrees, east 300 feet; thence south 11 degrees, west 900 feet to the commencing point, containing 26 acres, subject to the right of way of said Railway Company.

Also, beginning at a point in the centre of Fall Creek on the south line of the north half (½) of the southwest quarter (¼) of section twenty-six (26), township sixteen (16) north, range three (3) east, said point being (109.6) one hundred nine and six tenths feet east of the centre of the C. C. C. & St. L. R. R., and fifty-six and one half (56½) feet east of the west abutment of Fall Creek bridge as now located; thence east along the south line of said half quarter section, eight hundred sixty-eight and one-half (868½) feet to the west side of Fall Creek; thence northwest along the west side of Fall Creek to a point one hundred sixty (160) feet north of the south line of said half quarter section, measured at right angles thereto; thence west parallel to, and one hundred sixty (160) feet distant from the south line of said half quarter section, seven hundred forty-eight (748) feet across an island

in Fall Creek to the east side of the west channel of said creek; thence southwest along said creek to place of beginning, containing two and ninety-six hundredths (2 96/100) acres, more or less.

Also, Lots number eighteen (18), Nineteen (19), twenty (20), twenty-one (21), Forty-one (41), forty-two (42), forty-three (43), forty-four (44), forty-five (45), forty-six (46), forty-seven (47), forty-eight (48), forty-nine (49), fifty (50), fifty-one (51), fifty-two (52) and fifty-three (53) in Joshua W. Langsdale's Addition to the city of Indianapolis according to a Subdivision of a part of the South half of the Southwest quarter of Section twenty-six (26) in Township Sixteen (16) north of range three (3) east recorded in Plat Book Seven (7) page forty-eight (48) in Recorder's office of Marion County, Indiana.

Excepting from the operation hereof, however, the Lessor's corporate seal and books of record and its deeds, grants, plats and other instruments and documents containing or constituting the evidence of its rights and title to the property now or hereafter owned by the Lessor; and also excepting all cash on hand, and also excepting the property known as the Majestic Building situated at the Northeast corner of Maryland and Pennsylvania streets in the city of Indianapolis, Marion County, Indiana, the property situated at the corner of 16th and Alvord Streets in the city of Indianapolis, being lots 1, 2, 3, 4 and 5 in Square 1, S. A. Fletcher, Jr.'s Northeast Addition.

Provided always that this lease be subject to all the provisions of a certain indenture of Mortgage of the Indianapolis Gas Company to the Trust Company of America and Ferdinand Winter, Trustees, dated the 1st day of October, 1902, securing an authorized issue of bonds in the sum of $7,500,000 of which at this time there are issued and outstanding $4,833,000, and provided further this lease is made expressly subject to all contracts of lease, all contracts for service and all contracts for employment entered into by the Lessor, other than contracts for employment relating to the operation of the Majestic Building, and other than any contracts of rental or employment relating to the New York Office recently maintained by the Lessor.

To Have and to Hold the same unto the Lessee, its successors and assigns with the right to demand and receive for its own sole use and benefit all tolls, rents, dividends, earnings, profits, revenues and income to be derived from the same, or

any part thereof, and from the exercise of the rights, powers and franchises and other property hereby demised unto the lessee, for the term of ninety-nine years from the first day of October, 1913, on the following conditions, to-wit:

The lessee and lessor consent and agree that the Public Service Commission of Indiana and any other Commission or body that may be created by the State of Indiana in the place and stead of said Public Service Commission shall at all times have the same power, authority and right to regulate the rates, tolls, charges and service of said lessee and lessor, or either of them, in the same manner and to the same extent as said Commission would have if said lessee was operating under an indeterminate permit as defined in and according to the provisions of the Shively-Spencer Utility Commission Act, and this lease shall continue and be in full force and effect so long as said lessee shall abide by and observe the terms of said condition and agreement but in no event to exceed ninety-nine years. And if at any time said lessee denies or disputes the right of said Public Service Commission or other commission or body created in the stead of said Public Service Commission to so regulate the rates, tolls, charges or service of said lessee or lessor or either of them as fully and to the same extent and manner as might lawfully be done if said lessee and lessor were operating under an indeterminate permit, then said commission or body subject to the conditions set forth in Article 27½ Section (8) hereof may declare this lease terminated and the same shall thereafter be null and void.

36 And said term of this lease is also on the provision and condition that said lessee shall keep and perform all covenants and agreements herein contained on its part to be kept and performed, and shall yield and pay the rent which it hereby covenants and agrees to yield and pay to the amount and in the manner and at the time and the place hereinafter provided.

1. The Lessor covenants that during the continuance of this lease it will either maintain its corporate organization or that if for any reason by expiration of its corporate life or otherwise it cannot maintain the same that it will seasonably cause all its property hereby leased to be transferred to a new corporation which will in the same way either maintain its corporate organization or in turn convey its property to another which will so do, and for that purpose the Lessor and its successors will hold all necessary meetings, elect all necessary directors and officers and make and

keep all necessary records, reports and returns required by law, and will at the request and expense of the Lessee exercise or cause to be exercised all franchises and do and perform or cause to be done or performed all acts, lawful and consistent with its rights hereunder, as shall be proper and necessary for the due protection, preservation and full enjoyment of the Lessee of all the property, rights, franchises, contracts and interests hereby demised or granted to it, and the proper extension or renewal from time to time of such right and franchises, and further to carry out the true intent and meaning of this instrument, provided the Lessee shall assume the responsibility for securing all extensions of such franchises as hereinafter provided. The Lessor covenants that the Lessee may use the name of the Lessor in bringing, prosecuting or defending any suits or proceedings in law or equity which may be necessary or proper in the opinion of the Lessee, for taking action hereafter for the protection and preservation and full enjoyment by the Lessee as such, of all the property rights, franchises and privileges hereby leased, or do or undertake any act or thing that may be necessary or proper in the opinion of the Lessee for the full enjoyment of this lease, but the Lessee shall have and hold the Lessor harmless and indemnified from and against all loss, cost, damage and expense whatsoever arising therefrom.

The Lessee may at all reasonable and convenient times have access to and make copies of the Lessor's plats, deeds, grants and other instruments and documents containing or constituting the evidence of its right and title to the properties, contracts, powers, rights, privileges and franchises hereby leased and demised.

2. The Lessor covenants that the Lessee shall have full, quiet and uninterrupted possession and enjoyment of the leased property during the term hereby created as long as there shall be no forfeiture of this lease by the award of arbitrators or otherwise as herein provided, and that it will warrant and defend the Lessee in such use and enjoyment of the entire property as described above during the entire term of this lease, subject, however, to the lien of the mortgage herein mentioned and described; provided, however, this covenant shall not be construed as imposing any liability upon the Lessor to secure extensions or renewals of franchises now enjoyed or a warranty for the continued enjoyment of franchises now held by the Lessor.

And provided also this covenant shall not be deemed as

imposing any obligation upon the Lessor to preserve present grade lines and locations of its pipes and mains, but the entire obligation arising out of any change in any such grade lines or locations shall be and hereby is assumed by the Lessee.

3. The Lessor covenants that in case any part of the property hereby leased shall become so worn or damaged, as to be no longer suitable or safe for use, or if any of said property shall become no longer necessary for the purposes for which it was leased, the Lessee may sell, alter, change or replace such property, and the Lessor will act with the Lessee in any sale thereof, and in executing and delivering such instruments as may be necessary to transfer the Lessor's title therein to the vendee, provided that such sales shall always be in accordance with the terms of all mortgages at that time existing upon the property, and provided further that in the absence of mortgage provisions for such a transaction, the proceeds of any such sale or sales shall be applied to the substitution of property of value at least equal to that sold, the title to which shall be taken in the name of the Lessor, or shall be expended to increase the value of the
37 other property hereby leased, or shall be applied toward the redemption and retirement of the Lessor's bonds under the above-mentioned mortgage.

4. The Lessor covenants that it will at any time or times hereafter upon reasonable request of the Lessee make, do and execute, or cause or procure to be made, done and executed, all and every such further and other reasonable acts, conveyances, transfers, assignments and assurances for the better and more effectually vesting and confirming the property hereby leased or intended so to be, in and to the Lessee as such.

5. The Lessor covenants that it will at the Lessee's request and expense comply with all requirements of law in so far as the Lessee cannot act in its stead, and will in like manner at all times when it cannot be done by the Lessee, itself, do such acts and execute such instruments as may be necessary or proper to carry out the true intent of these presents.

6. The Lessor covenants that at the date of the execution hereof the total authorized bonded indebtedness secured upon the property of the Lessor is Seven Million Five Hundred Thousand Dollars ($7,500,000) par value of bonds secured by the said mortgage of The Indianapolis Gas Company to

the Trust Company of America and Ferdinand Winter, Trustees, dated October 1st, 1902, of which bonds Four Million Eight Hundred Thirty-three Thousand Dollars ($4,833,000) at par have been issued and are outstanding.

All or any part of the uncertified and unissued bonds of the Lessor which may be in the hands of the Trustees under its said mortgage may be used by the Lessee for the purpose provided in said mortgage, and to that end whenever the Lessee shall need funds for any such purpose, it shall in writing notify the Lessor of the amount of money required for such purpose; such notice shall be signed by the President or Vice-President of the Lessee, attested by its Secretary and sworn to by one of the officers of the Lessee, and shall conform to the provisions of the said mortgage of the Lessor relating to the issue and delivery of the bonds secured by said mortgage; whereupon the Lessor shall by resolution of its Board of Directors call upon the Trustee under said mortgage in the manner therein provided for the certification and delivery of such an amount of said bonds as may be certified and delivered for the purpose at the time under the terms of said mortgage, and upon receipt of said bonds the Lessor shall deliver the said bonds to the Lessee to be used by it for the purpose aforesaid, it being expressly understood that the Lessee shall provide the funds necessary to make such extensions or betterments over and above the amount which may be realized upon said bonds so certified and delivered to it, and shall have no lien against the property of the Lessor on account thereof, and no claim for the repayment thereof by the Lessor, except as is in paragraph Fifteen hereof expressly provided.

It is expressly understood and agreed, however, that no bonds of the Lessor shall be used by the Lessee for the purpose of making any extensions or betterments to the plant and system of the Lessor, which are not reasonably necessary or desirable in developing the plant and system of the Lessor, considered as a separate and complete system apart from the property, plant and system of the Lessee; and should the Lessor not deem the extensions and betterments so proposed to be made by the Lessee to the Lessor's plant and system, on account of which bonds of the Lessor are desired to be used by the Lessee, of the character thus defined, then the question shall be submitted to arbitrators as hereinafter provided, and the conclusion of such arbitrators shall be final and binding on both parties hereto.

The Lessor covenants that it will not, during the term of this lease authorize the creation of any mortgage or other lien upon its property hereby demised, except the same be made in renewal or continuation of the mortgage hereinbefore mentioned, or pursuant to the provisions of Article 27 hereof, and that it will create no debts, becoming a party to no contracts, and incur no obligations of any kind whatsoever during the term of this lease which would constitute a lien upon the property hereby leased or in any way interfere with the Lessee's use and enjoyment thereof.

7. The Lessor covenants that whenever, during the term of this lease, the principal of the bonds secured by the mortgage hereinbefore mentioned upon the Lessor's property shall become due and payable, the Lessor will upon the written request of the Lessee execute in the name of the Lessor, all necessary papers and instruments as shall be requisite
38 to the extension of the time of payment of the principal so maturing, or to the discharge thereof by the substitution therefor of renewal bonds and mortgage. The Lessor covenants to do all acts and things necessary or proper to be done on its part to obtain such extension, renewals or refunding, the negotiations for which shall be controlled by the Lessee. No greater amount of bonds in principal shall be issued or secured by any such renewal or refunding mortgage than the amount of bonds thereby refunded and such refunding bonds shall not bear a higher rate of interest than five per cent. per annum.

Such bonds shall be sold by the Lessee at the highest price which it is able to obtain for the same and the proceeds shall be applied to the retirement of the outstanding bonds; should such refunding bonds be sold below par, then the Lessee shall pay any additional sum necessary to complete the payment of the outstanding bonds, and shall have no lien upon the property or charge against the Lessor therefor; should such refunding bonds sell at a premium, then such premium shall belong to the Lessee. Until payment in full of the principal and interest of all bonds secured by the existing mortgage or by any renewal or refunding mortgage, such bonds and any mortgage by which they are secured shall be and remain a lien upon all of the property, contracts, powers, rights, privileges and franchises of the Lessor which are now subject or which may hereafter become subject to the lien of any such mortgage, superior in all respects to any right of the Lessee under this lease. And any such refunding mortgage shall cover

all property of the Lessor covered by this lease and not theretofore disposed of, and also all additions, extensions or betterments thereto made by the Lessee hereunder, and the lien of such mortgage thereon shall be superior to any right, title or interest therein of the Lessee or of any person claiming under the Lessee.

In event the Lessee shall fail at least six (6) months prior to the maturity of the mortgage bonds of the Lessor hereinabove referred to, or of any renewal or refunding bonds issued to retire the same, to complete arrangements for the refinancing of such outstanding obligation and furnish satisfactory evidence to the Lessor that it has so done, then the Lessor shall be permitted to take entire charge of such refinancing, including the sale of such renewal or refunding bonds at the best price which it is reasonably able to obtain therefor, and the Lessee shall thereupon pay to the Lessor upon demand the difference between the par amount of the bonds so refunded and the net amount realized from the sale of a like amount of refunding bonds.

8. The Lessor covenants and agrees that the Lessee may make physical connections of its pipe lines with those of the Lessor, such connections to be made at the expense of the Lessee and to remain its sole property.

9. The Lessee covenants and agrees that it will take over said leased property subject to the existing contract with Semet Solvay Company dated June 11, 1912, covering the installation of by-product coke ovens and other betterments and enlargements and other matters related thereto, and will fully carry out and perform all the obligations of the Lessor thereunder, and it will cause said contract to be fully performed in its essential features by the said Semet Solvay Company unless it is found wise and expedient to alter said contract which may be done with the written consent of the Lessor, and said consent is not to be unreasonably withheld.

In consideration of which agreement on the part of the Lessee, the Lessor agrees that it will provide the funds as the same may be needed to carry out the provisions of said contract, provided the total sums so to be provided, including all sums paid on account of such contract before the date hereof shall not exceed the aggregate sum of Six Hundred Thousand Dollars. In event the total cost of such work shall exceed such aggregate sum of Six Hundred Thousand Dollars, the Lessee shall provide any such additional funds and the Lessor is expressly relieved from any and all liability

on account thereof as between the parties hereto, except as hereinafter in Article Fifteen hereof provided, and as between the Lessor and any other party whatsoever, the Lessee shall assume all such liability and protect and save harmless the Lessor on account thereof.

It is expressly understood and agreed as between the parties hereto that should the Lessor hereafter sell the real property heretofore referred to as reserved from the operation of this lease, it may use the proceeds of the sale in paying the expense of installing the new coke oven plant in this Article referred to, and if the Lessor shall have paid such ex-
39 pense with other funds, the Lessor may, as against the Lessee, reimburse itself through the proceeds of such sale.

10. It is further covenanted and agreed between the parties that the Lessor as an incident to the practical operation of said leased property hereby assigns to the Lessee all accounts and bills receivable held and possessed by the Lessor, (other than accounts or bills receivable on account of bonds of the Lessor heretofore sold by it) which shall be collected by the Lessee and from the proceeds thereof the Lessee shall pay all accounts and bills payable of the Lessor other than the mortgage bonds hereinabove mentioned and other than any bills or accounts payable representing payments on account of the improvements referred to in Paragraph Nine hereof, paying over to the Lessor any balance which may remain; provided, however, the Lessee shall receive reasonable compensation for the collection of such accounts. The Lessor guarantees the collectibility of said accounts and bills receivable to an amount sufficient to pay all of its accounts payable.

11. It is further covenanted and agreed between the parties that the Lessee shall be permitted to use as its own all coal, coke, oil, gas, meters, pipe, fittings, tools, horses, wagons, automobiles and all supplies and merchandise of any kind on hand belonging to the Lessor. An inventory and appraisal thereof as of the day this lease takes effect shall be made by two appraisers, one selected by each of the parties hereto and two copies thereof shall be signed by the parties hereto and one original copy delivered to each. At the termination of this lease whether by lapse of time, by forfeiture or for any other cause, the Lessee agrees to deliver to the Lessor in good condition, useful and salable supplies and merchandise of a like value or to pay to the Lessor in money the

difference between the value of the property returned and the total value of the inventory.

12. It is further mutually covenanted and agreed that there shall be made as of the day when this lease takes effect a full, complete and particular inventory and description of all the estate and property, real and personal, belonging to the Lessor and coming into the possession of the Lessee by virtue of this lease, other than that covered by the inventory referred to in the last paragraph hereof. Such inventory shall be made by two competent persons, one selected by each party, and such inventory shall be made in duplicate, properly identified and an original furnished to each party. To such inventory there shall be added at the completion of the construction work now under way a complete description thereof, and on the 1st day of February, 1914, and semi-annually thereafter during the continuance of this lease there shall be added to such inventory a complete description of all changes, removals, extensions, additions and betterments made by the Lessee during the preceding six months, thereby furnishing an accurate record of the property covered by this lease, and which the Lessee is by this agreement obligated to preserve, maintain and return.

13. The Lessee hereby covenants and agrees that it will faithfully comply with all the provisions of the franchises from the city of Indianapolis and all obligations imposed upon it by law or by the Public Service Commission or other body having legal authority in the premises, and do all things necessary to preserve its right to do business in the city of Indianapolis. That it will so far as the same may be necessary to that end, secure new franchises from time to time from the city of Indianapolis or other public authorities having power to grant said franchises to do business in the city of Indianapolis. That at or before the termination of the corporate life of the Lessee, the Lessee will so far as it is legally able so to do, either extend its corporate life or cause a new corporation to be formed to which it will transfer all its then property and assets, and cause said new company expressly to assume all the obligations of this lease. And the like duty shall be assumed by all successive companies acquiring said property as a part of the consideration for their so acquiring said property as such successors in title. All of which agreements however are expressly subject to the rights now held by the city of Indianapolis under the terms of the franchise granted to the Lessee by said city.

14. The Lessee covenants that it will during the continuance of this lease pay, satisfy and discharge as the same shall accrue all taxes, rates, charges, licenses and assessments, general and special, ordinary and extraordinary, of every nature and description which are now a lien or may be lawfully imposed or assessed during the continuance of this lease in any way upon the Lessor with reference to its capital stock or property, earnings, contracts, rights, privileges or franchises hereby demised, or upon the rental herein reserved, so far as the same may constitute the basis for an income tax and upon all dividends declared during the continuance of this lease upon the capital stock of the Lessor, for which the Lessor as a corporation shall in any manner be liable, and also all sums of money which the Lessor may now be or may hereafter become liable to pay by law, contract or otherwise, for the possession, enjoyment or perpetuation of any of its rights, powers, privileges or franchises; provided, however, from the taxes and assessments thus to be paid there shall be deducted all taxes or assessments against the Lessor on account of the real estate above mentioned which is reserved from the operation of this lease, or on account of any property hereafter acquired by the Lessor which is not a part of the property covered by this lease; said payments to be made as the same become due to the officers or other persons entitled by law to receive the same; and in the event that said Lessee shall fail to make any such payments when the same become due, the Lessor may at any time thereafter make such payments and recover the amount thereof with interest thereon from the date of such payments and all costs, attorney's fees and other expenses from the Lessee, without prejudice to any rights secured to the Lessor by this lease for breach of any covenants hereof; it being understood and agreed, however, that if the Lessee shall desire to resist by legal proceedings, the payment of any tax or assessment, and shall so notify the Lessor, the Lessor shall not pay nor shall the Lessee be obliged to pay any such tax or assessment until thirty days after the final adjudication thereupon by the Court having jurisdiction in such cases, and in the event that the Lessee shall take an appeal from any adjudication upon such tax or assessment, then the Lessor shall not pay nor shall the Lessee be obliged to pay such tax or assessment until thirty days after final adjudication upon such appeal. It is however expressly agreed that the Lessor shall

pay its proportionate part of the taxes for the year 1912 based on the portion of the year 1913 which has expired when this lease goes into effect.

15. The Lessee hereby accepts the gas plants of the Lessor and the estate and property, real and personal, hereby demised as the same actually are at the date hereof, except as herein otherwise provided, and covenants that it will, subject to the provision of existing and future municipal grants, during said term renew, repair, replace and extend the same, so as to maintain and keep the demised premises in as good order, repair and condition as the same are now, or may be put upon the completion of the construction contract hereinabove referred to, and in their present state of efficiency; and so as to comply with all requirements of law or ordinance of any municipality or of the Public Service Commission or other body, that it will from time to time at its own expense (except as otherwise provided in Article Nine hereof) make all extensions, additions, alteratic , improvements, renewals and betterments which may be necessary or proper with reference to the premises and property hereby demised and for the use and operation thereof, and will do and perform all other things necessary to make and maintain said gas plants and system as first class, modern and efficient gas plants and system, that all lands, structures, improvements, betterments, extensions and renewals added to or made upon the demised premises, and all rights, privileges and franchises acquired by the Lessee in connection with the demised premises shall immediately become the property of the Lessor and be treated as part of the demised premises and be subject to all the terms, conditions and provisions of this indenture in like manner as if they had been vested in the Lessor at the date of this instrument.

Provided, however, that upon the expiration of the term of this lease, or if before the expiration of the term thereof this lease be terminated for any cause other than the default of the Lessee, then upon such termination, the Lessor shall pay to the Lessee, any sum paid by the Lessee in excess of the funds furnished by the Lessor for the construction of the betterments now under way referred to in Article Nine hereof, and in addition thereto the actual value at the time of such expiration or termination of all then existing additions, betterments, improvements, extensions and renewals made by the Lessee to and of the leased property, which are properly

chargeable to capital account, except such as shall have been made out of the proceeds of the sale of, or insurance on, the property now owned by the Lessor, or shall have
41 been made in the renewal of or substitution for property existing at the commencement of the term of this lease, and thereafter worn out or destroyed; or shall have been paid for out of the proceeds of bonds of the Lessor, as herein provided; but the payment of such value shall be postponed to the lien of the mortgage upon the property of the Lessor hereinbefore mentioned, and of any refunding or renewal mortgages or mortgage executed pursuant to the provisions of Article 27 hereof to the extent that may be necessary for the payment of the bonds secured thereby. Such value shall be ascertained and fixed by the award of arbitrators, to be chosen as provided in Article Twenty-eight hereof, and the award of the arbitrators or the majority of them shall be final and binding upon the parties hereto.

For the purpose of ascertaining at such expiration or termination of this lease what additions the Lessee shall have made which shall then be the subject of valuation as herein provided, copies of the inventory herein provided for by the terms of Article 12 shall be deposited, duly certified by the persons who shall have made the same, with the Lessor and the Lessee, respectively. At the termination of this lease as aforesaid, another inventory shall be made by persons selected in the same way, and a comparison of the two shall be made for the purpose of ascertaining what, if any, additions have been so made and then exist, for the purpose of valuation as aforesaid. But nothing herein shall be construed to be an addition, which is furnished or used by the Lessee in renewal or in place of or in substitution for any of the property hereby leased, saving to the extent that the additions shall at the termination of the lease, possess value in excess of what would then be the value of the matter or thing for which such substitution or renewal was made. Provided, however, any pipe lines of the Lessor which may have been heretofore injured by electrolysis and which may on account thereof be replaced by the Lessee, the cost of such replacement shall not be deemed as a maintenance or repair charge, but as a new extension or betterment for which the Lessee shall be entitled to repayment on the condition at the time and in the manner in this section of the lease provided.

On this further conditon, however, the right of the Lessee to thus treat pipe lines heretofore injured by electrolysis shall be limited to such pipe lines as may be replaced by the Lessee on or before July 1st, 1918, and the Lessee shall at the time it replaces any such pipe, notify the Lessor in writing thereof and of its claim that the necessity for such replacement is due to electrolysis, and unless the Lessor shall in writing assent to such claim, then the matter shall be settled by arbitrators selected as hereinafter provided.

It is further expressly understood and agreed however that nothing herein contained shall require the Lessee to make repairs upon and maintain the coal gas plant of the Lessor or to return the same in its present condition, it being the expectation and understanding of the parties that said coal gas plant may be abandoned by the Lessee whenever it shall cease to be necessary or profitable to continue the operation thereof.

16. The Lessee covenants that it will before the expiration of each and every franchise of the Lessor as now held or hereafter secured, take steps to secure and will use all reasonable endeavor in the name of the Lessor to secure an extension or renewal of all such franchises, to the end that there may be at all times during the continuation of this lease present operative franchises in the name of the Lessor wherever it is legally necessary or desirable to have such franchises; and the Lessor will in all reasonable ways cooperate in the securing of such extensions or renewals. But no such franchise shall be procured by the Lessee in the name of the Lessor which is unreasonable or detrimental to the Lessor, and if the Lessor shall object to the terms of any such proposed franchise, the question as to its reasonableness from the standpoint of the Lessor shall be submitted to arbitrators elected as hereinafter provided, and their decision shall be final and conclusive.

In event the Lessor shall at any time during the term of this lease deem it necessary or expedient that a new franchise, license or permit be procured, to do business in the city of Indianapolis or in any part of the territory reached by its system, from the city of Indianapolis, or other municipality, or from the Public Service Commission or other board, agency or officer authorized to grant such franchise, license or permit, it may do so in its own name, and such franchise, license or permit shall thereupon pass under and become a part of the property covered by this lease, and

the Lessee shall do all things necessary to maintain and
42 preserve such franchise, license or permit; provided, however, the Lessee shall not be required to accept the benefits of and operate under any such franchise, license or permit if arbitrators selected as hereinafter provided shall decide that the same diminishes the rights or increases the burdens of the Lessee hereunder to an extent materially detrimental to its interests.

The right of the Lessor to surrender its existing franchise and accept in lieu thereof an indeterminate franchise under the provisions of the "Shively-Spencer Utility Commission Act" shall not be abridged by the execution of this lease, and on and after such acceptance of an indeterminate franchise, or if and when by operation of law the Lessor becomes subject to such indeterminate franchise or to regulations, terms, conditions, or other requirements touching the construction, repair, maintenance and operation of the leased property, other or different from or additional to those now in force, the obligations of the Lessee under this lease shall not be affected thereby, but such indeterminate franchise and all the provisions of any such law or ordinance to be performed and observed by the Lessor shall be performed and observed on its behalf by the Lessee.

17. The Lessee covenants to insure and keep insured such parts of the leased property as are of an insurable nature for such sums and in such manner as shall reasonably protect the same against loss or damage by fire and as shall be usual in like properties and to exhibit to the Lessor or its agents the policies whenever reasonably requested and to apply all sums received by virtue of any such insurance to the rebuilding, replacement or repair of the property damaged or destroyed, whenever necessary or desirable in the judgment of the Lessee for the operation of leased property, or when not so necessary or desirable, then to extensions, betterments and renewals of property, subject to this lease, or to the retirement of the Lessor's bonds as the Lessor and Lessee may mutually agree.

Provided, however, that the Lessee may adopt such other plan or method of protection against loss by fire, whether by the establishment of an insurance fund, or otherwise, as may be approved by the Board of Directors of the Lessor. It is understood and agreed, however, that the Lessee will at all times comply with the insurance clause contained in the existing mortgage upon the demised property or any renewal thereof

or any refunding mortgage. In case of any failure on the part of the Lessee to keep said property so insured or protected from loss by fire, it shall be lawful for the Lessor to cause said property to be insured, and the Lessor may recover the amount of any payments of premiums for such insurance, with interest thereon from the date thereof, from the Lessee, without prejudice to any rights secured to the Lessor by this lease for breach of any covenant thereof.

It is understood by and between the parties hereto that the provisions thus made for the restoration of the demised property, or any part thereof, which may be destroyed or injured by fire, shall be treated and shall operate as a waiver by the Lessee of any right, whether statutory or otherwise, on its part to surrender said leased property or any part thereof by reason of destruction or injury by fire or otherwise, the object being to require the Lessee, notwithstanding such event to continue the term of this lease and to make the payments and perform the covenants herein required, anything in the statutes of the State of Indiana to the contrary notwithstanding.

18. The Lessor covenants to deliver to the Lessee the property herein demised free of any and liens whatsoever except the bonded indebtedness secured by its mortgage and except taxes not delinquent. The Lessor agrees to indemnify and hold harmless the Lessee against any and all suits now pending and claims now existing or hereafter asserted as the result of any act done by the Lessor, its agents, servants and employes prior to the beginning of the term of this lease.

19. The Lessee covenants at its own cost and expense to operate said gas plants and system and the other leased properties in compliance with the laws of the State of Indiana and in compliance with requirements of franchises, contracts and orders of Public Service Commission or other public authority and to make all returns and do all things that may by law be required in respect to the whole or any part of the leased property or the business conducted thereon, and that it will furnish all equipment and apparatus of every description necessary for the proper use and operation of said gas plant and system and other leased property in accordance with the requirements of this lease.

43 The Lessee further covenants to save the Lessor harmless from the payment of any claim, debt or liability whatsoever growing out of the present construction and condition or of the working, maintaining or operating or future construction of said leased property subsequent to the date of the

beginning of the term of this lease during the term of this lease or growing out of any fault or neglect of the Lessee or its agents or employes or their violation of any law or municipal ordinance, or order or requirement of any commission or other public authority now existing or hereafter lawfully existing, the Lessee taking upon itself the same duties, obligations and liabilities in respect of such leased property and its appendages and appurtenances and the working, maintaining and operating the same as if the Lessee by succession had become the corporate owner thereof.

20. The Lessee further covenants that it will perform all of the grants to the Lessor from or contracts by it with any state, city, town, county or governmental body, in relation to the leased property and not do or omit or suffer to be done or omitted any act or thing which shall be ground for forfeiture of any of the franchises, rights and privileges or easements derived thereunder for the construction and maintenance and operation of gas plants and system or any part thereof, of which the Lessee shall at any time be in possession under this lease, or which shall be a breach of any condition or obligation imposed upon the Lessor by the Mortgage hereinbefore mentioned, or any renewal or refunding mortgage, or mortgage executed subject to the provisions of Article 27 hereof, or by any other contract entered into by the Lessor; and said Lessee shall and will hold the Lessor harmless from all liability, cost or expense arising during the term hereby created for or upon the bonds heretofore or hereafter executed to any city, town or county conditioned for the faithful performance of the obligations of the Lessor under its grant from or contract with any such city, town or county.

21. The Lessee covenants with the Lessor that it will pay as rental for the demised premises and property in gold coin of the United States without relief from valuation or appraisement laws and with attorney's fees.

(1) The interest as the same shall from time to time fall due on the $4,833,000 of bonded indebtedness of the Lessor now outstanding, being part of the authorized issue of the $7,500,000 par value of five per cent. fifty year gold bonds, secured by mortgage to the Trust Company of America and Ferdinand Winter, Trustees, dated October 1st, 1902, so long as the said bonds or any of them shall be outstanding; also the interest as it shall from time to time fall due on any bonds which may be issued in refunding, renewing or extending the bonded indebtedness of the Lessor under the provisions of

Article 27 hereof. Also the interest on any escrow bonds under said mortgage which may hereafter be certified and used under the provisions of this lease for betterments and extensions. It being, however, expressly understood that the pro rata proportion of the interest on outstanding bonds from April 1st, 1913, to the beginning of the term of this lease shall be paid by the Lessor.

(2) The Lessee will pay to the Lessor as additional rental for the demised property:

On the 31st day of December, 1913, at the rate of One hundred and twenty thousand dollars ($120,000), per annum for that portion of the year 1913 during which this lease may be effective, and on the 30th day of June and the 31st day of December thereafter Sixty thousand dollars ($60,000), Provided that when the maximum price of gas to the general consumer shall be fixed at a sum more than 45 and not more than 50 cents per thousand cubic feet sixty days or more prior to the date when any semi-annual payment of rent shall be due, then such semi-annual payment and all subsequent semi-annual payments until a further reduction in the price of gas as hereinafter provided shall be made, shall be in the sum of $65,000.00 and provided further that when the maximum price of gas to the general consumer shall be fixed at a sum not more than 45 cents per 1000 cubic feet sixty days or more prior to the date when any semi-annual payment of rent shall be due then such semi-annual payment and all subsequent semi-annual payments during the period that this lease shall be effective shall be in the sum of $67,500.00.

It is agreed by the parties hereto that the price of gas shall be deemed to have been fixed when so established by voluntary act of the Lessee or by act of the Lessee under orders of the Public Service Commission or the State of Indiana, provided,

however, that if said Lessee shall within sixty (60) days
44 appeal from any such order of the Public Service Commission fixing a new rate for gas, the change in the amount of rent herein provided shall not become effective until such appeal has been decided by the last court to which it may be carried by said Lessee; and when any such appeal shall be so decided by the last court to which said Lessee may apply, any change in the amount of rental shall become effective as of the date on which such court shall order the change in the maximum net price of gas to the general consumer to take effect.

All such payments shall be made free and clear of all

charges, taxes, assessments and impositions whatsoever. The sums thus to be paid under Subdivision 2 of this article shall be paid to the Lessor or its nominees as follows: Twenty (20) or more days before any such payment becomes due, the Lessor shall declare a dividend of an amount equal to said payment to the holders of the shares of its capital stock, and the Lessee, as agent of the Lessor, shall pay the amounts of such dividends thus declared to such persons and in such amounts to each as shall be certified to the Lessee under oath by the treasurer of the Lessor at least twenty (20) days before the sum to be paid becomes due and payable, as entitled to receive the same on the day the same becomes due and payable by virtue of their respective holdings of the capital stock of the Lessor. The Lessor, in the interest and for the benefit of the holders of its stock, hereby requests and directs the Lessee thus to pay for the benefit of the Lessor said sums of money, the payment of which are provided for in said Subdivision 2 of this article, directly to the holders of said shares respectively, in such amounts to each as shall be certified to the Lessee under oath by the treasurer of the Lessor at least twenty days before the sums to be paid under said subdivision 2 of this article become due, and to accept the receipts of the persons to whom such payments shall be made in lieu of the receipt of the Lessor therefor (which receipt may consist of the endorsement of the payee on the dividend checks) with the same effect as if such payments had been made to the Lessor and receipted for by it; and the Lessee, in pursuance of said request and direction, hereby agrees that it will make said payment of said sums, the payments of which are provided for in said subdivision 2 of this article, to said shareholders certified to it as aforesaid, in the amounts in each case so certified, it being agreed that said certificates so presented to it from time to time shall exempt it from all liability to inquire or be informed concerning the performance of prerequisite conditions.

It is agreed between the parties hereto that the instructions and agreement last above written for the payment of said sums shall not be varied without the consent in writing of the Lessor and of the holders of three-fourths of said shares of stock of the Lessor.

And the Lessee further agrees that it will, at the request of the Lessor, endorse upon each certificate of stock its said agreement to make said payments to the holders thereof, in pursuance of and according to the terms herein stated.

3. Such sum not exceeding Three Hundred Dollars ($300) per year as may reimburse the Lessor for its actual and reasonable disbursements made for the purpose of and incidental to the maintenance of its corporate organization.

22. The Lessee covenants to perform and observe all the covenants and agreements of the Lessor, except those as to the payment of the principal of the bonds, contained in its mortgage to the Trust Company of America, dated October 1st, 1902, securing an issue of bonds in the sum of Seven Million Five Hundred Thousand Dollars ($7,500,000) hereinabove referred to, or in any mortgage executed pursuant to the provision of Article Twenty-seven hereof, and that as to the principal of said bonds it will refund or renew the same at maturity as provided in Article Seven hereof; and also all covenants and agreements of the Lessor, except those as to the payment of the principal of the bonds contained in any refunding or renewal or other mortgage executed pursuant to the provisions of Articles Seven and Twenty-seven of this lease.

As between the parties hereto it is agreed that the Lessee may at any time invest its funds in the outstanding bonds of the Lessor, but its acquirement thereof shall not be deemed a cancellation or retirement thereof unless the Lessee expressly elects to have the same cancelled or retired.

23. The Lessee covenants that at the expiration of this lease through lapse of time or otherwise, the Lessee shall surrender to the Lessor the demised property, rights, privileges, franchises, and all improvements, additions and extensions thereto, and all properties, real and personal rights, privileges and franchises acquired by the Lessee hereunder or in pursuance of this instrument, upon payment therefor by the Lessor, in accordance with the provisions of Article Fifteen hereof, except as the same may have been sold, conveyed, altered, changed, abandoned, removed or replaced in accordance with the terms of this instrument; and upon such expiration or termination the Lessee shall permit the Lessor immediately to resume possession of all and singular the demised premises and property and of such additions thereto, and shall thereupon at the request of the Lessor, make, execute and deliver all such deeds, releases or other instruments which the Lessor may reasonably require in order to revest in the Lessor at once the full and complete title thereto.

24. The Lessee covenants that the Lessor, by its agents or representatives may at all proper and reasonable times

enter upon the demised property and estate and inspect the same for the purpose of ascertaining its condition and whether the covenants and agreements of the Lessee herein contained are being substantially complied with.

25. It is expressly agreed and notice is hereby given that the Lessee shall have no right under any circumstances to create liens against the property of the Lessor hereby leased without the consent of the Lessor, and no person claiming by, under or through the Lessee shall have any right to assert any lien against the Lessor's property.

26. It is further understood and agreed by and between the parties hereto that immediately after the date of the beginning of this lease an account shall be taken of all extensions or betterments properly chargeable to capital account made after February 28th, 1913, (other than those embraced under the contract with the Semet Solvay Company above referred to) and that as between the parties hereto the Lessor shall be permitted to drawn down escrow bonds of the issue now outstanding hereinbefore referred to on account of such improvements and any others which it has made for which it is entitled to draw down escrow bonds, to an amount which will produce, if sold at 85 per cent. of par, the total cost of such extensions or betterments made since February 28th, 1913, other than those covered by the said Semet Solvay Contract. And such bonds thus drawn shall be the sole property of the Lessor to be used by it as it may see fit, and the interest hereafter falling due thereon shall be a part of the rental to be paid by the Lessee under the first subdivision of Article Twenty-one hereof. But except as herein provided, the Lessor shall not draw down escrow bonds on account of any betterments, extensions or additions made by the Lessor.

27. In event during the term of this lease all escrow bonds of the Lessor secured by the Mortgage dated October 1st, 1902, hereinbefore referred to, shall have been used to defray the expense of making betterments and extensions to the plant and system of the Lessor made by the Lessee under the provisions of this lease, and it thereupon becomes necessary or advisable in order to meet the expense of further extensions and betterments to the plant of the Lessor that additional bonds shall be authorized and issued secured by a mortgage or deed of trust upon the property of the Lessor hereby leased, then the parties hereto mutually

covenant and agree that they will take all steps and do all things necessary to authorize and issue such additional bonds as may be reasonably necessary for such purposes, and the rights and obligations of the parties with reference to any such additional mortgage and the bonds secured thereby shall be similar in all respects to the rights and obligations created by this instrument with reference to the oustanding mortgage dated October 1st, 1902, hereinabove referred to.

The mortgage securing the payment of additional bonds may be executed at or before the maturity of the bonds secured by the mortgage of the Lessor dated October 1st, 1902, and such additional bonds may be included in an entire authorized issue of bonds, part of which may be issued or held in escrow to take up, refund or renew upon the terms and conditions prescribed in Article Seven hereof, the bonds secured by said mortgage of the Lessor dated October 1st, 1902, and all such additional and refunding and renewal bonds may be refunded or renewed, as provided in said Article Seven.

27½. It is further covenanted and agreed by and between the parties hereto as follows, to-wit:

46 (1) That immediately upon the approval of this lease by the Public Service Commission, the said Indianapolis Gas Company shall file with the Clerk of the City of Indianapolis, and shall also file with said Commission a written declaration, legally executed, that it surrenders its license, permit or franchise, and desires to receive by operation of law in lieu thereof, an indeterminate permit as provided in said Shively-Spencer Utility Commission Act; said Indianapolis Gas Company shall also file with said Public Service Commission a certified copy of its written declaration filed with the Clerk of said City of Indianapolis, to which shall be attached a certificate of said Clerk certifying to the date upon which said written declaration was filed in the Office of said Clerk of said City of Indianapolis. Provided, nevertheless, that if the execution of this lease be prevented by judicial action or be set aside as the result of judicial proceedings, then such surrender of the Indianapolis Gas Company of its license, permit or franchise and the acceptance by it of an indeterminate permit shall be set aside and said company be reinstated without prejudice in its license, permit or franchise so surrendered.

(2) That in any subsequent valuation for rate making purposes of the properties owned by the Lessor and the

Lessee herein, or either of them, the value of the plants and equipments upon which the said Indianapolis Gas Company and the said Citizens Gas Company or either of them shall be entitled to earn an income, shall include only property actually used and useful for the convenience of the public, and shall not include the value of any unnecessary duplications of parts of said property or properties, and such value of all of the property owned by the Lessor and the Lessee or either of them shall for rate making purposes be determined exactly the same as if both companies were operating under indeterminate permits as provided in the Shively-Spencer Utility Commission Act.

(3) That in any rate making proceedings hereafter to be determined fixing rates for gas produced, and sold by the said Indianapolis Gas Company, and the Citizens Gas Company or either of them, the amount of stocks and bonds of either of said companies now outstanding shall not be deemed to have been capitalized against the public by the Act of the Public Service Commission of Indiana in approving this lease.

The interest and dividends on the stocks and bonds of either of said companies now outstanding shall not be deemed to be or permitted by the act of the Public Service Commission of Indiana in approving this lease to become fixed charges, the payment of which must be provided for in establishing a just and reasonable rate for the product produced, transmitted, furnished or sold by said Indianapolis Gas Company or said Citizens Gas Company, or either of them.

(4) That the power to regulate the rates at which gas produced, transmitted, furnished or sold by or through the Indianapolis Gas Company shall during the term this lease is in force remain in the Public Service Commission of Indiana, as fully and completely as it is now vested in said commission, and by the approval of this lease said Commission shall not be deemed to have waived its right to determine the rate at which gas so produced, sold or transmitted by or through the said Indianapolis Gas Company shall be sold.

(5) That the said Citizens Gas Company shall hereafter while this lease is in force permit the Public Service Commission of Indiana (or whatever legal commission or authority, that may have conferred upon it powers now conferred upon the Public Service Commission to fix rates for

the service produced or sold by Public Utilities) to fix and determine the rates and charges at which gas produced, transmitted or sold by it through the properties now operated by it or by the Indianapolis Gas Company as fully and completely as if the said Citizens Gas Company had surrendered its license, permit or franchise and received an indeterminate permit as provided in the Shively-Spencer Utility Commission Act.

(6) That the said Citizens Gas Company hereby binds itself, its successors, and assigns to extend the various lines and mains of its plant as set forth in Section 17 of its franchise as amended and in addition thereto, to extend the mains of the combined plants of the Lessor and Lessee to the extent of at least three miles in any one year, such mains to be of adequate size to serve the consumers along such extensions. In addition to such minimum requirements, the Public Service Commission of Indiana, or any body succeeding to its duties, shall be permitted, upon petition of the proper authorities of the City of Indianapolis, to order additional extensions to a reasonable amount upon proper evidence that such extensions are necessary and will, if made, provide a reasonable return on the cost thereof.

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After the Citizens Gas Company shall cease to operate under the franchise from the City of Indianapolis now held by it, said company, its successors and assigns, shall make such extensions to its mains as may be required by the Public Officials having authority in the premises.

(7) The said Citizens Gas Company hereby covenants and agrees to file with the Public Service Commission of Indiana so that the same may be effective on the first day of January 1914, a schedule showing the following rates, tolls and charges for gas transmitted, produced and sold by it, to-wit:

For the first 50,000 cubic feet of gas transmitted, sold or furnished by it to any one consumer in any one month through one meter 55 cents per thousand cubic feet.

45 cents per thousand cubic feet for all in excess of 50,000 cubic feet and not in excess of 100,000 cubic feet furnished to one consumer in any one month through one meter.

40 cents for each 1000 cubic feet of gas in excess of 100,000 cubic feet furnished to one consumer in any one month through one meter.

(8) That the Lessor and the Lessee, each for itself hereby expressly covenants and agrees that this lease shall re-

main in full force and effect so long as each one separately of the conditions hereinabove set forth numbered respectively 1-2-3-4-5-6 and 7, shall be complied with not to exceed a term of 99 years, and the Lessor and the Lessee, each for itself, covenants and agrees with each other and with the Public Service Commission of Indiana, that the violation of any one of said conditions numbered as aforesaid shall, at the option of the Public Service Commission of Indiana forfeit this lease and render the same null and void. Provided, however, before declaring such forfeiture for any such cause or as provided in the habendum clause of this lease such Public Service Commission shall give not less than thirty (30) days' notice of its proposed action to each of the parties hereto, and if within thirty (30) days thereafter the party not in default shall begin action to compel the party in default to do or cease doing the thing on account of which such Public Service Commission proposes declaring such forfeiture and shall diligently prosecute such action to final decision, then the Public Service Commission shall not proceed further in the matter of such forfeiture until the final determination of such action. And if as a result of such action, or prior thereto by the voluntary act of the defaulting party, the default shall be corrected then the Public Service Commission shall not be authorized to forfeit this lease.

(9) The approval of this lease by the Public Service Commission of Indiana shall not be deemed in any wise to authorize the issuance of any bonds by either the Lessor or Lessee or any of the purposes specified by the terms of this lease, without the consent of such Public Service Commission to such issuance being obtained from time to time as is now or may hereafter be by law provided.

(10) That the execution of this lease by the Lessor and the Lessee as herein provided shall be conclusively presumed to be an acceptance by the Lessor and Lessee of each one separately of the conditions and terms herein set forth.

28. If any difference shall arise between the parties hereto relative to the construction of this lease or the performance of any of the covenants hereof, and in all cases in which the appointment of arbitrators is provided for herein, such arbitrators shall be selected as follows:

(a) The parties in the first instance may by agreement submit any difference calling for arbitration to one or more arbitrators to be agreed upon, or

(b) Failing to agree upon an arbitrator or arbitrators,

and within ten days after such failure to agree, either party hereto may make written application to any judge of the Superior or Circuit Court of Marion County, Indiana, willing to act for the appointment of three disinterested persons who shall be competent experts concerning the matter in dispute to whom shall be committed the final decision of the point or points in controversy by a majority vote. Said arbitrators, before entering upon their duties, shall take
48 an oath that they have no interest of any kind in either company and that they will faithfully and honestly discharge the duties committed to them. Or the parties hereto may by mutual consent refer any such matter for adjustment to the Public Utilities Commission of the State of Indiana.

29. The Lessor and Lessee mutually covenant that they will each look for the carrying out of the obligations of this lease solely to the corporate assets and franchises of the other, and such assets shall not embrace any claim which might under any circumstances be enforcible in any way whatsoever against a stockholder, director or officer, under any statute or other law now or hereafter in force, or against a stockholder by reason of any insufficiency in the payment of capital stock. Any personal, statutory or other liability of any stockholder, director or officer of either the Lessor or the Lessee, whether such liability now exists or hereafter arise, being a part consideration for this lease is hereby expressly waived.

30. This lease is made upon the condition that whenever and as often as the Lessee shall make default in the payment of any sum required to be paid by it under this lease, or shall fail to perform or observe any other covenant or condition contained herein to be kept or performed by the Lessee, and such default shall continue for the period of sixty (60) days after written notice and demand by the Lessor, the Lessor shall have the right at its option by and under the award of arbitrators, as herein provided, and without arbitration in case of the failure to pay any installment of rent or of interest upon bonded indebtedness of the Lessor, as hereinabove provided, to terminate this lease and to reenter upon and take possession of all the leasehold property, franchises, rights and privileges hereby lease and demised, together with all the additions, extensions and improvements, made thereto, and franchises acquired in connection therewith, by the Lessee as contemplated herein, and the same shall own, hold and possess as of its former estate.

The arbitrators herein referred to shall be appointed as in Article Twenty-eight herein provided, and if they or a majority of them shall find that the Lessor is entitled hereunder to terminate this lease and re-enter as aforesaid, they shall so notify the Lessee in writing, and if thirty (30) days thereafter the Lessee shall still be in default in the payment of any sum (except as to any installment of rent or of interest upon bonded indebtedness of the Lessor as to which defaults there is to be no arbitration) or in the performance of any covenants or conditions of this lease, then upon the expiration of such period of thirty days this lease shall terminate without further notice, and the Lessor shall thereupon be entitled, without any proceedings whatever at law or in equity, to re-enter as aforesaid and to expel the Lessee and all persons claiming under it as aforesaid from the property hereby demised and every part thereof, without prejudice to its rights of action for arrears of rent or any breach of covenant. And provided also that if the Lessee shall desire to resist by legal proceedings the payment of any tax or assessment, as herein provided in Article Fourteen, failure to pay the same pending the adjudication thereof shall not be construed as a default, or a subject of arbitration between the parties. Such arbitrators shall also, in the event of a termination of this lease as aforesaid, adjust, settle and determine all damages, claims and demands between the parties hereto growing out of the termination of this lease, and all other matters of difference between the respective parties hereto, and any award so made by said arbitrators shall be conclusive and binding upon the said parties.

31. The failure or omission of the Lessor to enforce a forfeiture of this lease and re-enter upon the demised premises for default of performance by the Lessee of any of the obligations thereunder to be performed by the Lessee shall not be deemed a waiver of the right to forfeit and re-enter for any other or subsequent default.

32. In the event that any of the agreements in this lease contained, not substantially affecting the rentals to be paid, or the maintenance and operation of the leased property, or other matter going to the essence of the contract, shall be by a court of final jurisdiction adjudged ultra vires and void, the validity of this agreement in other respects shall not be affected by such nullity.

In event it should be determined by a court of final juris-

diction that the contract is ultra vires or void because of the length of the term created, and that such term is in ex-
49 cess of the authority of either party hereto to contract, then this lease shall nevertheless be binding upon the parties hereto for the longest term for which the parties hereto might lawfully contract.

In Witness Whereof, the Lessor, The Indianapolis Gas Company, and the Lessee, Citizens Gas Company of Indianapolis, have caused this instrument to be executed in duplicate by their respective Presidents and the due execution thereof to be attested by their respective Secretaries and by their corporate seals hereto affixed, this 30th day of September, 1913.

The Indianapolis Gas Company,
(Seal) By (Signed) Volney T. Malott,
President.

Attest:
(Signed) William M. Stevenson,
Secretary.

Citizens Gas Company of Indianapolis,
(Seal) By (Signed) Franklin Vonnegut,
President.

Attest:
(Signed) J. D. Forrest,
Secretary.

State of Indiana, }
Marion County. } ss.

Before me, the undersigned, a Notary Public in and for said County and State, this 30th day of September, 1913, personally appeared Volney T. Malott, President of The Indianapolis Gas Company, and Franklin Vonnegut, President of the Citizens Gas Company of Indianapolis, and each for and on behalf of the Company of which he is President acknowledged the execution of the foregoing lease.

Witness my hand and Notarial Seal.

(Signed) Margaret Wells,
(Seal) *Notary Public.*

My commission expires November 4, 1916.

50 **Exhibit C.**

Franchises, Articles of Incorporation and By-Laws of Citizens Gas Company of Indianapolis.

51 **Franchise of Citizens Gas Company of Indianapolis.**

An Ordinance ratifying, confirming and approving a certain contract and agreement made and entered into on the 25th day of August, 1905, between the city of Indianapolis, by and through its board of public works, and Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, viz.:

[Approved August 30, 1905.]

Contract.—Capital Stock.—Earnings—Mortgages.—Trustees. 1. This contract and agreement made and entered into by and between the city of Indianapolis, Marion County, Indiana, by and through its board of public works, party of the first part, hereinafter designated as the "City," and Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, for themselves and their associates and assigns, of the city of Indianapolis, Marion county, Indiana, and hereinafter designated as parties of the second part, witnesseth:

Whereas, The said Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, parties of the second part, for themselves, associates and assigns, have presented their written petition to the said board of public works of said city of Indianapolis asking permission to enter upon and lay, construct, maintain and operate a system of pipes in and along the streets and alleys and other places of said city for the distribution and sale of gas to such city and to such of the inhabitants thereof as desire to be supplied therewith;

Now, Therefore, The said city of Indianapolis, party of the first part, by and through its board of public works aforesaid, in consideration of the several agreements of the said Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, parties of the second part, and their associates and assigns hereinafter stipulated and set forth, does hereby grant, authorize, empower and permit the said parties of the second part, their associates and assigns, subject to the ratification and approval of the common council of said city, to enter upon the streets,

alleys, avenues and other public places and parts of said city and to excavate and construct the necessary ditches, trenches, conduits and tunnels and to place, lay, bury, maintain, operate and repair a system of pipes therein of such size as the parties of the second part and their associates and assigns may require for the distribution and supply of gas to said city, and the inhabitants thereof, for fuel and heating and lighting purposes, together with the right to construct, maintain and repair all necessary regulations, valves, curb boxes and safety appliances and other appurtenances, subject to the following conditions, to-wit:

1. Provided, However, That said Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, their associates and assigns, before exercising any of the rights herein conferred, shall organize a corporation under and in accordance with the laws of Indiana to carry out the purpose of this grant, to which corporation this franchise and all interests thereunder shall be assigned which articles of incorporation shall, among other matters, provide as follows:

(a) The Capital stock shall be not less than one million ($1,000,000.00) dollars, to be divided into shares of twenty-five ($25.00) dollars each.

(b) No increase of capital stock shall be made except it be provided that such new stock shall be submitted to the public at public auction upon thirty days' notice of the time and place of sale to be published in three Indianapolis newspapers having the largest city circulation, at which time said stock shall be sold at the best price obtainable therefor and any premium offered and paid for such stock shall go to the surplus capital of said company and shall bear no dividend.

(c) The said company by its board of directors shall make and publish in at least two Indianapolis newspapers of general circulation, a semi-annual public statement in detail of the affairs of said company, including the accounts of its assets and liabilities, disbursements and receipts; and the controller of said city shall have the right to investigate the books of said company at any time for the purpose of examining into the correctness of said report, or for other purpose; and the city civil engineer shall have the right at any time to make examination of said company's plant and property.

(d) The entire capital stock of the corporation shall be placed under the control of a board of five (5) trustees
52 and their successors, who shall be stockholders in said company, who shall be designated in said articles of incor-

poration and one of whom shall be nominated by the mayor of said city; which said board of trustees shall have full, complete, exclusive and irrevocable power, during the continuance of this corporation, to hold said stock and vote the same as fully and completely as if they were the owners of said capital stock; to elect directors, as herein provided, and to fill any vacancy that may occur in said board of directors. Said entire capital stock shall be voted as a unit; and in case said trustees shall not agree as to how said stock shall be voted, the majority of them shall cast the vote of the board. If a vacancy shall occur in said board of trustees by death, resignation, removal from the city of Indianapolis, or otherwise, such vacancy shall be filled by the remaining members of the board, except that the mayor of said city shall appoint the successor to the trustee originally named by such mayor; and in the event of the failure of said board or mayor to fill such vacancy, the Marion circuit court shall, upon application of any stockholder, after said trustees or mayor have had ten (10) days' notice in writing of said application, and shall have in the meantime failed to fill such vacancy, appoint some competent person to fill the same.

Any member of the board of trustees may be removed by the Marion circuit court upon the showing that said trustee is an employe or holder of any of the securities or capital stock of any other company organized for the purpose of manufacturing or delivering gas to consumers residing in, or in the vicinity of the city of Indianapolis, or for any corrupt practice or any misconduct which said court may deem detrimental to the interests of said company. Removal from the city of Indianapolis shall, ipso facto, vacate the office of any trustee.

(e) Said trustees shall issue to each subscriber to the capital stock of said company, upon full payment by such subscriber to said company of the amount of his subscription, and upon the stock therefor being issued to said trustees as above provided, a certificate showing the amount of stock held by said trustees in trust for said subscriber; and said subscriber or holder of said certificate by assignment, shall be entitled by virtue thereof to receive from said company all dividends which shall be declared, not, however, exceeding ten per centum per annum, payable semi-annually in money or in payment of any indebtedness of the holders of such certificates as consumers of the gas of said company, so long as said certificates remain outstanding and uncancelled as hereinafter provided.

(f) The earnings of said company shall be used in the following order, to-wit; first, to the payment of matured debts and operating expenses; second, to the payment semi-annually of said dividends of ten per centum per annum and any unpaid accrued dividends; third, to such extensions and betterments as may be ordered by the board of public works of said city; and the excess to the payment in whole or partial payments of the amounts subscribed: Provided, however, That when any part of the amount subscribed and paid in by any certificate holder has been repaid only the balance unpaid shall thereafter be entitled to receive such dividend of ten per centum per annum.

(g) When said certificate-holder shall have received, by dividends or otherwise, upon said certificates an amount equal to the face value thereof together with interest thereon at the rate of ten per centum per annum payable semi-annually, then said certificates issued to said subscribers shall be deemed fully paid and cancelled and it shall be the duty of the trustees and directors of said company to convey said gas plant and property belonging to said company to said city, to be owned and operated or leased by it, and all the rights, title and interest of said company or its certificateholders, stockholders, officers, directors or trustees, shall be deemed to be fully paid and extinguished, and all such certificates, whether of stock or otherwise, shall be surrendered and cancelled and said corporation shall be wound up.

(h) The business and prudential concerns of the corporation shall be managed by a board of directors consisting of nine (9) members, to be after the first year, annually elected by the board of trustees, and said annual election shall be held on the second Monday of January of each year thereafter.

(i) If upon the expiration of the term and period of the franchise granted by said city of Indianapolis to said parties and assigned to said company, the same shall terminate
53 without the payment of said certificates, together with dividends thereon, at the rate of ten per centum per annum, then upon notice to such effect to be given said board of directors by the board of public works of said city at least six months before the expiration of said franchise period, the said board of directors shall mortgage its gas plant and property for such sum as to enable it to pay its stock or certificate-holders an amount which with what has already been paid will equal the full amount of such subscription with divi-

dends estimated at the rate of ten per centum per annum thereon, and with the proceeds thereof, or with the mortgage notes so issued in proper amounts, pay off and discharge the amounts due such certificate-holders and convey said plant to said city subject to such obligations and other legal obligations against said company: Provided, however, That by the terms of said mortgage such obligation shall bear interest not exceeding six per centum per annum and be payable on or before ten years from date of execution.

City Bound by Contract. 2. And it is agreed and understood that all of the above stipulations to be provided in the articles of incorporation of the company to be formed by said Potts, Stalnaker and Schmidt, and their associates shall bind and be enforceable by said city against said company as conditions of this contract.

Purchase of Consumers' Gas Trust Co.'s Mains. 3. And provided further that this grant is made upon the following additional conditions, to-wit: That said Potts, Stalnaker and Schmidt, their associates and assigns, shall secure, acquire or construct, and put in operation a fuel gas plant for the purpose of supplying gas under this franchise, with not less than one hundred miles of mains in the streets and alleys of said city, within eighteen months from the date of the sale of the Consumers' Gas Trust Company mains now pending, and failing therein, shall forfeit all rights hereunder: Provided, however, the board of public works may at any time after said sale of the Consumers' Gas Trust Company's mains now pending, by written notice require said second parties, their associates and assigns, to file a bond within thirty days in the sum of twenty five thousand ($25,000) dollars with surety to the approval of said board, conditioned for the faithful performance of this contract and the acquiring or construction and putting in operation of such fuel gas plant with at least one hundred miles of mains laid in the streets and alleys of said city and upon failure of said second parties, their associates and assigns to comply with said notice and order for the filing of such bond, this franchise contract shall become void and all the rights, privileges and interest granted or arising hereunder to said second parties, their associates and assigns, shall at once become void and of no effect, and provided further that said board of public works may, in its discretion, extend the time above fixed for the construction of such plant to a date not more than six months after the expiration of the date as above provided.

Bond of Indemnity. 4. Before said parties of the second part or their assigns shall enter upon or take possession of any street, alley, avenue or other public place within said city for said purposes aforesaid, they or their assigns shall execute to said city of Indianapolis a good and sufficient bond to be maintained throughout the term of this franchise, in the sum of twenty-five thousand ($25,000) dollars, with surety to the approval of said board of public works, and conditioned for the indemnification of said city against all loss by reason of damages sustained by any person, firm or corporation by reason of the construction or operation of said gas plant by the said parties of the second part, or their assigns, and for the faithful performance by said parties of the second part and their assigns of each and every stipulation and agreement contained in this contract.

Protecting City. 5. Said second parties for themselves and their assigns agree to indemnify and hold harmless said city, its officers and employes from the payment of any and all damages, costs, expenses, royalties, patent fees, attorney's fees or any other sum of money whatsoever by reason of any action or demand for any infringement of any patent or copyright, or by reason of any demand or suit against said city on account of any act of omission or commission by said second parties or their assigns; and upon written notice said second parties or their assigns shal defend any suit against said city on account of any such matter, and shall prosecute or defend any appeal therein and promptly pay any final judgment that may be recovered therein against said city.

54 Diagram of Streets to be Occupied. 6. Before entering upon or commencing operations in any streets, alleys, or public ground of said city, said parties of the second part, or their assigns, shall furnish to the board of public works of said city a plan showing the street, alley, avenue or other place to be opened and the proposed location of the pipes therein, with a general specification giving particulars as to the kind and size of pipes to be used. Duplicate plans shall be submitted to and approved by the city civil engineer before any street is opened for any purpose whatever, and one copy of said plan shall be retained by said city. Said parties of the second part, or their assigns, shall also file in the office of the board of public works within sixty (60) days after laying the mains in any street, alley or public place a full and complete map showing the position and size of the pipes therein.

Permit to Work in Streets. 7. All work done in or upon any of the streets, alleys or public places of said city, either in the original construction or in making repairs, shall be done upon permits issued by the board of public works, and all trenches shall be dug and pipes laid and the trenches or ditches closed within the shortest possible time within which the same can be done with skillfulness and dispatch. All work shall be done so as to interfere as little as possible with public use and travel upon said streets, alleys and public ground, and the said parties of the second part and their assigns shall restore and maintain the streets and other places in their original condition and shall clear the streets and other places occupied by the parties of the second part and assigns of dirt and rubbish.

Supervision of Inspectors. 8. In the construction or repair of that part of such plant as is located in any of the streets, alleys, avenues or public places of said city, the same shall be subject to the supervision of inspectors to be appointed by the board of public works, and all necessary expenses for the employment of such inspectors which may be necessary for such purposes, shall be paid by the said parties of the second part or their assigns to the city controller on demand.

Service Pipes. 9. All service pipes connecting with said mains of the parties of the second part or their assigns, shall be placed and located at such points and locations as shall meet the approval of the owner of the property whose premises are to be connected by such service pipes and service lines to property line of streets and alleys. Provided, however, that where service pipes are already laid in connection with a system of mains secured by second parties or their assigns, no relocation of such service pipes shall be required. Said service pipes to property lines and curb boxes shall be put in at the expense of said parties of the second part and their assigns, who shall also furnish all necessary meters and safety devices free of charge to each consumer of gas. Provided, however, That the parties of the second part and their assigns shall be entitled to require a deposit of not to exceed five dollars with each meter furnished, which deposit shall be held and returned to such consumer upon the surrender by him of such meter in good condition, the same as when originally installed, natural wear excepted.

Mains. 10. All mains shall be laid with reference to the present grade of the street, alley or public ground through

which the mains shall be placed, and in case the grade of such streets, alleys or public places shall be changed the parties of the second part and their assigns shall cause such pipes to be relaid in conformity to such changed grade at their expense and the parties of the second part or assigns shall not be entitled to damages by reason of such change of grade.

Materials, Quality. 11. All materials used in the equipment or construction of said plant shall be of the best quality and the mains of said company shall at all times be of sufficient size to render adequate service. All pipes shall be so laid and located as not to interfere with the city's sewers, water or other pipes, or those of any other person or company, and when the city shall determine to lay any sewer, water or other pipe in any street, alley or public ground occupied by the pipes of the parties of the second part, or their assigns, or change the location of any such pipe, the parties of the second part or their assigns, shall, at their own expense, lower, elevate, change or remove their pipes so as not to interfere with the use of sewer or water pipes.

Complying With Ordinances—Mains. 12. In the construction, maintenance and repair of any of said pipes of said parties of the second part or assigns, they shall comply
55 with all ordinances and regulations existing, or that may hereafter be passed by the common council of said city of Indianapolis, or resolutions or regulations made by the board of public works applicable to the parties of the second part or their assigns, concerning the manner of laying, constructing or repairing mains and connections of said plant, and they shall also be liable for any damages by reason of their failure to comply with any of said regulations, resolutions or ordinances, and shall save the city harmless from any and all damages by reason of said neglect.

Quality of Gas. 13. The parties of the second part, for themselves and their assigns, further agree that the gas so to be furnished, sold and distributed shall have at least six hundred (600) British thermal units per cubic foot, measured according to standard methods employed for such purposes.

Price of Gas. 14. The parties of the second part and assigns further agree that the price to be charged the consumer for gas so to be furnished under this contract shall never at any time exceed the sum of sixty (60) cents per thousand cubic feet, and in the event said parties of the second part or their assigns shall ever increase its rates for gas in excess of sixty (60) cents per one thousand (1,000) cubic feet,

aforesaid, for gas furnished under the terms of this contract, then and in that event all the rights, privileges and franchises herein granted shall at once become null and void and its right to longer occupy or use any of the streets, alleys, avenues, public places or other parts of said city may be terminated, and the city shall have the right to acquire said plant as herein provided as upon the termination of the franchise period.

Refilling Excavations. 15. In the event the parties of the second part, or assigns, should fail to refill any excavation made in the construction or repair of any portion of said plant, or fail to restore any street, alley or public ground to its former condition, the said city of Indianapolis, through its board of public works, may, after five (5) days' written notice to the parties of the second part or assigns, at their office in said city, do such work and make repairs as may be necessary and the cost thereof shall be paid to the controller of said city by said second parties, or assigns within ten (10) days from the date upon which itemized bills are presented therefor.

Emergency Fund—Repairs. 16. Before said parties of the second part or assigns shall commence the work of construction, they or their assigns shall deposit with the city treasurer of said city to the credit of said board of public works the sum of five hundred ($500.00) dollars, and shall so maintain said sum on deposit during the entire life of this contract or franchise, which shall be designated as an "emergency fund." Whenever, in the opinion of the board of public works, an emergency arises in any part of any street, alley or public ground, which has been caused by the parties of the second part or assigns, and they shall fail, on notice, to immediately repair the same, the said board of public works may cause such repairs to be made at once, and if the cost thereof be not promptly paid by the parties of the second part or assigns on presentation of itemized bill therefor, such cost shall be paid from such emergency fund, which fund shall be immediately reimbursed by said parties of the second part or assigns; or said board of public works may deduct an amount equal to any payment made by it out of any sum due said parties of the second part or assigns and may add the same to such emergency fund.

Extension of Lines—Forfeiture. 17. The parties of the second part hereby bind themselves, their successors and assigns, to so extend the various lines and mains of said plant that all the inhabitants of said city may be supplied with gas

for fuel and lighting purposes, when they may reasonably require the same and when a petition therefor has been presented to the board of public works signed by the owners of property in any territory in said city asking for such extension, and in which said owners or occupants of at least three houses already erected shall bind themselves to make five or more stove or grate connections or fifteen or more burners and to use the same for each five hundred (500) feet of space that said lines are asked to be extended. Whenever such petition has been filed with the said board of public works it shall cause written notice to be given to the parties of the second part, their successors or assigns, which may be served on any officer or employe of said parties of the second part or assigns, at the main Indianapolis office of said parties or assigns, requiring said parties of the second part or assigns to appear before said board of public works
56 at a certain hour specified in said notice in not less than five days after the serving of such notice, to show cause why the prayer of said petitioners should not be granted. Such notice shall contain an accurate description of the streets, alleys and public places through and along which such extension is asked and the territory and inhabitants of which it is proposed to supply with gas as aforesaid. On the day and at the time named in such notice the board of public works shall give to the parties of the second part or assigns, if they so desire, a full hearing on the question as to whether such petition has been signed by the required number of owners and occupants of property who have agreed therein to take and use the number of stoves or grate connections or burners, and whether such extension should be required; if said parties of the second part or assigns should not appear before said board of public works at the time fixed in said notice, said board of public works may act upon such petition and upon such evidence or information as it may have from any source. If said board of public works, after such hearing, shall decide that said petition has been signed as hereinbefore provided and contains the agreement as to burners or stove connections herein required, and that such extension may reasonably be required, it may make an order requiring such extension and fixing the time within which said work of extension shall be completed, reasonable time being given, written notice of which shall be given the parties of the second part, or assigns, and if the parties of the second part or assigns should fail or refuse to make such extension within the time limited,

unavoidable delays excepted, the parties of the second part or assigns shall forfeit and pay to said city the sum of fifty ($50.00) dollars for each and every day that the completion of such extension is delayed beyond the period so fixed, which sum shall be considered as liquidated damages for breach of this contract; provided, however, that said parties of the second part or assigns shall not be required to proceed with the extension of any lines, pipes or mains between the first day of November and the first day of April of the following year, in any year, and provided further that such extension shall not be required by said board of public works of said city unless the earnings of said company will permit the same after the payment of the dividend of ten per centum per annum, upon the subscribers' certificates; and provided further, that after three years from the date of this ordinance such extensions may be required by said board of public works of said city to an extent not exceeding in the aggregate in any one year ten thousand feet of mains of adequate size to serve the consumers along such extension, without regard to the previous payment of the dividend of ten per centum per annum upon the subscribers' certificates.

Agreement to Take Gas—Extension of Lines—Forfeiture.

18. If it shall appear that the extension petitioned for can not be made by said board of public works in the manners heretofore provided in the foregoing section, then such extension may be required of said company upon the following terms and conditions, to-wit: The property owners of any territory in said city not supplied with gas by said company may petition the board of public works of the city for such extension, and shall therewith file their agreement to take at par for cash an amount of the capital stock of said company sufficient to cover the cost of the material and labor of making such extension, together with agreement of property owners or occupants of at least three houses already erected along such proposed lines binding themselves to take at least five stove connections, or fifteen burners, and use the same, for each five hundred feet that said mains are asked to be extended. Said board of public works of said city shall thereupon fix a day for the hearing of said petition, giving said company at least ten days' notice in writing and shall hear all parties interested therein and shall determine by an order, from which there shall be on appeal, if said petition is properly signed by the required number of property owners who have agreed to take the stove connections or burners, and use the same

as above provided and to determine also if said petitioners have sufficiently subscribed therefor and are responsible under their obligation to take an amount of the capital stock of said company which at its face value would cover the cost of material and labor of making such extension together with service connections to the property lines, such cost to be determined by an estimate of the city civil engineer, and in such order said board of public works shall require said company to make such extensions on said conditions and fix the time within which the work shall be completed. And it shall be the duty of the board of directors of said company, upon such order of the board of public works, to offer for sale as
57 herein provided any of the subscribed capital stock, or if necessary, to increase the capital stock, and so offer for sale such increase to an amount sufficient to cover the estimated cost of such extension; and if said stock be not sold at more than the face value thereof, then the same shall be taken and paid for by said petitioners at the face value thereof and thereupon such extensions shall be made. And if said company shall fail or refuse to make such extension within the time fixed therefor, unavoidable delays excepted, it shall forfeit and pay to said city fifty ($50.00) dollars for each and every day of such failure or delay.

Meter. 19. The parties of the second part, or assigns, shall use no meter, nor require the use of any meter in the measurement of gas sold under the provision of this contract, except such as will accurately measure all gas passing through it, and it is agreed that any meters whose measurement shall exceed two per cent (2 per cent.) fast or two per cent. slow, will be considered inaccurate.

Test of Meters—Forfeiture on Failure to Furnish Gas. 20. Said board of public works shall at all times have authority to inspect or cause to be inspected and to test or cause to be tested any meters in use by the parties of the second part or assigns, or to inspect and test the apparatus, mains or plant of said company, and to test or cause to be tested the quality of the gas and the calorific and illuminating value of the same for the purpose of determining whether the same does comply with the terms and provisions hereof. And [any] unsafe apparatus or imperfect meters shall immediately be replaced upon order of said board of public works. And upon order of said board of public works the gas of said company shall be made to conform to the standard herein fixed, and if said company shall fail to make its gas of the standard

and quality herein fixed within a period of five days after such order, it shall forfeit to said city the sum of one hundred ($100.00) dollars for each day's failure to comply with such order, and in addition to the above penalty the city shall have the right by any proper action at law or equity, to compel said company to furnish gas of the quality herein prescribed.

Term of Franchise. 21. This contract and agreement shall be in force from and after the date of its ratification by the common council of said city and for a period of twenty-five years thereafter, and thereafter all rights of said company to occupy the streets and alleys of said city shall terminate and cease.

Property Becomes City's 22. If the plant and system of mains of said company shall not have become the property of said city by the cancellation of the certificates of subscribers and conveyance of such property to such city by the board of directors and trustees of said company on or before the expiration of the aforesaid period of said franchise, then said city, by and through its board of public works, upon the expiration of said franchise period, shall have the right to pay any balance remaining due said certificate holders and the plant and property of said company shall be conveyed to said city as above provided to be owned and operated, or owned and leased by it; or, at the option of said city, the board of directors of the corporate successor of the second parties shall, as hertofore provided, upon the conclusion of said franchise period, mortgage its plant and with the proceeds thereof, or with the mortgage notes issued in proper amounts, pay off and discharge the amount due certificate holders, and thereupon convey said plant to said city subject to such obligations and other legal obligations against said company.

Insolvency of Company. 23. If at any time the company operating under this franchise should become insolvent and be ordered sold by any proper judicial authority, the city of Indianapolis reserves the right to acquire all the property and rights of said company by the payment of its bona fide indebtedness and any balance due the certificate or stockholders of said company, and upon the tender by said city of the amount of such indebtedness and amount due certificate or stockholders the trustees and directors of said company shall upon demand execute proper instruments trans-

ferring all such property and rights to said city of Indianapolis to be owned and operated or leased by it.

Assignment of Contract. 24. This contract shall not be assigned nor in any manner transferred, whether directly or indirectly, except as herein provided by second parties to the corporation to be organized by them, without the consent of the board of public works, and approved [approval] of the common council of said city.

58 In Witness Whereof, The said city of Indianapolis has caused its corporate name to be hereunto affixed by its board of public works and the said Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt have hereunto set their hands, all in triplicate, this 25th day of August, A. D., 1905.

City of Indianapolis,
By M. A. Downing,
Jacob Woessner,
David Wallace,
Board of Public Works,
Party of the first part.

Approved:
John W. Holtzman, *Mayor.*
Alfred F. Potts,
Frank D. Stalnaker,
Lorenz Schmidt,
Party of the second part.

And Whereas, Said contract and agreement has been submitted through the board of public works to the common council of the city of Indianapolis for its action thereon, therefore,

Ordinance Ratifying Contract. Section 1. Be it ordained by the common council of the city of Indianapolis, That the foregoing contract and agreement made and entered into on the 25th day of August, 1905, by the city of Indianapolis, by and through its board of public works, and Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, be and the same is, hereby in all things ratified, confirmed and approved.

Assignment of Franchise.

Whereas, The city of Indianapolis, by and through its Board of Public Works, did, on August 25, 1905, grant the undersigned Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt a certain franchise, which franchise was duly ap-

proved by the Mayor of said city and ratified by the Common Council thereof; and

Whereas, the said grant was made to the undersigned upon the condition that a corporation should be organized under the laws of Indiana to which said franchise should be assigned; and

Whereas, The Citizens Gas Company of Indianapolis, a corporation, has been incorporated under the laws of said State in accordance with the terms of said franchise, and for the purpose of furnishing gas to said city and its inhabitants under the same;

Now, Therefore, we, the undersigned, hereby assign, transfer and set over to the Citizens Gas Company of Indianapolis said franchise and, all and singular, the right, title and interest of the undersigned, in, to, and under said franchise this the 24th day of May, 1906.

Alfred F. Potts,
Frank D. Stalnaker,
Lorenz Schmidt.

Articles of Incorporation of The Citizens Gas Company of Indianapolis

The undersigned, desiring to incorporate themselves under the laws of Indiana, adopt the following certificate and articles of incorporation:

I.

The name of the corporation shall be "Citizens Gas Company of Indianapolis."

II.

The principal place of business of said company shall be located in Indianapolis, Indiana.

III.

The object of the promotion of this company shall be to supply the city of Indianapolis and its inhabitants with light, heat and power.

IV.

The amount of capital stock of the company shall be one million ($1,000,000.00) dollars, to be divided into shares of twenty-five ($25.00) dollars each. The capital stock of said company may be increased as by law provided, but whenever the capital stock shall be increased such new stock in excess of said one million dollars shall be submitted to the public at public auction upon thirty days' notice of the time and place of sale, to be published in three Indianapolis newspapers having the largest city circulation, at which time said stock shall be sold at the best price obtainable therefor, and any premium offered and paid for such stock shall go to the surplus capital of said company and shall bear no dividend.

V.

The said company by its Board of Directors shall make and publish in at least two Indianapolis newspapers of general circulation a semi-annual public statement in detail of the affairs of said company, including the accounts of its assets and liabilities, disbursements and receipts, and the controller of said city shall have the right to investigate the books of said company at any time for the purpose of examining into the correctness of said report, or for other purposes; and the city civil engineer shall have the right at any time to make examination of said company's plant and property.

VI.

The entire capital stock of the corporation shall be placed under the control of a board of five (5) trustees and their successors, who shall be stockholders in said company, who shall be designated in said articles of incorporation and one of whom shall be nominated by the mayor of said city, which said Board of Trustees shall have full, complete, exclusive and irrevocable power, during the continuance of this corporation, to hold said stock and vote the same as fully and completely as if they were the owners of said capital stock; to elect directors, as herein provided, and to fill any vacancy that may occur in said Board of Directors. Said entire capital stock shall be voted as a unit; and in case said trustees

shall not agree as to how said stock shall be voted, the majority of them shall cast the vote of the board. If a vacancy shall occur in said Board of Trustees by death, resignation, removal from the city of Indianapolis, or otherwise, such vacancy shall be filled by the remaining members of the board, except that the mayor of said city shall appoint the successor to the trustee originally named by such mayor; and in the event of the failure of such board or mayor to fill such vacancy, the Marion Circuit Court shall, upon application of any stockholder, after said trustees or mayor have had ten (10) days' notice in writing of said application, and shall have in the meantime failed to fill such vacancy, appoint some competent person to fill the same.

VII.

Any member of the Board of Trustees may be removed by the Marion Circuit Court upon the showing that said trustee is an employee or holder of any of the securities or capital stock of any other company organized for the purpose of manufacturing or delivering gas to consumers residing in, or in the vicinity of the city of Indianapolis, or for any corrupt practice or any misconduct which said court may deem detrimental to the interests of said company. Removal from the city of Indianapolis shall ipso facto, vacate the office of any trustee.

VIII.

Said trustees shall issue to each subscriber to the capital stock of said company, upon full payment by such subscriber to said company of the amount of his subscription, and upon the stock therefor being issued to said trustees as above provided, a certificate showing the amount of stock held by said trustees in trust for said subscriber; and said subscriber, or holder of said certificate by assignment, shall be entitled by virtue thereof to receive from said company all dividends which shall be declared, not however, exceeding ten per centum per annum, payable semi-annually in money or in payment of any indebtedness of the holders of such certificates as consumers of the gas of said company, so long as said certificates remain outstanding and uncancelled as herein provided.

IX.

The earnings of said company shall be used in the following order, to-wit: first, to the payment of matured debts and operating expenses; second, to the payment semi-annually of said dividends of ten per centum per annum and any unpaid accrued dividends; third, to such extensions and betterments as may be ordered by the board of public works of said city, and the excess to the payment in whole or partial payments of the amounts subscribed: Provided, however, That when any part of the amount subscribed and paid in by any certificate-holder has been repaid, only the balance unpaid shall thereafter be entitled to receive such dividends of ten per centum per annum.

X.

When said certificate-holder shall have received, by dividends or otherwise, upon said certificates an amount equal to the face value thereof, together with interest thereon at the rate of ten per centum per annum payable semi-annually, then said certificates issued to said subscribers shall be deemed fully paid and cancelled, and it shall be the duty of the trustees and directors of said company to convey said gas plant and property belonging to said company to said city, to be owned and operated or leased by it, and all the rights, title and interest of said company or its certificate-holders, stockholders, officers, directors or trustees, shall be deemed to be fully paid and extinguished, and all such certificates, whether of stock or otherwise, shall be surrendered and cancelled and said corporation shall be wound up.

XI.

The business and prudential concerns of the corporation shall be managed by a Board of Directors consisting of nine (9) members, to be after the first year annually elected by the Board of Trustees, and said annual election shall be held on the second Monday of January of each year thereafter.

XII.

If, upon the expiration of the term and period of the franchise granted by said city of Indianapolis to said parties and assigned to said company, the same shall terminate without the payment of said certificates, together with dividends thereon, at the rate of ten per centum per annum then upon notice to such effect to be given said Board of Directors by said Board of Public Works of said city at least six months before the expiration of said franchise period, the said Board of Directors shall mortgage its gas plant and property for such sum as to enable it to pay its stock or certificate-holders an amount which, with what has already been paid, will equal the full amount of such subscription with dividends estimated at the rate of ten percentum per annum thereon, and with the proceeds thereof, or with the mortgage notes so issued in proper amounts, pay off and discharge the amounts due such certificate-holders and convey said plant to said city subject to such obligations and other legal obligations against said company: Provided, however, That by the terms of said mortgage such obligation shall bear interest not exceeding six per centum per annum and be payable on or before ten years from date of execution.

XIII.

The term of the existence of the company shall be fifty (50) years.

XIV.

There shall be nine (9) directors of said company, and for the first year these shall be: Frank D. Stalnaker, Franklin Vonnegut, Joseph Littell, James L. Keach, Edward H. Eldridge, Lorenz Schmidt, George J. Marott, J. D. Forrest and Alfred F. Potts.

XV.

The names of the five (5) trustees herein provided are as follows: William D. Cooper, Lucius B. Swift, Thomas L. Sullivan, Henry Kahn and Thomas H. Spann.

In witness whereof the undersigned have hereunto set their

hands and subscribed, as indicated, the amount of the capital stock of said company set opposite their respective names.

[Here follow the names of the incorporators.]

61 By-Laws.

Article I.

Trustees.

1. The Trustees shall elect a President and Vice-President from among their number and a Secretary. All officers shall hold office at the pleasure of the board.

2. The annual meeting of the Trustees of the company shall be held on the second Monday of January of each year at 4 o'clock p.m., at the principal office of the company. Special meetings may be held at any time on the call of the President of the Board of Trustees, or of any three members of the Board of Trustees, or on call of the Board of Directors.

3. A notice of all meetings shall be mailed to each trustee at his postoffice address appearing upon the records of the company five days before each annual meeting and twenty-four hours before each special meeting, which notice, in case of a special meeting, shall state the object or objects for which it is called. No business shall be transacted at a special meeting except as stated in the notice sent to the Trustees, unless all members of the Board are present.

4. At any meeting of the Trustees a quorum for the transaction of business shall consist of a majority of the Board; and a majority of the Board shall vote the entire capital stock as a unit on all matters on which the owners of the stock would be entitled by law to vote if the said stock were not held in trust by said Trustees.

5. The Trustees may at any time make a thorough and careful examination of the accounts of the company, and verify the same; and may appoint such expert accountants as may be necessary, the compensation of said experts to be fixed by the Trustees and paid by the company. Or the Trustees may appoint a committee of three stockholders not directors of the company, who may conduct such examination, and such committee may employ such expert accountants, who shall receive such compensation as the Trustees may order.

Article II.

Certificates of Stock and Trustees' Certificates.

1. Certificates of stock shall be in form adopted by the Board of Directors and shall be signed by the President, or Vice-President and the Secretary and sealed with the corporate seal. Trustees' certificates shall be prepared by the and shall be signed by the President of the Board of Trustees, attested by the President and Secretary of the Board of Directors, and sealed with the corporate seal.

2. Transfers of trustees' certificates may be made only upon the books of the company by the holder thereof in person or by his duly authorized attorney, and no transfers shall be entered except upon the surrender of the certificate properly assigned. No transfers of certificates shall be made within fifteen days before the payment of a dividend. On proper transfer of a trustees' certificate the President of the Board of Trustees shall order a corresponding transfer of the stock represented by said trustees' certificate.

3. Duplicate trustees' certificates may be issued upon proof that any such certificates have been lost or destroyed, the company taking a satisfactory bond of indemnity against any loss or claims that the company may incur by reason of issuing such duplicate certificates. But the Directors and Trustees shall not be compelled to issue any duplicate certificates except upon the order of a court of competent jurisdiction.

4. The Board of Directors may, in accordance with the Articles of Incorporation of the company, declare dividends from the net earnings or surplus of the company over and above the amount which from time to time may be fixed by the Board as the amount to be reserved for the enlargement of the company's equipment or for working capital. The Directors may increase, diminish and vary this surplus reserve in their judgment and discretion.

5. The capital stock of the company may be increased as provided by the company's franchise and by statute, by resolution of the Board of Directors and approval by the Board of Directors and approval by the Board of Trustees
62 at a meeting called for the special purpose of considering such proposed increase.

6. The Board of Directors shall provide a suitable seal, containing the name of the company, which seal shall be in charge of the Secretary.

Article III.

Directors and Meetings.

1. The Board of Directors shall meet on the first Tuesday after the annual election at 4 o'clock p.m., at the principal office of the company and shall organize by electing a President, Vice-President, Secretary and Treasurer, who shall serve for one year and until their successors are elected and qualified. The President and Vice-President shall be members of the Board. The same person may be elected to the offices of Secretary and Treasurer.

2. The Directors, by a two thirds vote of the members of the Board, may remove any officer or agent of the Board of Directors whenever, in their judgment, the interests of the company may require it.

3. Any office, except Director, made vacant by death, resignation, or removal, shall be filled by vote of the Board of Directors at the next regular or called meeting after the occurrence of such vacancy.

4. The regular meetings of the Board of Directors shall be held on the second Tuesday of each month at the principal office of the company at such time as the Board shall designate. Five members shall constitute a quorum for the transaction of business, but a smaller number may adjourn the meeting from time to time when a quorum is not present. Special meetings may be called at any time on the request in writing of three members, which request shall state the object of the meeting so called, and shall be filed with the Secretary of the Company, whose duty it shall be to notify the members of the time of such called meeting by mailing notice to their respective postoffice addresses, as recorded at the office of the company, at least twenty-four hours prior to the time named for said meeting; but such notice may be waived by any Director. Or a special meeting may be called in the same manner by the Secretary on the order of the President, such order to state the object of the meeting. No business other than that which is specified in the call shall be considered at such called meeting, except when every member of the Board is present. The Board may adjourn any regular or called meeting to a time named in the order of adjournment, in which case no notice of such adjourned meeting need be given.

5. At meetings of the Board of Directors business shall be transacted in such order as, from time to time, the Board may determine.

Article IV.

Duties of Officers.

1. It shall be the duty of the President to preside at all meetings of the Board of Directors, to sign the records of the proceedings of the Board, and in the name of the company to execute and sign all stock certificates and such other papers, contracts and agreements as the Board may order, and to perform all other executive duties required of him by the Board.

2. It shall be the duty of the Vice-President to perform all the duties of the President in case of absence or disability of that officer.

3. It shall be the duty of the Secretary to keep a faithful record of the proceedings of the Board of Directors and to attest the same after it shall have been signed by the President. He shall have general charge of all the books, accounts, documents and papers belonging to the company or pertaining to its business, which books, documents, papers and accounts shall be produced by him at any time on order of the Board. He shall also keep correct accounts in books provided for that purpose of all dealings of the corporation with its stockholders, officers, creditors, customers and others, according to such system as may be approved by the Board of Directors. He shall attest and fix the corporate seal to all stock certificates, trustees' certificates, and other documents requiring it, and shall keep a complete record of certificates of stock in the hands of the Trustees and of certificates issued by the Trustees to the purchasers of the capital stock of the company and their assigns. As soon as practicable after June 30 and December 31 of each year he shall prepare and publish in two Indianapolis newspapers of general circulation a detailed report of the affairs of the company for the preceding six months, together with a complete exhibit of its resources and liabilities; and the report as of January 1 shall set forth the operations of the preceding year.

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It shall be his duty to see that all the orders of the Board of Directors are carried out. He shall have direct control of

the general office and supervision of all other departments, and appointments by heads of departments shall be subject to his approval. He shall appoint all employes in the general office: Provided, however, that the approval of the Board of Directors shall be obtained before any person shall be employed on a monthly salary or on a contract for regular employment extending over a longer period than one month.

4. It shall be the duty of the Treasurer to cause all moneys of the company to be deposited daily in such depositaries as may be designated by the Board of Directors. He shall pay out money on checks countersigned by the Secretary, but only on vouchers signed by the Secretary and approved by the Chairman of the Executive Committee, or approved by general orders of the Executive Committee, signed by its Chairman. He shall, at the regular meeting each month, make, or cause to be made, a report of the receipts and expenditures of the preceding month, and shall make such reports as may be required by the Board of Directors in addition to the annual and semi-annual reports of the Secretary, as required in Section 3 of this article. On his request the Board of Directors may authorize him to appoint such expert assistants as may be necessary to make special examinations of the books of the company.

Article V.

Executive Committee.

1. At the first meeting of the Board of Directors each year there shall be elected an Executive Committee consisting of three members of the Board. The Board shall designate the member of the Committee who shall serve as its Chairman; but the Committee may select a temporary Chairman in the absence of the one appointed by the Board. The Board of Directors shall fill vacancies in the Executive Committee by election from the Directors, and at all times it shall be the duty of the Board of Directors to keep the membership of the Committee full.

2. It shall be the duty of the Executive Committee to execute the orders of the Board of Directors, except as otherwise provided for by these by-laws or by resolution of the Board. But the action of the Committee shall be reported from time to time to the Board, and shall not be binding on the company until approved by the Board, except in such matters as are authorized by these by-laws.

3. The Committee shall hold regular meetings at the company's principal office, at an hour to be designated by the Committee, on the first and third Tuesdays of each month, at which time, in addition to such other business as may come before it, it shall audit and pass upon all bills presented against the company and shall report the same to the Board of Directors at its next regular meeting. All such claims so audited shall be counter-signed by the Chairman of the Committee, and no voucher shall be paid by the Treasurer except when so countersigned, except that the Treasurer may be authorized from time to time by gereral order of the Executive Committee to pay certain designated accounts without the signature of the Chairman on a separate voucher for each check to be drawn in making such settlements. Special meetings may be held by the Executive Committee on call of the Chairman or by resolution of the Board of Directors.

4. The Secretary, or some person designated by the Secretary, shall keep a faithful record of the proceedings of the regular and special meetings of the Executive Committee, and all action by the said Committee shall be reported to the Board of Directors at its meetings next succeeding such action, and shall be subject to revision and alteration by said Board.

5. A majority of the Committee shall constitute a quorum, but the Chairman alone shall constitute a quorum for the auditing and approving of claims, but only at the time and place herein designated for the regular meetings of the Committee.

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Article VI.

Miscellaneous.

1. Resignations of directors, officers, and members of the Executive Committee shall be in writing, addressed to the Board of Directors.

2. During the temporary absence or disability of both the President and Vice-President, or of the Secretary, Treasurer, or Chairman of the Executive Committee, the Board of Directors or, during intervals between meetings of the Board, the Executive Committee may designate some other member of the Board to sign checks, vouchers and other papers of the company; and the responsibility of the officer thus relieved shall wholly cease for acts performed during such period.

3. Every Director shall receive the sum of $5.00 for at-

tendance at each meeting of the Board or of the Executive Committee, when a member of that Committee, but only when the records of such meeting shall show that he was present within ten minutes of the time set for the beginning of said meeting and that he remained until the adjournment of the same; provided that no such compensation shall be received when no business is transacted by reason of absence of a quorum at such meetings of the Board or of the Executive Committee; and provided further that no compensation shall be received for such service rendered prior to January 1, 1909.

No Director shall receive any other compensation for his services as Director, officer or member of any committee, except on affirmative vote of a majority of all the members of the Board of Directors.

4. When a designated meeting for the Board of Trustees, Board of Directors, or Executive Committee, falls on a legal holiday, such meeting shall be held on the day following.

5. The Board of Directors shall require the Secretary and the Treasurer to give bond for the faithful performance of their duties in such sums and with such sureties as the Board may consider necessary; and any other officer or employee may be required by the Board to give such bond. The expense of procuring such surety shall be borne by the company.

6. No mortgage indebtedness shall be created except by affirmative vote of a majority of all Directors and the approval of the Board of Trustees. All votes on such motions shall be viva voce, and the ayes and nays shall be recorded.

7. The company shall make no contribution whatever from its money or other property for any political, religious, educational, charitable, or other purpose.

8. These by-laws may be amended, altered or repealed only by vote of two-thirds of all Directors and approval of the Board of Trustees, except that such as relate to the organization, meetings and order of business of the Board of Trustees may be altered by that body alone.

9. These by-laws shall be in force from and after approval by the Board of Trustees.

[These By-Laws were approved by the Trustees, January 13, 1908.]

Amendments.

Reserve Fund for Required Extensions.

The Board of Directors may, at any dividend-declaring time, deduct from the earnings before determining the amount dividend then to be declared such a sum as, in their judgment, may reasonably be required to defray the cost and expense of making such extensions as the Board of Public Works may, under the Franchise of the Company, require the company to make within the six months' period ending June 30, or December 31 next thereafter as the case may be. Such an amount shall be carried as an asset of the amount in a contingent fund for making such extensions. Against such fund shall be charged the cost of such extensions so required to be made by said Board of Public Works. The amount remaining in such fund at the end of each six months' period shall be returned to the earnings account, then to be dealt with as the circumstances of the case may require.

Approved by Trustee Nov. 22, 1910.

65 Depreciation.

The Board of Directors may, in their discretion, from time to time cause to be charged off of the assets of the corporation such a sum as, in their judgment, represents the reasonable depreciation of its assets as shown according to the last preceding inventory of the assets of the corporation and deduct such amount from the apparent earnings otherwise applicable to the payment of dividends; and all such sums so charged off on account of such depreciation shall be contingently credited to depreciation account, against which shall be charged from time to time the cost of making good such depreciations as may from time to time be ordered by the Board. And if thereafter by actual experience it has been found that a greater sum has been accumulated in such depreciation fund than fairly represents the amount of such depreciation, all things considered, making such amount over and above a just estimate of such depreciation, it may be withdrawn from such fund and be placed in current funds for dividend purposes.

Approved by Trustee Nov. 22, 1910.

Time for Paying Dividends.

Within ninety days after the first of January and July in each year, the Directors shall cause a careful account to be taken of all of the earnings of the company within the six months preceding such named dates, and after making reasonable deductions therefrom for depreciation and anticipated extensions required to be made by the Board of Public Works, they shall declare and pay from such earnings such a dividend to the stockholders as the surplus of such earnings may justify.

Approved by Trustee Nov. 22, 1910.

An Ordinance ratifying, confirming and approving a certain contract and agreement made and entered into on the 29th day of November, 1911, between the city of Indianapolis, by and through its Board of Public Works, and the Citizens' Gas Company of Indianapolis, Indiana, viz:

(Approved May 22, 1912. General Ordinance Record 13, Page 341.)

This contract and agreement made and entered into by and between the city of Indianapolis, of Marion County, Indiana, by and through its Board of Public Works, party of the first part, and the Citizens' Gas Company of Indianapolis, Indiana, a corporation organized and acting under and pursuant to the laws of the State of Indiana, party of the second part, witnesseth:

Whereas, Said city of Indianapolis, on the 25th day of August, 1905, entered into a certain contract with Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, which contract was approved by an ordinance adopted by the Common Council of the city of Indianapolis, and approved by the Mayor of the city of Indianapolis, August 30, 1905, by the terms of which contract there was granted unto said Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, for themselves and their assigns, a franchise for the manufacture and sale of gas; and

Whereas, Said contract, pursuant to the provisions of Section 24 thereof, was assigned to the said Citizens' Gas Company, party hereto, and,

Whereas, It is desired for the mutual benefit and accommodation of the parties that certain provisions of said contract shall be amended;

Now, Therefore, it is agreed by and between the parties hereto as follows:

Sec. 1524. 1. That Section 17 of said contract, hereinabove referred to, be amended to read as follows:

The parties of the second part hereby bind themselves, their successors and assigns, to so extend the various lines and mains of said plant that all the inhabitants of said city may be supplied with gas for fuel and lighting purposes, when they may reasonably require the same and when a petition therefor has been presented to the Board of Public Works signed by the owners of the property in any territory in said city asking for such extension, and in which said owners or occupants of at least three houses already erected shall bind themselves to make five or more stove or grate connections or fifteen or more burner connections, and to use the same, for each five hundred (500) feet of space that said lines are asked to be extended. Whenever such petition has been filed with the said Board of Public Works it shall cause written notice to be given to the parties of the second part, their successors or assigns, which may be served on any officer or employe of said parties of the second part or assigns, at the main Indianapolis office of said parties or assigns, requiring said parties of the second part or assigns to appear before said Board of Public Works at a certain hour specified in said notice in not less than five days after the serving of such notice, to show cause why the prayer of said petitioner should not be granted. Such notice shall contain an accurate description of the streets, alleys and public places through and along which such extension is asked and the territory and inhabitants of which it is proposed to supply with gas, as aforesaid. On the day and at the time named in such notice the Board of Public Works shall give to the parties of the second part, or assigns, if they so desire, a full hearing on the question as to whether such petition has been signed by the required number of owners and occupants of property who have agreed therein to take and use the number of stoves or grate connections or burners, and whether such extension should be required; if said parties of the second part or assigns should not appear before said Board of Public Works at the time fixed in said notice, said Board of Public Works may act upon such petition and upon such evidence or information as it may have from any source. If said Board of Public Works, after such hearing, shall decide that said petition has been signed as hereinbefore provided, and contains

the agreement as to burners or stove connections herein required, and that such extension may be reasonably required, it may make an order requiring such extension and fixing the time within which said work of extension shall be completed, reasonable time being given, written notice of which shall be given to the parties of the second part, or assigns, and if the parties of the second part, or assigns, should fail or refuse to make such extension within the time limited, unavoidable delays excepted, the parties of the second part, or assigns shall forfeit and pay to said city the sum of fifty ($50.00) dollars for each and every day that the completion of such extension is delayed beyond the period so fixed, which sum shall be considered as liquidated damages for breach of this contract: Provided, however, That said parties of the second part, or assigns, shall not be required to proceed with the extension of any lines, pipes or mains between the first day of November and the first day of April of the following year, in any year; and, Provided further, That such extension shall not be required by said Board of Public Works of said city unless the earnings of said company will permit the same after payment of the dividend of ten per centum per annum, upon subscribers' certificates; and, Provided, further, That such extensions may be required by said Board of Works of said city during the five years beginning January 1, 1912, to an extent not exceeding in the aggregate in any one year twenty thousand (20,000) feet of mains of adequate size to serve the consumers along such extension; during the five years beginning January 1, 1917, to an extent not exceeding in the aggregate in any one year twenty-five thousand (25,000) feet, and during the remaining term of the franchise, i. e., beginning January 1, 1922, to an extent not exceeding in the aggregate in any one year thirty thousand (30,000) feet, without regard to the previous payment of the dividend of ten per centum per annum upon the subscribers' certificates.

Sec. 1525. 2. That Section 24 of said contract hereinabove referred to be amended to read as follows:

This contract shall not be assigned, nor in any manner transferred, whether directly or indirectly, without the consent of the Board of Public Works, and approval of the Common Council of said city, except by way of mortgage or deed of trust, and as a part of the security for bonds of the company, and which mortgage or deed of trust shall contain, among others, the following limitations and conditions:

First. That such bonds shall bear interest at not to exceed five (5) per cent. per annum.

Second. That there be set aside annually as a sinking fund or otherwise applied toward the immediate or future re-
67 tirement of such bonds, a sum equal to at least one-half ($\frac{1}{2}$) of one per cent. of the total bonds at the time outstanding, beginning not later than five (5) years after issue thereof.

Third. That bonds may be certified at or after the date of the execution of such mortgage or deed of trust to the amount of the bonds heretofore authorized for the purpose of refunding the same, and in addition thereto bonds to the amount of forty (40) per cent. of the present capital stock of the company, which stock has been sold at not less than par, may be certified and used for proper corporate purposes, but that no other bonds shall be issued and certified except for betterments, replacements and extensions to the plant of the company hereafter made or other property for any of the company's corporate purposes hereafter acquired, and this only to the extent of eighty (80) per cent. of the cost thereof: Provided, however, The foregoing shall not be deemed as in any wise affecting the transfer of this franchise heretofore made to the Citizens Gas Company, which transfer was expressly authorized by the terms of Section twenty-four (24) of such franchise, as originally adopted.

In Witness Whereof, The said city of Indianapolis has caused its corporate name to be hereunto affixed by its Board of Public Works, and the said Citizens' Gas Company has caused this instrument to be executed in its name and on it's behalf by its president and the due execution thereof to be attested by its secretary and its corporate seal hereto affixed, this 29th day of November, A. D. 1911.

City of Indianapolis,
C. A. Schrader,
Charles L. Hutchins,
E. J. O'Reilly,
Board of Public Works.

Approved:
S. L. Shank,
Mayor.

Citizens' Gas Company of Indianapolis,
By Franklin Vonnegut,
(Seal) *President.*
Attest:
J. D. Forrest,
Secretary.

And, Whereas, Said contract and agreement has been submitted through the Board of Public Works, to the Common Council of the city of Indianapolis, for its action thereon; therefore,

Section 1. Be it ordained by the Common Council of the City of Indianapolis, That the foregoing contract and agreement made and entered into on the 29th day of November, 1911, by the city of Indianapolis, by and through its Board of Public Works, and the Citizens' Gas Company, be and the same is hereby in all things ratified, confirmed and approved."

Filed
August 27, 1921.
Ed. Jackson, Secretary of State.

The undersigned, being the holders of record, and the sole voting stockholders of all the stock of Citizens Gas Company of Indianapolis, a corporation organized and acting under and pursuant to the Manufacturing and Mining laws of the State of Indiana, have this day executed the following certificate of amendment to the Articles of Incorporation of said company, the same being executed under and pursuant to the Act of the General Assembly of the State of Indiana, as set out in the Acts of 1913, page 681.

1. Article IV of said Articles of Incorporation is hereby amended to read as follows:

IV.

The amount of capital stock of the Company shall be four million dollars ($4,000,000), of which two million dollars ($2,000,000), divided into shares of twenty-five dollars ($25.00) each, shall be common stock, and two million dollars ($2,000,000), divided into shares of One hundred dollars ($100.00) each, shall be preferred stock. The capital stock of said company may be increased as by law provided. Any additional preferred stock shall have equal preferences, both as to principal and dividends, (except as the rate of dividends may vary) with the preferred stock herein authorized. The holders of the preferred stock shall be entitled to receive the dividends expressed in the preferred stock certificate be-
68 fore any dividends are paid on account of the common stock and no further or additional dividends, and, on liquidation of the company, shall be entitled to receive the par value of the preferred stock, plus all accrued dividends, before any

sum if paid on account of the common stock. The preferred stock shall bear such rates of dividends, be subject to redemption at such time and on such terms, and shall be disposed of and issued upon such terms and conditions as the Board of Directors of the Company may deem best. The preferred stockholders shall not have any voting rights in the company. Any premium paid for any stock of the company, common or preferred, shall go to the surplus capital and shall bear no dividend.

2. Article VI of the said Articles of Incorporation is hereby amended to read as follows:

VI.

The entire capital stock of the corporation shall be placed under the control of a board of five (5) trustees and their successors, who shall be stockholders in said company, who shall be designated in said articles of incorporation and one of whom shall be nominated by the mayor of said city, which said Board of Trustees shall have full, complete, exclusive and irrevocable power, during the continuance of this corporation, to hold said stock and vote the same as fully and completely as if they were the owners of said common stock, including the right to elect directors, as herein provided, and to fill any vacancy that may occur in said Board of Directors. Said entire common capital stock shall be voted as a unit; and in case said trustees shall not agree as to how said stock shall be voted, the majority of them shall cast the vote of the board. If a vacancy shall occur in said Board of Trustees by death, resignation, removal from the City of Indianapolis or otherwise, such vacancy shall be filled by the remaining members of the Board, except that the mayor of said city shall appoint the successor to the trustee originally named by such mayor; and in the event of the failure of such board or mayor to fill such vacancy, the Marion Circuit Court shall, upon application of any stockholder, after said trustees or mayor have had ten (10) days' notice in writing of said application, and shall have in the meantime failed to fill such vacancy, appoint some competent person to fill the same.

3. Article VIII of said Articles of Incorporation is hereby amended to read as follows:

VIII.

Said trustees shall issue to each subscriber to the common capital stock of said company, upon full payment by such subscriber to said company of the amount of his subscription, and upon the stock therefor being issued to said trustees as above provided, a certificate showing the amount of stock held by said trustee in trust for said subscriber; and said subscriber, or holder of said certificate by assignment, shall be entitled by virtue thereof to receive from said company all dividends which shall be declared, not, however, exceeding ten per centum per annum, payable semi-annually in money or in payment of any indebtedness of the holders of such certificates as consumers of the gas of said company, so long as said certificates remain outstanding and uncancelled as herein provided.

4. Article IX of said Articles of Incorporation is hereby amended to read as follows:

IX.

The earnings of said company, after the payment of operating expenses and taxes, shall be applied, subject to the discretion by law vested in the directors, but which discretion shall not affect the order in which such application shall be made, in the following order, to-wit:

First, to the payment of any accrued and unpaid dividends upon any preferred stock of the company at the time outstanding; second, to the payment of dividends at the rate of not to exceed 10 per centum per annum upon the common stock, and any unpaid and accrued dividends at the same rate on account of prior years, third, to the payment in whole or partial payments of the par value of the common stock of the company; provided, however, that when any part of the amount subscribed and paid in by any certificate-holder has been repaid, only the balance unpaid shall thereafter be
69 entitled to receive such dividends of ten per centum per annum.

5. Article X of said Articles of Incorporation is hereby amended to read as follows:

X.

When all outstanding preferred stock of the Company shall have been retired and the holders of the certificates representing the common stock shall have received by dividends, or otherwise, upon said certificates, an amount equal to the face value thereof, together with interest thereon at the rate of ten per centum per annum, payable semi-annually, then said certificates shall be deemed fully paid and cancelled, and it shall be the duty of the trustees and directors of said company to convey said gas plant and property belonging to said company to the city of Indianapolis, subject to all outstanding legal obligations of the company, to be owned and operated or leased by it, and all the rights, title and interest of said company or its certificate-holders, stockholders, directors, or trustees, shall be deemed to be fully paid and extinguished, and all such certificates, whether of stock or otherwise, shall be surrendered and cancelled and said corporation shall be wound up.

6. Article XII of said Articles of Incorporation is hereby amended to read as follows:

XII.

If, on the 30th day of August, 1930, that being the date of the expiration of the term and period of the franchise granted by the city of Indianapolis, to Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, and which was thereafter assigned to the Citizens Gas Company of Indianapolis, said certificates representing the common stock of the company, together with dividends thereon, at the rate of ten per centum per annum, shall not have been paid, then upon notice of such fact to be given to the directors of said company by the board of public works of said city at least six months before the expiration of such franchise period, the said board of directors shall mortgage its gas plant and property for such sum as to enable it to pay the holders of the certificates representing its common stock, an amount which, with what has already been paid, will equal the full amount of such stock with dividends estimated at the rate of ten per centum per annum thereon, together with the amount necessary to redeem any outstanding preferred stock, and with the proceeds thereon, after redeeming any outstanding preferred stock in

accordance with the provisions therefor contained in the stock certificates, or with the mortgage notes so issued in proper amounts, pay off and discharge the amounts due such holders of the certificates representing its common stock and convey said plant and property to said city, subject to such mortgage and other legal obligations against said company; provided, however, that by the terms of said mortgage such obligation shall bear interest not exceeding six per cent per annum and be payable on or before ten years from date of execution.

In Witness Whereof, the undersigned have hereunto set their hands this 11th day of August 1921.

Thomas L. Sullivan,
Lucius B. Swift,
C. A. Schnull,
Henry Kahn,
Board of Trustees of Citizens Gas Company of Indianapolis.

70 EXHIBIT D.

Finding and Order

By Public Service Commission of Indiana.

71 Finding and Order.

In this case the Citizens Gas Company and the Indianapolis Gas Company have filed a petition asking for an order of this Commission authorizing the Indianapolis Gas Company to lease to the Citizens Gas Company and the Citizens Gas Company to lease from the Indianapolis Gas Company for a period of ninety-nine years all of the plant and property of said Indianapolis Gas Company used in the manufacture and sale of gas and its by-products in the city of Indianapolis.

A hearing on the petition was had. Smith, Hornbrook and Smith appeared for the Citizens Gas Company, Ferdinand Winter for the Indianapolis Gas Company, and Joseph B. Kealing, corporation counsel for the city of Indianapolis, for said city. During the progress of said hearing Frank S.

Fishback appeared by Gavin, Gavin and Davis and Woodburn Masson, and as a stockholder in the Citizens Gas Company filed a protest against granting said two gas companies the right to execute said lease on the terms proposed. Said hearing was continued, resumed and adjourned from time to time and much evidence introduced and a valuation of the property of the Indianapolis Gas Company was made by the staff of the Commission, and by experts employed by said company. From the great mass of evidence the following facts are found, and deemed pertinent.

The Indianapolis Gas Company was organized in 1891, its plant being composed of three small plants then operating in the city of Indianapolis. Since said date said company has operated in said city and during a period of some years, while natural gas was abundant in Indiana fields, said company supplied natural gas to said city for heating and to some extent for lighting purposes, and during that period produced but a comparatively small amount of artificial gas for lighting purposes. Said company has three hundred and seventy-five miles of mains in said city, more than forty-one thousand meters, water and coal gas plants and is just completing a modern coke oven plant of large capacity. Its capital stock is two million dollars par value and its bonded indebtedness four million eight hundred and thirty-three thousand dollars. The plant is in good condition throughout and is well managed.

The Citizens Gas Company was organized in 1905, as a citizens organization for competitive purposes with a view to producing gas at sixty cents per thousand cubic feet, and since its organization it has produced gas at that price and at a profit. Its stock is held and voted by a board of trustees selected from the representative citizens of Indianapolis and stockholders of the company, and in such a way as to practically insure the continued management of the affairs of the company as much in the interest of the consumers of gas as in the interest of the stockholders. Its management has been of a very high order throughout its entire existence. It has a capital stock of $1,250,000 and a bonded indebtedness of $1,247,000.

The two plants are so constructed and laid out as to adapt the two to a single working plant of great efficiency and under one management they can be operated at a great saving

as compared with the cost of operating them as separate and competitive plants.

The valuation of the plant of the Indianapolis Gas Company is, in the opinion of the Commission, sufficient to justify, under the circumstances, a rental such as is proposed in the subjoined lease. On account of the late date at which the valuation of the plant was begun the engineers have been unable to furnish the Commission complete data of their work and the engineer appointed on the staff of the Commission has been able to furnish tentative values only, and we deem it not advisable to attempt to fix at this time a definite value of the plant, but leave that for a later and separate consideration.

The lessee and lessor have tendered for the approval of the Commission a lease containing all the terms and conditions as agreed upon by and between said parties, which lease is as follows. (Here Insert.)

And the Commission finds that said lease, before being approved, should be changed and modified so as to comply with the following provisions and conditions:

1. That before said lease shall be executed and legalized the said Indianapolis Gas Company shall file with the clerk of the city of Indianapolis, and shall also file said Commission a written declaration, legally executed, that it surrenders its license, permit or franchise, and desires to receive by operation of law in lieu thereof, an indeterminate permit as provided in said Shively-Spencer Utility Commission
72 Act; said Indianapolis Gas Company shall also file with said Public Service Commission a certified copy of its written declaration filed with the clerk of said city of Indianapolis, to which shall be attached a certificate of said clerk certifying to the date upon which said written declaration was filed in the office of said clerk of said city of Indianapolis; Provided, That if the execution of this lease be set aside by judicial proceedings, then such surrender and acceptance of an indeterminate permit shall be set aside and said Company be reinstated without prejudice in its license, permit or franchise so surrendered.

2. That in any subsequent valuation, for rate-making purposes, of the properties owned by the Lessor and the Lessee herein, or either of them, the value of the plants and equipments upon which the said Indianapolis Gas Company and the said Citizens Gas Company, or either of them, shall be

entitled to earn an income, shall include only property actually used and useful for the convenience of the public, and shall not include the value of any unnecessary duplications of parts of said property or properties, and such value of all the property owned by the Lessor and Lessee, or either of them, shall for rate-making purposes be determined exactly the same as if both said companies were operating under an indeterminate permit, as provided in the Shively-Spencer Utility Commission Act.

3. That in any rate-making proceedings hereafter to be determined fixing rates for gas produced and sold by the said Indianapolis Gas Company and the Citizens Gas Company, or either of them, the amount of stocks and bonds of either of said companies now outstanding shall not be deemed to have been capitalized against the public by said proceedings.

The interest and dividends on the stocks and bonds of either of said companies now oustanding shall not be deemed to be or permitted by this proceeding to become fixed charges, the payment of which must be provided for in establishing a just and reasonable rate for the product produced, transmitted, furnished or sold by said Indianapolis Gas Company or said Citizens Gas Company, or either of them.

4. That the power to regulate the rates at which gas produced, transmitted furnished or sold by or through the Indianapolis Gas Company shall during the term of said lease remain in the Public Service Commission of Indiana as fully and completely as it is now vested in said Commission, and by the approval of this lease said Commission shall not be deemed to have waived its right to detemine the rate at which gas so produced, sold or transmitted by or through the said Indianapolis Gas Company shall be sold.

5. That the said Citizens Gas Company shall hereafter permit, during the term of this lease, the Public Service Commission of Indiana (or whatever legal commission or authority, that may have conferred upon it powers now conferred upon the Public Service Commission to fix rates for the service produced or sold by public utilities) to fix and determine the rates and charges at which gas produced, transmitted or sold by it through the properties now operated by it or by the Indianapolis Gas Company as fully and completely as if the said Citizens Gas Company had surrendred its license, permit or franchise and received an indeterminate per-

mit as provided in the Shively-Spencer Utility Commission Act.

6. That the said Citizens Gas Company hereby binds itself, its successors, and assigns, to extend the various lines and mains of its plant, as set forth in Section Seventeen of its franchise as amended, and in addition thereto, to extend the mains of the combined plants of the Lessor and the Lessee, to the extent of at least three (3) miles in any one year, such mains to be of adequate size to serve the consumers along such extensions. In addition to such minimum requirements, the Public Service Commission of Indiana, or any body succeeding to its duties, shall be permitted, upon petition of the proper authorities of the city of Indianapolis, to order additional extensions to a reasonable amount, upon proper evidence that such extensions are necessary, and will, if made, provided a reasonable return on the cost thereof.

After the Citizens Gas Company shall cease to operate under the franchise from the city of Indianapolis now held by it, said company, its successors and assigns, shall make such extensions to its mains as may be required by the public officials having authority in the premises.

7. The said Citizens Gas Company hereby covenants and agrees to file with the Public Service Commission of Indiana, as that the same may be effective on the first day of
73 January, 1914, a schedule showing the following rates, tolls and charges for gas transmitted, produced and sold by it, to wit:

For the first fifty thousand (50,000) cubic feet of gas transmitted, sold or furnished by it, to any one consumer in any one month, through one meter, fifty-five cents (55c) per thousand cubic feet.

Forty-five cents (45c) per thousand cubic feet for all in excess of fifty thousand (58,000) cubic feet and not in excess of one hundred thousand (100,000) cubic feet, furnished to any one consumer in any month, through one meter.

Forty cents (40c) per thousand cubic feet of gas in excess of one hundred thousand (100,000) cubic feet, furnished to any one consumer in any one month through one meter.

8. That the Lessor and the Lessee, each for itself, hereby expressly covenants and agrees that this lease shall remain in full force and effect so long as each one separately of the conditions hereinafter set forth, numbered respectively 1, 2, 3, 4, 5, 6 and 7, shall be complied with, not to exceed a term

of ninety-nine (99) years, and the Lessor and the Lessee, each for itself, covenants and agrees with each other and with the Public Service Commission of Indiana, that the violation of any one of said conditions numbered as aforesaid shall, at the option of the Public Service Commission of Indiana, forfeit this lease and render the same null and void; provided, however, before declaring such forfeit for any such cause or as provided in the habendum clause of this lease, such Public Service Commission of Indiana shall give not less than thirty (30) days' notice of its proposed action to each of the parties hereto, and if, within thirty (30) days thereafter the party not in default shall begin action to compel the party in default to do or cease to do the thing on account of which said Public Service Commission proposes declaring such forfeit, and shall diligently prosecute such action to final decision, then the Public Service Commission shall not proceed further in the matter of such forfeit, until the final termination of such action, and if as a result of such action or prior thereto, by voluntary act of the defaulting party, the default shall be corrected, then the Public Service Commission shall not be authorized to forfeit this lease.

9. The approval of this lease by the Public Service Commission of Indiana, shall not be deemed in anywise to authorize the issuance of any bonds by either the Lessor or the Lessee for any of the purposes specified by the terms of this lease, without the consent of such Public Service Commission to such issuance being obtained from time to time, as is now or may hereafter be provided by law.

10. The Lessee will pay to the Lessor as additional rental for the demised property:

On the first day of December, 1913, at the rate of one hundred and twenty thousand dollars ($120,000) per annum, for that portion of the year 1913, during which this lease may be effective; and on the 30th day of June and the 31st day of December, thereafter, sixty thousand dollars ($60,000). Provided, that when the maximum price of gas to the general consumer shall be fixed at a sum more than forty-five cents (45c) and not more than fifty cents (50c) per thousand cubic feet, sixty days or more prior to the date when any semi-annual payment of rent shall be due, then said semi-annual payment of rent and all subsequent semi-annual payments until a further reduction in the price of gas as hereinafter provided shall be made, shall be in the sum of sixty-five thousand

dollars ($65,000); and provided further, that when the maximum price of gas to the general consumer shall be fixed at any sum not more than forty-five cents (45c) per thousand cubic feet sixty days or more prior to the day when any semi-annual payment of rent shall be due, then said semi-annual payment and all subsequent semi-annual payments of rent shall be in the sum of sixty-seven thousand and five hundred dollars ($67,500).

11. The execution of this lease by the Lessor and the Lessee as herein provided shall be conclusively presumed to be an acceptance by the Lessor and the Lessee of each one separately of the terms and conditions herein set forth.

Comes now the said Citizens Gas Company and the said the Indianapolis Gas Company and submit the following lease as embodying the said provisions and conditions herein fixed by the Public Service Commission of Indiana, said lease being in words and figures as follows: (Here insert)

And the Commission, having examined said lease and being advised in the premises, now orders that the same be approved and spread upon the records of said Commission.

74 I, J. L. Reily, Secretary of the Public Service Commission of Indiana, hereby certify that the above and foregoing order is a true and complete copy of an order this day made by said Commission, as appears of record in my office.

Witness my hand and seal this first day of October, 1913.

Indianapolis, Indiana,
October 1, 1913.

J. L. Reily,
Secretary.

75 EXHIBIT E.

Instrument of Transfer and Assignment of Personal Property of Citizens Gas Company of Indianapolis.

76 Instrument of Transfer and Assignment of Personal Property.

Whereas, the City of Indianapolis has taken all the necessary steps and performed all the required conditions in the exercise of its right to acquire, take over and administer as a

public charitable trust all the property of Citizens Gas Company of Indianapolis, pursuant to the terms and provisions of the original and amended articles of incorporation of said Company and the franchise agreement entered into on the 25th day of August, 1905 between the said City, by and through its Board of Public Works, and Alfred F. Potts, Frank W. Stalnaker and Lorenz Schmidt, which franchise and contract was assigned to and accepted by the said Company on the 24th of May, 1906; and

Whereas, the right of the City of Indianapolis to acquire, take over and administer the property of the Citizens Gas Company of Indianapolis, as the beneficiary of the said public charitable trust, has been legally established and adjudicated by the judgment and decision of the United States District Court for the Southern District of Indiana in the suits instituted by Newton Todd and by John J. Cotter and others against the said Citizens Gas Company of Indianapolis and others, which judgment and decision was affirmed upon appeal to the United States Circuit Court of Appeals for the Seventh Circuit, and a petition for a writ of certiorari to the United States Supreme Court thereafter denied; and

Whereas, the City of Indianapolis has deposited with The Indiana National Bank of Indianapolis, in a special account to the credit of the Citizens Gas Company of Indianapolis, the sums of $2,500,000 and $1,050,000, to be held by the said Company as trust funds to be used for the sole purpose of retiring, respectively, the outstanding common stock of said Company at the par value thereof plus dividends at the rate of 10% per annum and retiring the outstanding preferred stock of said Company at 105% of the par value thereof, (said Company, by its Board of Directors, has furnished and made provision for the funds necessary for the payment of the dividend upon such preferred stock for the current quarter expiring August 31st, 1935.); and

Whereas, nothing further remains to be done by the City of Indianapolis to entitle it to have all the property of the Citizens Gas Company of Indianapolis, including the property hereafter described, conveyed and transferred to said City, pursuant to the provisions of said franchise agreement and the original and amended articles of incorporation of said Company and in accordance with the judgment and decision of said Courts.

Now, Therefore, in consideration of the premises and for

the purpose of carrying out and executing the public charitable trust as aforesaid, the Citizens Gas Company of Indianapolis, a corporation organized and existing under the laws of the State of Indiana, hereby sells, transfers, assigns and delivers to the City of Indianapolis, a municipal corporation organized and existing under the laws of the State of Indiana, all of the personal property and chattels owned and belonging to said Company of any nature or form whatsoever, and meaning hereby to include all property, (excepting real property), tangible and intangible, personal and mixed, executed and executory contracts, accounts, deposits, cash and any other form of personal and chattel property whatsoever, whether or not used by the said Company in its business of the manufacture and sale of gas and by-products of gas.

Attached hereto is a list of executory contracts executed in the name of or assigned to the said Company which are intended to be specifically assigned and the benefits transferred to the said City hereby. The inclusion of such list of specific contracts shall not be deemed to exclude any other executory or executed contracts or agreements of said Company, but all such contracts and agreements shall be deemed to be assigned and transferred to said City by this instrument.

This instrument shall be deemed also to assign and transfer to the said City all the contracts and policies of insurance, of any nature and for whatsoever, held and possessed by the said Company, and the said City shall have the benefit to and right to recover any payments thereunder for the remainder of the unexpired term of any and all of such contracts and policies.

This instrument shall be deemed also to assign and transfer to the said City all the right, title and interest of the said Company in and to the capital stock of Milburn By-Prod-
77 ucts Coal Company, a corporation organized and existing under the laws of the State of West Virginia, the wholly owned subsidiary corporation of said Company.

The foregoing transfer and assignment is made, however, subject to the following exceptions and conditions:

1. Said transfer and assignment is made pursuant and subject to, and in conformity with the terms, conditions and agreements contained in the original and amended articles of incorporation of Citizens Gas Company of Indianapolis, the franchise agreement entered into between said Company's assigners and the City of Indianapolis, under date of August 25th, 1905, as aforesaid, and Chapter 78 of the Acts of 1929 of the General Assembly of the State of Indiana.

2. Said transfer and assignment is made subject also to the mortgage executed by Citizens Gas Company of Indianapolis, the Bankers Trust Company of New York, Primary Trustee, and The Union Trust Company of Indianapolis, Ancillary Trustee, under date of July 1, 1912, and recorded in Mortgage Record 593, page 399, in the office of the Recorder of Marion County, Indiana, in the principal amount of $10,000,000, and to all other existing liens, incumbrances and assessments of any nature whatsoever.

3. Said transfer and assignment, and the conveyance of the real property and the assignments of the leases hereinafter mentioned, separate instruments for which conveyance and assignments are being executed and delivered contemporaneously with this instrument, are made subject to all unpaid current obligations, bills and pledges of the said Company, including obligations incurred in the ordinary course of business of the Company, contracts for the purchase of coal and other supplies, contracts for the sale of products, pledges for charitable and other purposes, and all other current obligations, accounts and contracts of every nature whatsoever. All of such obligations, bills and pledges shall be paid by the said City in due course of business, and, until paid or otherwise disposed of, each and all shall remain a charge upon all of the property hereby transferred and assigned. Said City shall take such property subject to all taxes due Federal, State, County or City governments, including the Indiana State Gross Income, Federal Income, Excess Profits, and Capital Stock taxes which may be payable for all or any part of the year 1934 and 1935 by the said Company, and any and all additional assessments made or which may be made on account of taxes due for any prior years.

4. This transfer and assignment also are made subject to all other legal obligations of said Company, including the legal obligations of said Company, if any, under each of the leases hereinafter mentioned.

5. The assignment of the lease agreement made and entered into the 30th of September, 1913, between said Company and The Indianapolis Gas Company, whereby the latter company leased certain property for the manufacture and sale of gas and gas by-products to said Company for a term of ninety-nine years, and the assignment of the agreement of lease executed the 18th of July, 1933, between John J.

Reilly, Receiver of Majestic Building Company, and said Company, are expressly excluded from this instrument of transfer and assignment, separate instruments of assignment of such lease agreements being executed and delivered contemporaneously with this instrument.

This section in no way modifies or alters the provisions of of the last preceding section that this transfer and assignment are made subject to all legal obligations of said Citizens Gas Company of Indianapolis, including the legal obligations of said Citizens Gas Company, if any, under each of said two leases.

6. All funds and Deposits of said Company transferred and assigned hereby which are held by it in trust for any person or purpose or which are of a special nature shall preserve their character and status as such, and this transfer and assignment shall not be deemed to affect the present rights of any person in and to said funds or deposits. The rights of any or all of the employees of said Company to the benefits of any group insurance policy or policies shall not be affected or altered by the said transfer and assignment.

7. For the purpose of providing funds to meet and pay all outstanding cheques heretofore issued, the said Company has reserved a balance in its bank deposit sufficient for that purpose. Said Company has reserved a balance in its
78 bank deposit sufficient also to cover and pay the cheques heretofore executed but not actually delivered, in payment of the dividend upon the outstanding preferred stock of the Company for the current quarter ending August 31st, 1935, as aforesaid.

8. Said Company shall make and execute any and all other instruments necessary to carry out and execute the public charitable trust as aforesaid and to carry out completely the purpose and intent as hereinabove set forth.

In Witness Whereof, the said Citizens Gas Company of Indianapolis has caused this instrument to be executed by its Vice-President and the due execution thereof to be attested by its Secretary and by its corporate seal hereto affixed, this 9th day of September, 1935.

Citizens Gas Company of Indianapolis,
By Franklin D. Vonnegut,
Vice-President.

Attest:
Gastenburg,
Secretary.

State of Indiana, }
County of Marion. } ss:

Before me, the undersigned, a Notary Public in and for said County and State, this 9th day of September, 1935, personally appeared Franklin D. Vonnegut, Vice-President of Citizens Gas Company of Indianapolis, and for and on behalf of the Company of which he is Vice-President, acknowledged the execution of the foregoing instrument of transfer and assignment of personal property.

Witness my hand and Notarial Seal.

William G. Sparks,
Notary Public.

My commission expires Oct. 30, 1938.

79 EXHIBIT F.

Assignment of Lease.

80 Assignment of Lease.

Whereas, the City of Indianapolis has taken all the necessary steps and performed all the required conditions in the exercise of its right to acquire, take over and administer as a public charitable trust all the property of Citizens Gas Company of Indianapolis, pursuant to the terms and provisions of the original and amended articles of incorporation of said Company and the franchise agreement entered into on the 25th day of August, 1905, between the said City, by and through its Board of Public Works, and Alfred F. Potts, Frank W. Stalnaker and Lorenz Schmidt, which franchise and contract were assigned to and accepted by the said Company on the 24th day of May, 1906; and

Whereas, the right of the City of Indianapolis to acquire, take over and administer the property of the Citizens Gas Company of Indianapolis, as the beneficiary of the said public charitable trust, has been legally established and adjudicated by the judgment and decision of the United States District Court for the Southern District of Indiana in the suits instituted by Newton Todd and by John J. Cotter and others against the said Citizens Gas Company of Indianapolis and

others, which judgment and decision was affirmed upon appeal to the United States Circuit Court of Appeals for the Seventh Circuit, and a petition for a writ of certiorari to the United States Supreme Court thereafter denied; and

Whereas, the City of Indianapolis has deposited with The Indiana National Bank of Indianapolis, in a special account to the credit of the Citizens Gas Company of Indianapolis, the sums of $2,500,000 and $1,050,000, to be held by the said Company as trust funds to be uses for the sole purpose of retiring respectively, the outstanding common stock of the said Company at the par value thereof plus dividends at the rate of 10% per annum and retiring the outstanding preferred stock of said Company at 105% of the par value thereof (said Company, by its Board of Directors has furnished and made provision for the funds necessary for the payment of the dividend upon such preferred stock for the current quarter expiring August 31st, 1935); and

Whereas, nothing further remains to be done by the City of Indianapolis to entitle it to have all the property of the Citizens Gas Company of Indianapolis, including the property hereafter described, conveyed and transferred to said City, pursuant to the provisions of said franchise agreement and the original and amended articles of incorporation of said Company, and in accordance with the judgment and decision of said Courts;

Now, Therefore, in consideration of the premises and for the purpose of carrying out and executing the public charitable trust as aforesaid, the Citizens Gas Company of Indianapolis a corporation organized and existing under the laws of the state of Indiana, hereby assigns and conveys unto the City of Indianapolis, a municipal corporation organized and existing under the laws of the state of Indiana, all the said Company's right, title and interest in and to the certain lease bearing date of the 30th day of September, 1913, made by the Indianapolis Gas Company, a corporation organized and existing under the laws of the State of Indiana, to Citizens Gas Company of Indianapolis, a corporation organized and existing under the laws of the State of Indiana, and recorded in the office of the Recorder of Marion County, Indiana, in Miscellaneous Record 78, at page 257, of certain property for the manufacture and sale of gas and gas by-products for the term of ninety-nine years, to have and to hold the same unto the said City of Indianapolis from

the date of this instrument, for and during all the residue of said term of ninety-nine years mentioned in said lease, subject nevertheless to the rents, covenants, conditions and provisions therein mentioned.

1. This conveyance is made pursuant and subject to, and in conformity with, the terms, conditions, and agreements contained in the original and amended articles of incorporation of Citizens Gas Company of Indianapolis, the franchise agreement entered into between said Company's assignors and the City of Indianapolis, under date of August 25th, 1905, as aforesaid, and Chapter 78 of the Acts of 1929 of the General Assembly of the State of Indiana.

2. This assignment is made subject also to the mortgage executed by Citizens Gas Company of Indianapolis, to Bankers Trust Company of New York, Primary Trustee, and The Union Trust Company of Indianapolis, Ancillary Trus-
81 tee, under date of July 1, 1912, and recorded in Mortgage Record 593, page 399, in the office of the Recorder of Marion County, Indiana, in the principal amount of $10,000,000, and to all other existing liens, incumbrances and assessments of any nature whatsoever.

3. This assignment is also made subject to all other legal obligations of said Citizens Gas Company of Indianapolis.

Citizens Gas Company of Indianapolis,
By Franklin D. Vonnegut,
Vice-President.

Attest:
Gastenburg,
Secretary.

State of Indiana,)
County of Marion.) ss:

Before me, the undersigned, a Notary Public in and for said County and State, this 9th day of September, 1935, personally appeared Franklin D. Vonnegut, Vice-President of Citizens Gas Company of Indianapolis, and for and on behalf of the Company of which he is Vice President, acknowledged the execution of the foregoing assignment of lease.

Witness my hand and Notarial Seal.

William G. Sparks,
Notary Public.

My Commission Expires October 30, 1938.

82 EXHIBIT G.

Resolution for Rejection of Assignment of Lease Between The Indianapolis Gas Co. and Citizens as Company of Indianapolis.

83 Resolution for Rejection of Assignment of Lease Between The Indianapolis Gas Co. and Citizens Gas Company of Indianapolis.

Whereas, pursuant to rights and duties heretofore established, Citizens Gas Company of Indianapolis, an Indiana Corporation, has this day executed and tendered to the City of Indianapolis and its Board of Directors for Utilities, instruments of transfer of all of its property, including a deed of conveyance of real estate, assignments of lease interests, and assignments of personal property, subject to the legal obligations of said Company including the obligation of a certain lease bearing date of September 30, 1913, by and between the Indianapolis Gas Company, an Indiana corporation, and Citizens Gas Company of Indianapolis, recorded in Miscellaneous Record 78 at page 257 and following in the office of the Recorder of Marion County, Indiana; and

Whereas, said Citizens Gas Company of Indianapolis has also this day executed and tendered to the City of Indianapolis and its Board of Directors for Utilities an instrument purporting specifically to assign said The Indianapolis Gas Company lease to said City, subject to the terms and conditions contained in said lease; and

Whereas, this Board deems said lease to be onerous and disadvantageous to the City of Indianapolis, and in the discretion of this Board said lease should not be taken over, adopted, or assumed, but should be wholly rejected, its assignment not accepted, and said lease should not be recognized as one of the obligations, if such it is, of said Citizens Gas Company of Indianapolis to which any property of said Company is subjected when in the possession of the City of Indianapolis; and

Whereas, this Board in its discretion determines that the other property of said Citizens Gas Company of Indianapolis should be accepted upon the condition that such property is not subject to any obligation to said The Indianapolis Gas Company;

Now Therefore be it Resolved By The Board of Directors for Utilities of the City of Indianapolis, Indiana, in the exercise of the discretion conferred upon it by law, and on behalf of the City of Indianapolis:

1. That the City of Indianapolis by this Board accept the tendered assignments, transfers, and conveyances of all of the property of Citizens Gas Company of Indianapolis, an Indiana corporation, excepting, however the certain lease executed by The Indianapolis Gas Company, an Indiana corporation, to said Citizens Gas Company, bearing date of September 30, 1913; and on the assumption and condition that such acceptance in no way obligates the City of Indianapolis to said The Indianapolis Gas Company under said lease.

2. That the City of Indianapolis by this Board refuses to assume and be bound in any manner by the terms and provisions of said lease.

3. That the City of Indianapolis by this Board rejects and refuses to accept the assignment of said lease tendered by said Citizens Gas Company of Indianapolis to the City.

4. That the City of Indianapolis by this Board refuses to recognize said lease as an obligation of said Citizens Gas Company of Indianapolis which the City is bound to accept, or which in any respect whatsoever is one to which the property of said Citizens Gas Company of Indianapolis, when transferred to this City, is in any manner subject or which constitutes a charge upon such property.

5. That the following instrument be executed and served upon The Indianapolis Gas Company and recorded in the office of the Recorder of Marion County, Indiana:

Rejection of Assignment of Lease and Refusal to Assume, Take Over Or Be Bound Thereby.

The City of Indianapolis, Indiana, by its Board of Directors for Utilities of its Department of Utilities, hereby refuses to take over, adopt, or assume the certain lease bearing date of September 30, 1913, executed by The Indianapolis Gas Company, an Indiana corporation, to Citizens Gas Company of Indianapolis, an Indiana corporation, and recorded in the office of the Recorder of Marion County, Indiana, in Miscellaneous Record 78 at page 257 and following; rejects the assignment of said lease tendered to said City by said Citi-
84 zens Gas Company of Indianapolis; and refuses to recognize said lease as an obligation of said Citizens Gas Com-

pany of Indianapolis which this City is bound to accept, or which in any respect whatsoever is one to which the property of said Citizens Gas Company of Indianapolis, when transferred to said City, is in any manner subject or which constitutes a charge thereon.

Dated at Indianapolis, Indiana, September 9, 1935.

Board of Directors for Utilities of the
City of Indianapolis, Indiana,
By .....
Its President.

Attest:

.....
Its Secretary.

State of Indiana, }
County of Marion. } ss.

Before the undersigned, a Notary Public in and for said County and State, personally appeared said Henry L. Dithmer as President of the Board of Directors for Utilities of the City of Indianapolis and acknowledged the execution of the foregoing instrument as and for its and his voluntary act and deed.

.....
Notary Public.

6. That a copy of this resolution, certified by the Secretary of this Board, be served upon said The Indianapolis Gas Company as evidence of the attitude and intention of this Board.

7. That a copy of this resolution, certified by the Secretary of this Board, and a copy of said "Rejection of Assignment," be served upon said Citizens Gas Company of Indianapolis as evidence of the attitude and intention of this Board.

Certificate.

The undersigned, Roy Sahm, as Secretary of the Board of Directors for Utilities of the City of Indianapolis, hereby certifies that the above and foregoing is a true and complete copy of a resolution duly adopted by said Board at a regularly held meeting on the 9th day of September 1935 as said

resolution appears in the records in the custody of the undersigned as such Secretary.

Dated at Indianapolis, Indiana, September 9, 1935.

(Signed) Roy Sahm,
Secretary, Board of Directors for Utilities of the City of Indianapolis.

85 (Entry for June 8, 1936, continued.)

And thereupon, there issued out of the office of the Clerk of this Court a writ of subpoena in equity to the United States Marshal.

86 SUBPOENA IN EQUITY. Filed June 8 1936.

UNITED STATES DISTRICT COURT,

Indianapolis Division,

Southern District of Indiana.

1844 Equity.

The President of the United States of America To: Citizens Gas Company of Indianapolis, a corporation, The City of Indianapolis, a municipal corporation, The Indianapolis Gas Company, a corporation, William J. Mooney, Sr., A. Dallas Hitz, Alfred M. Glossbrenner, Edward W. Harris, and Charles S. Rauh, as members of the Board of Trustees for Utilities of the City of Indianapolis, Henry L. Dithmer, Broadhurst Elsey, Fred W. Jungclaus, Roy Sahm, David J. Angus, Isaac E. Woodward and Russell J. Ryan, as members of the Board of Directors for Utilities of the City of Indianapolis, Greeting:

You are hereby commanded that all excuses and delays set aside you be and appear within twenty days after the service of this subpoena at the Clerk's office of the United States District Court for the Southern District of Indiana at Indianapolis, to answer unto the bill of complaint of The Chase National Bank of the City of New York, Trustee, in said Court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable Robert C. Baltzell, United States

District Judge at Indianapolis this 8th day of June, A. D. 1936.

Albert C. Sogemeier,
Clerk.

87 By Thelma M. Riebeling,
(Seal) *Deputy Clerk.*

Memorandum.

The Defendants in this case are required to file their answer or other defense in the Clerk's office of said Court, on or before the twentieth day after service of this writ, excluding the day thereof; otherwise the Bill may be taken pro confesso.

88 (Marshal's Return Endorsed on Subpoena in Equity.)

I received this writ at Indianapolis, Indiana, June 9, 1936, and served the same upon the within named Citizens Gas Company of Indianapolis, a corporation, by reading the same to and within the hearing of, and by delivering a true copy of this Subpoena to Henry L. Dithmer, President of the Board of Directors of the said Citizens Gas Co., on June 10, 1936; and upon the within named The City of Indianapolis, a municipal corporation, by reading the same to and within the hearing of and by delivering a true copy of this writ to John W. Kern, Mayor of the City of Indianapolis, on June 9, 1936; and upon the within named The Indianapolis Gas Company, a corporation, by reading the same to and within the hearing of, and by delivering a true copy of this writ to Arthur V. Brown, Vice President of said company, he being the highest officer of said company found in my district, on June 9, 1936; and upon the within named William J. Mooney, Sr., A. Dallas Hitz, Alfred M. Glossbrenner, Edward W. Harris and Charles S. Raugh, as members of the Board of Trustees for Utilities of the City of Indianapolis, by reading the same to and within the hearing of and by delivering a true copy of this writ to each of them, on June 9, 1936; and upon the within named Henry L. Dithmer, Broadhurst Elsey, Fred W. Jungclaus, Roy Sahm,

David J. Angus, Russell J. Ryan, by reading the same to

89 and within the hearing of, and by delivering a true copy of this writ to each of them, and Isaac E. Woodward, by leaving a true copy of this writ at his last and usual place of residence, in the hands of his wife, Ada Woodward, all as members of the Board of Directors for Utilities of the City

of Indianapolis, on June 9, 1936; all of the above services made at Indianapolis, Indiana, on June 9, and 10, 1936 as indicated above.

Charles W. James,
U. S. Marshal.
By Edgar Collins,
Deputy.

Marshal's Costs:

15 Services	$30.00
Expense	1.16
	$31.16

90 And afterwards to wit at the April Term of said Court, on the 22nd day of June, 1936, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Comes now the plaintiff, by its solicitors, and files praecipe for alias subpoena for the defendant Citizens Gas Company, which praecipe is as follows:

(H. I)

And thereupon, there issued out of the office of the Clerk of this Court a writ of subpoena in equity to the United States Marshal.

91 ALIAS SUBPOENA IN EQUITY.

UNITED STATES DISTRICT COURT,

Indianapolis Division,

Southern District of Indiana.

The President of the United States of America To Citizens Gas Company of Indianapolis, a corporation, Greeting:

You Are Hereby Commanded that all excuses and delays set aside you be and appear within twenty days after the service of this subpoena at the Clerk's office of the United States District Court for the Southern District of Indiana, at Indianapolis to answer unto the bill of complaint of The

Chase National Bank of the City of New York, Trustee, in said Court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable Robert C. Baltzell, United States District Judge at Indianapolis this 22nd day of June, A. D. 1936.

Albert C. Sogemeier,
Clerk.
By Thelma M. Riebeling,
Deputy Clerk.

(Seal)

Memorandum.

The Defendant in this case is required to file its answer or other defense in the Clerk's office of said Court, on or before the twentieth day after service of this writ, excluding the day thereof; otherwise the Bill may be taken pro confesso.

(Endorsed): Marshal's Civil Docket No. 8147. United States District Court. * * (Caption—1844) * * Subpoena in Equity. Returnable on the 20th day after service. William L. Taylor, State Life Bldg., Indpls. Solicitor for Plaintiff.

92 (Marshal's Return Endorsed on Subpoena in Equity)

Southern District of Indiana, } ss:

Received the within writ on the 29th day of June, 1936, and executed same upon the within named Citizens Gas Company of Indianapolis, a corporation, by reading the same to and within the hearing of, and by delivering a true copy of this writ to Gustave A. Efromyson, president of said company, at Indianapolis, Indiana, June 29, 1936.

Charles W. James,
U. S. Marshal.
By Edgar Collins,
Deputy Marshal.

Marshal's Costs:

1 Services	$2.00
Expense	.14
	$2.14

93 And afterwards to wit at the April Term of said Court, on the 1st day of October, 1936, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Comes now the defendant The Indianapolis Gas Company, by Louis B. Ewbank, and William R. Higgins its solicitors, and files appearance, which is as follows:

(H. I.)

And said defendant The Indianapolis Gas Company now files answer, which is as follows:

94 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Oct. 1, 1936.

* * (Caption—1844) * *

SEPARATE ANSWER OF DEFENDANT, THE INDIANAPOLIS GAS COMPANY, TO THE BILL OF COMPLAINT.

Comes now The Indianapolis Gas Company, a defendant in the above entitled cause, and for its separate answer to the Bill of Complaint therein respectfully states that:

1. Answering the first paragraph of the Bill, it admits the allegations therein set out.

2. Answering the second paragraph of the Bill, it admits the allegations therein set out.

3. Answering the third paragraph of the Bill, it admits the allegations therein set out.

4. Answering the fourth paragraph of the Bill, it admits the allegations therein set out.

5. Answering the fifth paragraph of the Bill, its admits the allegations therein set out.

6. Answering the sixth paragraph of the Bill, its admits the allegations therein set out.

7. Answering the seventh paragraph of the Bill, it admits the allegations therein set out.

95 8. Answering the eighth paragraph of the Bill, it admits the allegations therein set out.

9. Answering the ninth paragraph of the Bill, it admits the allegations therein set out.

10. Answering the tenth paragraph of the Bill, this de-

fendant admits that at the time of the execution of said ninety-nine year lease its first mortgage bonds in the principal amount of $4,833,000 had been and were issued and outstanding and that susequent to the execution of said lease, and during the operation of its property thereunder by defendant, the Citizens Gas Company of Indianapolis, additional bonds in the principal amount of $2,048,000 were authenticated by the Trustee and delivered by this defendant to defendant, Citizens Gas Company of Indianapolis, to reimburse said latter company for capital expenditures made upon this defendant's property. This defendant denies any knowledge or information sufficient to make answer to the allegation in this paragraph of the Bill, that its bonds sold subsequent to the execution of said lease were sold in reliance upon the validity and effect of the said lease.

11. Answering paragraph eleven, this defendant admits the allegation therein contains.

12. Answering paragraph twelve, this defendant admits the allegation therein contained.

13. Answering paragraph thirteen, this defendant admits the allegation therein contained.

14. Answering paragraph fourteen, this defendant admits the allegation therein contained.

15. Answering paragraph fifteen, this defendant admits the allegation therein contained.

16. Answering paragraph sixteen, this defendant admits the allegation therein contained.

17. Answering paragraph seventeen, this defendant admits the allegation therein contained.

18. Answering paragraph eighteen, this defendant admits the allegation therein contained.

96 19. Answering paragraph nineteen, this defendant admits the allegation therein contained.

20. In answering paragraphs twenty and twenty-one of the Bill, this defendant denies that it has ever contended or admitted that the said ninety-nine year lease was not and is not a valid and binding obligation upon this defendant, and defendants, The Citizens Gas Company of Indianapolis, and the City of Indianapolis as assignee and successor in trust to said latter company.

21. Answering paragraph twenty-two of the Bill, this defendant says that it is not sufficiently informed concerning what is alleged in said paragraph to make answer thereto.

22. Answering the twenty-third paragraph of the Bill, this defendant admits the defendant, City of Indianapolis, through its Department of Utilities, has denied any liability and obligation as assignee and successor to the Citizens Gas Company of Indianapolis, under the terms and provisions of said ninety-nine year lease, and did so notify this defendant by letter. This defendant further admits that it undertook with defendant, City of Indianapolis through its Department of Utilities, negotiations looking to a settlement of the controversy concerning the use of its said property covered by said lease, but it denies that it at any time abandoned or waived or negotiated to abandon or waive any rights which at law or in equity belong to this plaintiff or the trust which it represents, or to affect them in any way unless with the full consent of plaintiff and the bondholders for which it is trustee.

23. Answering the twenty-fourth paragraph of the Bill, this defendants admits the execution of an agreement with the City of Indianapolis providing that if said City through its Department of Utilties continued the operations of this defendant's property pending the settlement of the controversy as to the said City's obligations as assignee and successor to the Citizens Gas Company of Indianapolis under said ninety-nine years lease, and should deposit certain funds in the Indiana National Bank, it should not thereby waive any right it might have to deny that said lease is
97 an obligation binding upon it, if such rights there be, substantially as alle, d in said paragraph of the Bill; but it denies that in so doing it gave any consent to the withholding of payment of any interest on any bonds, or deprived or agreed to the deprivation of this plaintiff, or the holders of bonds for whom it is suing, of any valuable property right or security underlying said bonds. This defendant further says that said agreement, providing that no waiver of any rights by any party thereto should result from such operation of the defendant's property, was entered into by it to prevent a failure and break-down of public service in the furnishing and distribution of gas to the citizens and gas users of the City of Indianapolis, which in the then belief of this defendant appeared to be otherwise imminent and unavoidable. By the terms of said agreement all rights under and pursuant to the terms and provisions of said ninety-nine year lease, which properly belong to this plaintiff as Trustee under said Mortgage Deed of Trust, this defendant believes

and therefore avers so far as could be done if said purpose to avert a break-down of said public service be accomplished, were expressly reserved and protected.

24. Answering the twenty-fifth paragraph of the Bill, this defendant denies that it is now negotiating with defendant, City of Indianapolis, for the use of its property by said City under any agreement, lease or arrangement which deprives or would deprive this plaintiff or the holders of this defendant's outstanding bonds of any rights or privileges which either at law or in equity properly inure to them by the terms and provisions of said Mortgage Deed of Trust. This defendant has at all times and does now, admit the obligation and liability of its entire property, both real and personal, to the performance of the terms and provisions of the said Mortgage Deed of Trust, and this obligation and liability it has never at any time denied or sought to evade by any agreement with any co-defendant in this cause, nor does it do so now.

98 25. This defendant denies each and every allegation in the Bill not hereinabove admitted, controverted or specifically denied.

Wherefore this defendant denies that the plaintiff is entitled to the relief prayed for in the Bill of Complaint against this defendant, and prays that as to it the Bill of Complaint be dismissed with costs.

The Indianapolis Gas Company,
By Louis B. Ewbank (Seal)
Wm. R. Higgins (Seal)
Its Attorneys.

99 (Entry for October 1, 1936, continued)

Come now the defendants City of Indianapolis, *et al.*, by their solicitors, and file answer and counter-claim, which are as follows:

100 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Oc 1936.

* * (Caption-1844) * *

Separate and Several Answer and Counter-Claim of Defendants the City of Indianapolis, a Municipal Corporation, William J. Mooney, A. Dallas Hitz, Alfred M. Glossbrenner, Edward W. Harris and Charles S. Rauh, as Members of the Board of Trustees for Utilities of the City of Indianapolis, Henry L. Dithmer, Broadhurst Elsey, Fred W. Jungclaus, Roy Sahm, David J. Angus, Isaac E. Woodward and Russell J. Ryan, as Members of the Board of Directors for Utilities of the City of Indianapolis.

James E. Deery,
Corporation Counsel,
City Hall, Indianapolis, Indiana,
William H. Thompson,
Albert L. Rabb,
Thomas D. Stevenson,
1350 Consolidated Building,
Indianapolis, Indiana.
Solicitors for Said Answering Defendants.

101 * * (Caption—1844) * *

The City of Indianapolis, a municipal corporation; William J. Mooney, A. Dallas Hitz, Alfred M. Glossbrenner, Edward W. Harris and Charles S. Rauh, as Members of the Board of Trustees for Utilities of the City of Indianapolis; Henry L. Dithmer, Broadhurst Elsey, Fred W. Jungclaus, Roy Sahm, David J. Angus, Isaac E. Woodard and Russell J. Ryan, as Members of the Board of Directors for Utilities of the City of Indianapolis, defendants in the above entitled cause, for their separate and several answer to the plaintiff's bill of complaint and by way of counter-claim say:

1. These answering defendants admit all of the averments contained in subdivision 1 of plaintiff's bill of complaint.

2. These answering defendants admit the averments contained in subdivision 2 of plaintiff's bill of complaint that jurisdiction is sought to be aserted in this cause on the ground of diversity of citizenship between the plaintiff and all of the

defendants; that this cause is of a civil nature and that the matter in controversy herein, exceeds, exclusive of interest and costs, the sum or value of $3,000; but these answering defendants aver on information and belief that this action is a collusive one in which jurisdiction is sought to be conferred upon this court over a controversy existing solely between the defendant The Indianapolis Gas Company, an Indiana corporation, and a citizen and resident of the Southern District of Indiana, Indianapolis Division, and these answering defendants, all of whom are citizens and residents of said Southern District of Indiana, Indianapolis Division, which is a controversy over which this Court has no jurisdiction, by reason of diversity of citizenship or otherwise, all as hereinafter in Subdivision 26 of this answer more particularly averred.

3. These answering defendants admit the averments 102 contained in subdivision 3 of plaintiff's bill of complaint that the plaintiff is Trustee under a deed of trust executed on the 1st day of October, 1902, by defendant The Indianapolis Gas Company, to secure the payment of the principal and interest of certain first mortgage bonds of said The Indianapolis Gas Company, but deny that the plaintiff has any right to maintain this suit as trustee for the reasons hereinafter in subdivision 26 of this answer more particularly averred.

These answering defendants deny, on information and belief, that this suit is brought by plaintiff as Trustee for and on behalf of the stockholders and owners of said bonds and pursuant to the rights granted to the original Trustees and their successor or succesors under said deed of trust.

These answering defendants have no knowledge as to whether this suit was commenced and is attempted to be prosecuted at the special instance and request of the owners and holders of $415,000 in principal amount of said bonds and neither admit nor deny said averments, but request that plaintiff be required to make strict proof thereof; but these answering defendants aver on information and belief that if said request was made it was a part of a collusive arrangement to attempt to confer jurisdiction on this Court which did not otherwise exist, all as hereinafter in subdivision 26 of this answer more particularly averred.

These answering defendants admit that the plaintiff seeks a declaratory judgment of this Court to determine and fix the rights of the plaintiff as mortgagee and as Trustee and

to determine the rights of the plaintiff and the obligations of the several defendants under or growing out of a certain lease executed on the 30th day of September, 1913, by and between the defendants, The Indianapolis Gas Company and Citizens Gas Company of Indianapolis, a copy of which lease marked Exhibit B is made a part of plaintiff's bill of complaint and admit that the plaintiff seeks further relief by way of injunction; but these defendants deny on information and belief that the plaintiff has any right to maintain such an action, deny that it is entitled to any relief whatever, and deny that there is any necessity for injunctive relief to preserve or protect the property and corpus of said trust, to prevent loss, waste and damage to the same or to prevent irreparable loss and damage to the holders of said bonds.

These answering defendants admit that a real and actual controversy exists as to the binding force and effect of said lease of September 30, 1913, but they allege:

(a) That such controversy exists between these answering defendants and The Indianapolis Gas Company, an Indiana corporation, and aver that the plaintiff has no legal interest in or right to be heard in connection with such controversy; and

(b) That such controversy exists only as to the binding force and effect of said lease of September 30, 1913, upon these answering defendants after the transfer of the property and assets formerly held by the Citizens Gas Company as Trustee of a public charitable trust to the City of Indianapolis as the successor Trustee of said trust, which transfer was made on September 9, 1935, and allege that as to these defend-
103 ants, no controversy ever existed as to the binding force and effect of said lease for and during the term of trusteeship of said Citizens Gas Company.

These answering defendants deny on information and belief that the plaintiff has no plain, complete or adequate remedy at law and that adequate relief can be administered only in a Court of Equity, but aver that the plaintiff is not entitled to any relief either at law or in equity in connection with this controversy and has no standing to maintain this action.

4. These answering defendants admit the averments contained in subdivision 4 of plaintiff's bill of complaint.

5. These answering defendants admit the averments contained in subdivision 5 of plaintiff's bill of complaint, but in that connection allege:

That the Citizens Gas Company of Indianapolis was not the

owner in its individual right of the property used by it in the manufacture and distribution of gas to the inhabitants of Indianapolis, but was merely the Trustee of a public charitable trust; that the instruments creating that trust, including the franchise, articles of incorporation and by-laws of said Citizen Gas Company of Indianapolis, are made a part of plaintiff's bill of complaint, identified as Exhibit C and are by reference made a part of this answer.

These answering defendants aver on information and belief that prior to the 30th day of September, 1913, the plaintiff as trustee, and defendant The Indianapolis Gas Company, either had actual knowledge of, or were bound in law by knowledge of, the following facts in connection with the Citizens Gas Company and its affairs:

First. Of the provisions of the ordinance of the City of Indianapolis approved August 30, 1905, whereby a franchise was granted to certain individuals therein named on the condition that they should organize a corporation to carry out the purposes of said franchise.

Second. Of the assignment of said franchise made by the individual grantees thereof to the Citizens Gas Company on May 24, 1906.

Third. Of the Articles of Incorporation of the Citizens Gas Company of Indianapolis which were adopted on May 23, 1906.

Fourth. Of the by-laws of the Citizens Gas Company approved January 13, 1908.

Fifth. Of all amendments made to said by-laws prior to September 30, 1913.

Sixth. Of an additional ordinance of the City of Indianapolis approved May 22, 1912.

Seventh. That the Citizens Gas Company was the initial Trustee named in said franchise contract and that at the end of the period of said franchise and, to wit: on the 30th day of August, 1930, was obligated, when the conditions fixed in the franchise contract precedent to the transfer had been complied with, to transfer the property operated by it as Trustee in the manufacture and distribution of gas to the City of Indianapolis and that all rights of the Citizens Gas Company as such Trustee would terminate approximately 77 years before the expiration of said 99 year lease.

104 These answering defendants further aver that at the time of the execution of said lease of September 30, 1913, substantial doubt existed as to the right of the Citizens Gas

Company of Indianapolis to execute a lease which would be binding beyond the term for which it was to operate said property as Trustee and that in recognition of such doubt there was inserted in said lease of September 30, 1913, the following provision:

"In the event it should be determined by a court of final jurisdiction that this contract is ultra vires or void because of the length of the term created, and that such term is in excess of the authority of either party hereto to contract, then this lease shall nevertheless be binding upon the parties hereto for the lengthiest term which the parties hereto might lawfully contract."

These answering defendants aver on information and belief that the above quoted provision was inserted in said lease at the request of defendant The Indianapolis Gas Company, and was drafted and phrased by its then counsel, Ferdinand Winter.

These answering defendants aver that such provision constituted notice to the plaintiff's predecessor trustee, to plaintiff and to each owner and holder of the stock and bonds of said The Indianapolis Gas Company, whether issued or purchased before or after September 30, 1913, that a doubt existed as to the right of the Citizens Gas Company to enter into a lease with The Indianapolis Gas Company beyond the term of the franchise hereinbefore referred to approved by the Common Council of the City of Indianapolis on August 30, 1905; and that neither the plaintiff, nor The Indianapolis Gas Company, nor any owner of the bonds or stock of The Indianapolis Gas Company can in equity be permitted to assert that it or he acquired rights without knowledge that a serious doubt existed as to the validity and binding effect of said lease after the transfer of said trust property to the said City as successor trustee, upon the City of Indianapolis as such or as Trustee, or upon the beneficiaries of said Public Charitable Trust which consist of the present and prospective users of gas in the City of Indianapolis.

That said lease of September 30, 1913, while containing all of the provisions averred in the fifth paragraph of the plaintiff's bill of complaint also contains many other conditions burdensome in character and said lease although conceded for the purpose of this litigation to be valid for the period of said franchise contract and until the property for which the Citizens Gas Company was Trustee was conveyed to the City

of Indianapolis as Trustee was ultra vires, invalid and void after the expiration of the term of the trusteeship of the Citizens Gas Company and the time necessary to transfer said property to the City of Indianapolis as successor trustee for the specific reasons and on the specific grounds hereinafter in Subdivision 27 of this answer more particularly set forth.

6. These answering defendants admit the averments contained in the first two literary paragraphs of subdivision 6 of plaintiff's bill of complaint.

These answering defendants deny that the Citizens Gas Company of Indianapolis has at all times continued to
105 exist and operate under the provisions of its franchise and its Articles of Association which embodied the terms of said franchise but allege the facts to be as follows:

(a) That from the date of the organization of said Citizens Gas Company it continued to exist and operate under the terms of said franchise until August 27, 1921, at which time, pursuant to the terms of an Indiana Statute Authorizing it so to do, it filed its declaration of surrender of said franchise and accepted an indeterminate permit with the result that from said date until September 9, 1935, it continued to operate as a public utility under an indeterminate permit, but that said indeterminate permit did not have the effect of modifying or rendering nugatory the terms of said franchise contract insofar as they created said Public Charitable Trust and defined the terms and conditions thereof, the rights, duties and liabilities of the Citizens Gas Company as original Trustee of the City of Indianapolis as Successor Trustee and of the present and prospective gas consumers of Indianapolis as the beneficiaries of said trust.

(b) That on the 9th day of September, 1935, the Citizens Gas Company of Indianapolis transferred its gas producing and distributing plant to the City of Indianapolis and thereupon ceased to be Trustee of said Public Charitable Trust and has not at any time since said date had any rights, powers, duties or responsibilities as such Trustee.

(c) That under the terms and provisions of subdivision (g) of said franchise contract approved by the Common Council of the City of Indianapolis August 30, 1905, the duty now rests upon said Citizens Gas Company to wind up its corporate affairs and dissolve and although steps have not been taken for this purpose, the Citizens Gas Company of Indianapolis is legally bound and obligated voluntarily to dissolve

its corporate existence and has not right to continue such existence beyond the time reasonably necessary for the purpose of winding up its affairs, all of which can properly and lawfully be done within one year from this date.

These answering defendants admit that the Articles of Incorporation of the Citizens Gas Company of Indianapolis were amended on August 27, 1921, and that by such amendment the authorized stock of the Company was increased to $4,000,000, of which $2,000,000 was to be common stock and $2,000,000 preferred stock, but they deny that the Articles of Incorporation of the Citizens Gas Company were ever amended so as to permit the issuance of mortgage bonds by said corporation.

These answering defendants aver that the Citizens Gas Company of Indianapolis issued its first mortgage bonds under a mortgage or deed of trust dated July 1, 1912, and that on September 9, 1935, there were outstanding in the hands of the public $2,745,000 par value of said mortgage bonds which had been issued not only without any authority having been granted so to do by its Articles of Incorporation but in violation of the express provisions of subdivision (i) of the franchise contract adopted by the City of Indianapolis which required that upon the expiration of the franchise period that if the term thereof should terminate without the payment of the certificates of beneficial interest to-
106 gether with dividends thereon at the rate of ten per cent per annum the Board of Directors of the Citizens Gas Company

"shall mortgage its gas plant and property for such sum as to enable it to pay its stock or certificate holders an amount which with what has already been paid will equal the full amount of such subscription with dividends estimated at the rate of ten per cent per annum thereon and with the proceeds thereof, or with the mortgage notes so issued in proper amounts, pay off and discharge the amounts due such certificate holders and convey said plant to said City subject to such obligations and other legal obligations against said Company; provided, however, that by the terms of said mortgage such obligation shall bear interest not exceeding six per cent per annum and be payable on or before 10 years from date of execution."

That said provision above quoted was intended to insure the payment of the certificates of beneficial interest issued

by the Voting Trustees of the Citizens Gas Company and to enable the City of Indianapolis to pay off the precedent obligations against said trust property at the date of the expiration of the franchise contract.

That on August 30, 1930, when said franchise contract expired by its terms said precedent obligations of the Citizens Gas Company had not been discharged and there was due thereon at that time to the owners of preferred stock and to the certificate holders of said Citizens Gas Company a sum of approximately $3,500,000.

That the mortgage so executed by the Citizens Gas Company and the bonds issued thereunder were void and unenforceable as such because they were issued without proper corporate authority and in direct violation of controlling provisions of the franchise contract and said public charitable trust; that these answering defendants were advised by counsel that because the moneys obtained from the sale of said bonds were used for the benefit of the Citizens Gas Company and for the purchase of property which was added to its plant an equitable lien was thereby created on the plant and property for which the Citizens Gas Company was Trustee and as a result thereof the City of Indianapolis has paid on account thereof the principal on said bonds with interest to September 15, 1935, and not thereafter, on all of said $2,745,000 face value of bonds except $44,000, which have not yet been presented for payment and holds itself ready to pay the remainder of said bonds with interest to September 15, 1935, upon surrender of the same.

These answering defendants admit that all the rights, property and assets acquired by the Citizens Gas Company of Indianapolis were acquired by it as Trustee for the benefit of the present and prospective users of the City of Indianapolis, but deny that the trust is for the benefit of all of the inhabitants of Indianapolis; they further admit that said trust property was acquired subject to a charge in favor of the stockholders, creditors and other persons having valid claims and rights against the property of said trust and admit that from the time of the creation of said Citizens Gas Company to September 9, 1935, said Company was the Trustee of
107 a public charitable trust for the benefit of those inhabitants of the City of Indianapolis who were or might become gas users; said trust being subject only to such charges in favor of stockholders and creditors as hereinbefore referred to.

7. These answering defendants admit the averments contained in Subdivisions 7 and 8 of the plaintiff's bill of complaint except that they:

(a) Deny that the Public Service Commission of Indiana either directly or indirectly attempted to approve or did approve the lease of September 30, 1913, executed between The Citizens Gas Company of Indianapolis and The Indianapolis Gas Company as valid and binding upon the City of Indianapolis after the property operated by the Citizens Gas Company should have been transferred to the City of Indianapolis in accordance with the terms of the franchise contract and public charitable trust above referred to.

(b) Deny that the Citizens Gas Company of Indianapolis was made a party to said proceedings before the Public Service Commission as Trustee of a Public Charitable Trust; and aver that all proceedings had before the Commission and the order entered by the Commission were had and conducted upon the theory that the Citizens Gas Company of Indianapolis was the owner of said property for the period of its corporate life and thereafter that the City of Indianapolis was the owner of the property.

(c) Deny that said Frank S. Fishback ever asserted any rights as the beneficiary of a Public Charitable Trust; and aver that said Fishback originally appeared in said proceedings before the Public Service Commission of Indiana solely as a stockholder of the Citizens Gas Company and a taxpayer of the City of Indianapolis.

(d) Deny that the City of Indianapolis appeared in said proceedings before the Public Service Commission as Successor Trustee of said Public Charitable Trust; and aver that no issue was presented to or heard or determined by the Public Service Commission of Indiana involving the existence of a Public Charitable Trust or the rights of the Citizens Gas Company of Indianapolis as Initial Trustee, of the City of Indianapolis as Succeeding Trustee, or of the beneficiaries of such trust consisting of the present and prospective gas consumers of Indianapolis.

8. These answering defendants aver that the approval of said lease of September 30, 1913, by the Public Service Commission of Indiana is not res adjudicata as to the binding effect of said lease upon these answering defendants subsequent to September 9, 1935, for each of the following reasons:

First. Said lease of September 30, 1913, which was sub-

mitted to the Commission for its approval contained in subdivision 32 thereof the provisions hereinbefore in subdivsion 5 of this answer set out were to the general effect that if for any reason the lease was ultra vires or void because of the length of the term created and in excess of the authority of either party to said lease, then that the lease should be binding for the term for which the parties might lawfully contract. The effect of the approval of the Public Service Commission of the lease under the law of Indiana could
108 and did extend no further than the approval of such lease for the period of time for which the parties might lawfully contract.

Second. The statutes of Indiana existing and in effect on September 30, 1913, did not attempt to confer any judicial power upon the Public Service Commission of this State. Under the provisions of the Constitution of Indiana and particularly Section 1 of Article III thereof, which was in force on September 30, 1913, and continuously since that date, the powers of Government are divided into three separate departments, the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments has any power to exercise any of the functions of another such department. Under said constitutional provisions the Public Service Commission of Indiana could not lawfully be granted any judicial power and was without authority to hear, determine or decide justiciable controversies. That the question of whether a Public Charitable Trust existed in the property operated by the Citizens Gas Company of Indianapolis and the further question as to whether the Trustee of such a Public Charitable Trust had the right to become the Lessee in a lease extending for approximately 77 years after the termination of its trusteeship, which lease contained onerous and burdensome conditions, were judicial questions which under the Statutes and Constitution of the State of Indiana the Public Service Commission of Indiana was without authority to hear and determine; and its approval of said lease of September 30, 1913, did not and could not adjudicate either or both of said questions.

Third. At the time said Public Service Commission of Indiana approved said lease of September 30, 1913, the Citizens Gas Company of Indianapolis was operating the gas manufacturing and distributing plant for which it was the

Trustee and it was not for more than twenty years thereafter that said property was conveyed to the City of Indianapolis as Successor Trustee. Any attempt on the part of the Public Service Commission of Indiana to hear, determine or adjudicate the validity of said lease of September 30, 1913, after the property of said Public Charitable Trust should have been transferred to the City of Indianapolis as Successor Trustee was without any legal or binding force whatever and could not operate as an estoppel or res adjudicata.

Fourth. The Public Service Commission of Indiana under the Statutes and Constitution of this State is purely an administrative body with no authority to hear, determine or decide justiciable controversies and its act and order approving said lease of September 30, 1913, amounted to no more than its determination that the terms of the lease were at that time in its opinion advantageous and the approval of said Public Service Commission thereto should be given and said order of the Public Service Commission has no further or different legal effect.

9. These answering defendants admit the averments contained in subdivision 9 of the plaintiff's bill of complaint, but in connection therewith aver:

(a) That in said action commenced by the said Frank S. Fishback in the Superior Court of Marion County, Indi-109 ana, such steps were taken as that a judgment was entered against him by said Superior Court in said cause on the 15th day of February, 1921, and that the appeal prosecuted therefrom to the Supreme Court of Indiana by the said Fishback was dismissed on the 8th day of March, 1923.

(b) That the Citizens Gas Company was made a party defendant to such litigation not as a Trustee, but in its individual capacity and that no claim was made or asserted in such litigation that the property held and operated by the Citizens Gas Company was that of a Public Charitable Trust.

(c) That the City of Indianapolis was made a party defendant to said suit individually and not as Trustee.

These answering defendants aver that the judgment, order and decree of the Marion Superior Court in the case of Frank S. Fishback *vs.* The Public Service Commission of Indiana, referred to in subdivision 9 of the plaintiff's bill of complaint is not res adjudicata and does not prevent consideration of any question involved in this cause against these defendants, for each of the following reasons:

First. Under the Statutes in effect at the time of the c-

mencement of said action and continuously thereafter until the appeal of Fishback was dismissed by the Supreme Court of Indiana no appeal could be taken from any order of the Public Service Commission of Indiana except from an order fixing rates or regulations, practices, acts or service; that the action commenced by Fishback and prosecuted by him in said Superior Court of Marion County, Indiana, was not an appeal under a statute but was a suit in equity to set aside and vacate in its entirety the order entered by the Public Service Commission of Indiana in approving said lease of September 30, 1913; that the sole question which could be lawfully heard and adjudicated by the Court in such action was whether said order of the Public Service Commission was valid or invalid; that inasmuch, as heretofore averred, the Public Service Commission could exercise no judicial power and had no authority to determine or adjudicate the validity of said lease, the Superior Court of Marion County, in the case commenced and maintained by the said Fishback could not adjudicate or determine the validity of said lease.

Second. The cause of action in the Fishback case and the cause of action in this case are essentially different in that in the Fishback case the sole question involved was whether the administrative order of the Public Service Commission approving the lease was valid or invalid, while here, the question involved is the binding effect of such lease on these answering defendants subsequent to September 9, 1935, on which date the property formerly operated by the Citizens Gas Company as Trustee was transferred to the City of Indianapolis as Successor Trustee. Inasmuch as the causes of action are different, the Fishback decree cannot be res adjudicata of any questions except those actually litigated therein and these answering defendants aver that none of the questions involved in this case were litigated or decided in the Fishback case.

110 Third. At the date of the rendition of the judgment of the Marion Superior Court in the Fishback case and at the time Fishback's appeal was dismissed by the Supreme Court of Indiana there was not in effect in the State of Indiana any declaratory judgment statute and the Superior Court was without power to determine or decide questions which might arise in the future, but which had not then arisen, that is to say, the binding effect of said lease of September 30, 1913, against these answering defendants subsequent to

the date of the transfer of the trust property to the City of Indianapolis as Successor Trustee.

Fourth. That in said Fishback case it was pointed out to the Court in the demurrer of the defendant therein filed to the sixth paragraph of plaintiff's complaint, in referring to the lease of September 30, 1913, between the Citizens Gas Company and The Indianapolis Gas Company, that "the lease set out in the complaint itself provides that if for any reason the lease should be held to be for too long a term it should be valid for such length of time as a lease could lawfully be made." That said Fishback case was heard and determined on the theory that whether the said lease was valid for its entire term or not, the action of the Public Service Commission in approving the same could not be vacated or set aside.

Fifth. That the estoppel of the Fishback judgment in law extends only to facts in issue as they existed at the time judgment was rendered and does not prevent a re-examination of the same questions between the same parties where in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the parties thereto; that since the judgment and decree in the Fishback case facts have occurred which alter the rights and relations of the parties hereto, towit: the transfer of the trust property to the City of Indianapolis as Successor Trustee on September 9, 1935, and the judgment and decree rendered in the Fishback case is therefore not determinative of the rights of the parties thereto as of this date.

Sixth. That in said Fishback case both the City of Indianapolis and The Indianapolis Gas Company were defendants, but on the pleadings in that case no issue was raised and none was heard or determined as between the said defendants involving the validity of said lease of September 30, 1913.

Seventh. That in said Fishback case all of the defendants thereto were sued in their individual capacities and not as Trustees and no issue was heard, determined or decided by the Court involving the existence of said Public Charitable Trust or the effect of that legal status upon the validity of the lease of September 30, 1913, upon the City of Indianapolis as Successor Trustee or upon the beneficiaries of said trust.

10. These answering defendants admit the averments of

subdivision 10 of the plaintiff's bill of complaint that at the date of the execution and delivery of said 99 year lease, $4,833,000 total face amount of The Indianapolis Gas Company first mortgage bonds had been issued and were outstanding; but allege that all of these bonds had been sold prior to the execution of said lease and without any knowl-
111 edge or belief upon the part of the purchasers that such a lease would be executed.

These answering defendants further admit that subsequent to the time of such approval, upon the request of The Indianapolis Gas Company, additional bonds in the principal sum of $2,048,000 were authenticated by the Trustee and were delivered by The Indianapolis Gas Company to the Citizens Gas Company of Indianapolis, pursuant to the provision of said lease, for the purpose of reimbursing said Citizens Gas Company for capital expenditures on account of extensions and betterments to the plant and system of The Indianapolis Gas Company theretofore made by the Citizens Gas Company as Lessee, all or substantially all of which bonds were sold by the Citizens Gas Company as provided in said lease. But these answering defendants aver that the Citizens Gas Company was only reimbursed to the extent of ninety per cent of the expenditures so made by it for improvements in and additions to the property of The Indianapolis Gas Company and that the property so added to the plant of The Indianapolis Gas Company was at the time the said additions were made reasonably worth the entire respective sums expended therefor by the Citizens Gas Company.

These answering defendants admit that said additional bonds were sold and distributed, but how widely they do not know. They deny that said bonds were acquired and purchased in reliance upon the proposition that they were secured by a valid and enforceable 99 year lease to a responsible corporation and that said corporation, its successors and assigns were legally obligated to pay the interest thereon as a part of the rental under said lease, or that the validity of said lease had been judicially and finally determined by the Public Service Commission of Indiana and by the courts of Indiana.

On the contrary, these answering defendants aver that at the time said additional bonds aggregating $2,048,000 were sold and delivered the purchasers thereof were charged with notice by reason of the provisions of said lease of September

30, 1913, and particularly subdivision 32 thereof hereinbefore in subdivision 5 of this answer set out in full, that a serious doubt existed as to the validity and enforceability of said lease after the expiration of said franchise contract and that such purchasers purchased and acquired said bonds, not only without any belief in or reliance upon the fact that said 99 year lease was legally enforceable but charged with notice as to the probable invalidity thereof after the transfer of the trust property to the City of Indianapolis as Successor Trustee and that said bondholders cannot now be heard to assert that these answering defendants are thereby estopped to contest the validity of said lease subsequent to September 9, 1935.

These answering defendants further aver that the said lease executed by The Indianapolis Gas Company to Citizens Gas Company of Indianapolis under date of September 30, 1913, was on or about such date recorded in the office of the Recorder of Marion County, Indiana, in Miscellaneous Record 78 and page 257 and following of the records in such office; such recordation being in the time and manner required by law for notice to all concerned of the existence and contents of such lease.

112 That as hereinbefore averred the validity of said lease after the expiration of the term of the trusteeship of the Citizens Gas Company had never been determined by the Public Service Commission of Indiana or the Courts of Indiana either by administrative order or judicial decree and said bondholders could not have relied upon any such order or decree.

11. With respect to subdivision 11 of the bill of complaint, these answering defendants admit that the plant and property of The Indianapolis Gas Company was operated by the Citizens Gas Company of Indianapolis from November 28, 1913, until September 9, 1935, when possession thereof was delivered to the City of Indianapolis, but aver that the operation by the Citizens Gas Company was as the Trustee of a Public Charitable Trust. They further admit that the operation referred to was under the terms of said lease of September 30, 1913, but for the reasons hereinafter in subdivision 27 hereof more specifically stated, they deny that said lease was valid for the full term of 99 years, and aver that it was only valid, if at all, only until the expiration of said franchise contract and until the trust property was conveyed by the

Citizens Gas Company to the City of Indianapolis as Successor Trustee.

These answering defendants admit that the Citizens Gas Company of Indianapolis accepted and enjoyed the use of the property granted under said lease of September 30, 1913; admit that it was thereby relieved from the waste and expense of competition, but deny that it was relieved of the duplication of facilities; admit that it has operated and maintained the leased plant and property as a unified part of its plant and system; but in this connection the answering defendants aver that in such operation the Citizens Gas Company was acting solely as the trustee of a Public Charitable Trust.

These answering defendants further aver that The Indianapolis Gas Company has during all of said time received the rentals due it under the terms of said lease; that the Citizens Gas Company of Indianapolis has paid all taxes in connection therewith and all other burdens imposed upon it by the terms of said lease, and that the payments so made to or in behalf of The Indianapolis Gas Company during the period from 1913 to 1935, inclusive, were as follows:

CITIZENS GAS CO., LESSEE—INDIANAPOLIS GAS CO., LESSOR

Summarized Statement of the Cost to the Lessee, of Carrying on the Lease, by Years and in Total, from the Beginning Date to Dec. 31, 1935

Period		Bond Interest	Stock Dividends	Taxes	Corporate Organization Maint. Fee	Cost of Obtaining the Lease	Discount on Bonds Sold	Interest During Construction	Total Cost
10-1/13 to 12-31/13		.....	$ 30,000.00	$ 40,545.96	$ 75.00	$56,996.29	.....	$ 212.00	$ 127,829.25
Calendar Years:	1914	$ 243,575.00	120,000.00	52,962.33	300.00	.....	.....	3,682.00	420,519.33
	1915	252,075.00	120,000.00	58,113.44	300.00	.....	17,930.00	1,983.00	450,401.44
	1916	253,650.00	120,000.00	71,232.44	300.00	.....	.....	3,172.00	448,354.44
	1917	253,650.00	120,000.00	72,634.60	300.00	.....	.....	3,027.00	449,611.60
	1918	253,650.00	120,000.00	79,064.35	300.00	.....	.....	452.00	452,562.35
	1919	255,525.00	120,000.00	124,121.61	300.00	.....	36,140.00	2,277.00	538,363.61
	1920	267,550.00	120,000.00	150,735.25	300.00	.....	.....	2,176.00	540,761.25
	1921	267,542.50	120,000.00	118,583.46	300.00	.....	.....	2,900.00	509,325.96
	1922	274,952.29	120,000.00	121,951.07	300.00	.....	56,975.00	2,501.00	576,679.36
	1923	280,800.00	120,000.00	141,182.03	300.00	.....	.....	2,646.00	544,928.03
	1924	280,946.81	120,000.00	154,627.30	300.00	.....	1,200.00	6,106.00	563,180.11
	1925	281,400.00	120,000.00	167,139.49	300.00	.....	.....	5,073.00	573,912.49
	1926	281,996.77	120,000.00	160,523.16	300.00	.....	17,250.00	4,203.00	584,272.93
	1927	311,674.18	120,000.00	162,527.33	300.00	.....	930.00	4,106.00	599,537.51
	1928	311,700.00	120,000.00	165,306.70	300.00	.....	.....	3,213.00	600,519.70
	1929	311,700.00	120,000.00	170,239.74	300.00	.....	.....	3,951.00	606,190.74
	1930	311,700.00	120,000.00	175,461.47	300.00	.....	.....	2,852.00	610,313.47
	1931	338,091.93	120,000.00	156,789.81	300.00	.....	2,358.75	487.00	618,027.49
	1932	343,150.00	120,000.00	155,326.48	300.00	.....	.....	238.00	619,014.48
	1933	343,150.00	120,000.00	138,075.28	300.00	.....	.....	137.00	601,662.28
	1934	343,150.00	120,000.00	120,777.11	300.00	.....	.....	175.00	584,402.11
	1935	343,150.00	120,000.00	120,580.55	300.00	.....	.....	295.00	584,325.55
Totals		$6,394,779.48	$2,670,000.00	$2,878,500.97	$6,675.00	$56,996.29	$132,783.75	$54,969.00	$12,194,695.49

Summary of Costs

Bond interest	$ 6,394,779.48
Stock dividends	2,670,000.00
All taxes	2,878,500.97
Corporate maintenance fee	6,675.00
Cost of obtaining lease	56,996.29
Discount on bonds sold	132,783.75
Interest during construction	54,960.00 (1)
Total cost	$12,194,695.49 (2)

(1) Calculated at 5% on average expenditures for additions and betterments to leased property.

(2) Not including the 10% differential between expenditures for additions and betterments, and bonds issued in payment therefor, which has amounted to $219,012.

Answer and Counterclaim.

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These answering defendants further admit that the City of Indianapolis and its gas consumers had the benefit and advantage of the operation of said leased property, but deny that over the period of the lease any profits have been produced thereby and deny that the Public Charitable Trust has been protected thereby. On the contrary these answering defendants aver:

(a) That the payments made to The Indianapolis Gas Company during the period of years above referred to, viz.: from 1913 to 1935 were largely in excess of the fair value of the use of said property during said time.

(b) That during many of the years referred to Citizens Gas Company was operated at a loss and one of the factors contributing materially to the existence of such loss was the excessive rental and other considerations required to be paid to and on behalf of said The Indianapolis Gas Company under the terms of said lease.

(c) That said lease is presently burdensome and not advantageous to said trust property, all as hereinafter in subdivision 27 hereof more specifically alleged.

(d) That the bondholders and stockholders of The Indianapolis Gas Company have benefited to an inequitable, unfair and unreasonable extent because of payments made to them or on their behalf under the terms of said lease.

12. These answering defendants admit the averments contained in the 12th subdivision of the plaintiff's bill of complaint, but allege in connection therewith that the Citi-
114 zens Gas Company of Indianapolis by the execution of its mortgage hereinbefore described had disabled itself from performing the demand made upon it by the City of Indianapolis to mortgage its property, and that as hereinbefore averred said mortgage was invalidly executed and void but the existence of said mortgage as a practical proposition destroyed the ability of the Citizens Gas Company to provide funds for the purpose of paying off the precedent charges against said Gas Company.

13. These answering defendants admit the averments of subdivision 13 of the plaintiff's bill of complaint except they allege that it was finally adjudged and determined that the beneficiaries of said Public Charitable Trust were those inhabitants of the City of Indianapolis who were then or who might thereafter become gas users, and aver, for reasons in subdivision 20 of this answer specifically stated, that the decision in said Todd case is not res adjudicata of any question involved in this case.

14. These answering defendants admit that as alleged in subdivision 14 of the plaintiff's bill of complaint one Allen G. Williams brought suit as an inhabitant and taxpayer on behalf of himself and other resident taxpayers of the City of Indianapolis in the Superior Court of Marion County, Indiana, and aver that the complaint in that case alleged the following:

(a) That a Public Charitable Trust existed in the property of the Citizens Gas Company of Indianapolis and that the plaintiff was entitled to a determination that such a trust existed.

(b) That a conspiracy was formed in 1913 to destroy said Public Charitable Trust and among the overt acts of said conspiracy were procuring the enactment of the Public Service Commission Act of Indiana, the approval by that Commission of the lease between The Indianapolis Gas Company and the Citizens Gas Company, the surrender by the Citizens Gas Company of its franchise and the acceptance of an indeterminate permit and the obtaining of a degree from the United States District Court at Indianapolis by the Citizens Gas Company enjoining the enforcement of confiscatory rates.

(c) That the lease between the two companies was void because:

First. It was in contravention of a contract clause of the Federal Constitution.

Second. That inasmuch as the Public Service Commission Act was invalid it had no authority to approve the lease and its approval was a denial of due process in violation of the fourteenth Amendment to the Constitution of the United States.

Third. That the lease was executed as the result of a conspiracy, the object and purpose of which was to destroy the Citizens Gas Company for the benefit of The Indianapolis Gas Company.

These answering defendants admit that the complaint in said Williams case also sought the appointment of a receiver to administer said trust and that the defendants hereto, the City of Indianapolis, the Citizens Gas Company of Indianapolis, The Indianapolis Gas Company and the plaintiff were made defendants in said cause of action and each of them appeared therein and filed a demurrer to the bill of complaint, which demurrer was duly sustained and final judgment rendered in favor of defendants in said cause;

and further admit that on appeal to the Supreme Court of Indiana the three contentions which are set out in subdivision 14 of the plaintiff's bill of complaint herein, were made by the plaintiff Williams, in said cause, but allege that said Williams in his complaint and in the proceedings of the Supreme Court of Indiana contended that said lease of September 30, 1913, was invalid for the reasons herein set forth and that there was not presented in the said Williams complaint nor heard, or adjudicated by the Court any issue whatever on the question of the validity of said lease, after the time of the transfer of the property of the trust to the City of Indianapolis as Successor Trustee.

These answering defendants further admit that the Supreme Court of Indiana affirmed the decision in said Williams case, but they deny that the Supreme Court determined or adjudicated the questions involved in this case as to the validity of said lease.

These answering defendants aver that although The Indianapolis Gas Company and the City of Indianapolis and the plaintiff in this cause were defendants in said Williams case, that none of said defendants presented for the determination of the Court any issue as between themselves or any of them as to the validity of said lease.

These answering defendants further aver that the City of Indianapolis filed a motion in said Williams case to strike out parts of the complaint in which appears the following statement:

"The validity of the Public Charitable Trust set up in the complaint is in no wise affected by the validity of such lease. If the lease is valid the leasehold created thereby constitutes a part of the Public Charitable Trust and is subject to be administered in the same way as property owned by the Citizens Gas Company in its own right. If for any reason the lease is invalid, it would fall without the scope of the trust."

These answering defendants aver that the decree in the Williams case is not res adjudicata as to the validity or binding effect of said lease of September 30, 1913, upon these answering defendants after the transfer of the property of the trust to the City of Indianapolis as Succeeding Trustee on September 9, 1935, for each of the following reasons:

First. The estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered and does not prevent a re-examination of the same

questions between the same parties where in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the parties. These answering defendants aver that the Williams case was heard, tried, determined and adjudicated prior to September 9, 1935, and that the facts and circumstances have been altered and changed since the date of said adjudication by reason of the transfer of the property of the trust on said last named date to the City of Indianapolis as Succeeding Trustee.

116 Second. That the cause of action involved in the Williams case was different from that involved in this case in that a taxpayer of the City of Indianapolis therein attempted to procure a determination of the invalidity of said lease on the ground that the execution of the same violated the Constitution of the United States and of the State of Indiana and the execution of the same had been obtained as the result of a conspiracy; that none of the questions involved in this cause were actually litigated in the Williams case or passed upon or determined by the Court in said case. Inasmuch as the causes of action in the two cases are not the same it is only matter which were actually determined and litigated in the Williams case which could bind any of the parties thereto and the judgment in that case is therefore not res adjudicata on the questions here involved.

Third. In the Williams case said The Indianapolis Gas Company and the City of Indianapolis were co-defendants. As heretofore alleged the causes of action in the Williams case and in this case were different. No issue was presented for determination or adjudicated in said Williams case as between the co-defendants thereto and under such circumstances the estoppel of the Williams' judgment is applicable only as between those who were adverse parties in that case.

15.* These answering defendants admit the averments of subdivision 15 of plaintiff's bill of complaint in the year 1935 the defendant, City of Indianapolis, offered for sale and sold $8,000,000 aggregate face amount of the City of Indianapolis Gas Plant Revenue 4½% Bonds and that said bonds were sold for the purpose, among other things, of permitting the City of Indianapolis to discharge certain precedent obligations of the Citizens Gas Company as initial trustee and thereupon to acquire certain property owned by the Citizens Gas Company of Indianapolis as Trustee of said Public Charitable Trust. These defendants aver that the facts in this connection are as follows:

(a) That in pursuance of resolutions adopted in April, 1935, by the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis a public offering for the sale of said bonds was made on May 4, 1935; that notice of such public offering was caused to be published in the Indianapolis Star, Indianapolis Times and the Indianapolis News, three newspapers of general circulation in the City of Indianapolis and that such substantial publicity was given to such offering not only in the papers above mentioned but in financial publications generally throughout the United States; that no acceptable bid was received on May 4th, 1935, and thereafter by a resolution of said Board of Directors adopted May 7th, 1935, another public offering of said gas plant revenue bonds was directed to be made on May 28th, 1935; that notice of such public offering was published in said three newspapers on May 11th, 1935, and substantial publicity of said offer was contained in news items in the leading financial papers in the United States.

(b) That the joint bid of Halsey, Stuart & Co., and Otis & Co., for said bonds, which was submitted at the time fixed in said offering, was accepted by the Department of Util-
117 ities and the City of Indianapolis on May 29, 1935, and the proceeds of the bond issue were received on June 27, 1935.

(c) That a copy of the notice published by the City Controller of the City of Indianapolis pursuant to said resolution adopted May 7th, 1935, which is substantially identical with the notice first published, is attached hereto, marked Exhibit A and made a part of this answer. That in said notice the following statement was made about the use of the proceeds of said bonds:

"The proceeds of such bonds are to be used for the taking over of certain property owned by Citizens Gas Company of Indianapolis and/or in which it has an interest, including the redemption or extinguishment of its capital stock and/or for the payment of certain of its obligations and for the necessary expense incurred in connection therewith, including the expense of the city incident to obtaining such funds, as well as for the purpose of making certain betterments, improvements, extensions and additions to such property."

These answering defendants deny that the City of Indianapolis made any representation in said public offering that upon the acquisition of the property the City of Indianapolis would control the business, supplying the entire domestic and

resolutions adopted in April,
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Indianapolis a public offering
made on May 4, 1935; that
as caused to be published in
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of general circulation in the
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and in Marion County and in the towns

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an appraisal made by an independent e
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On information and belief these answ

commercial gas requirements of the City of Indianapolis and its suburbs, or that the Citizens Gas Company held a lease for 99 years covering the properties and business of The Indianapolis Gas Company, thereby giving it the control of the entire gas business of the City of Indianapolis and vicinity; or that the property covered by said lease from The Indianapolis Gas Company had a depreciated physical value of $9,181,960 and a reproduction value of $12,734,090 as against which the capital value of said Company's outstanding first consolidated mortgage 5% gold bonds was $6,881,000 and the capital value of its outstanding stock was $2,000,000; or that upon the acquisition of the entire property operated by the Citizens Gas Company the City of Indianapolis would cause the same to be continuously operated as a gas system in an efficient manner and at a reasonable cost and would use all reasonable efforts to resist competition and maintain the exclusive right to serve gas in the City of Indianapolis and in Marion County and in the towns therein.

These answering defendants allege that after said revenue bonds were sold the purchasers thereof issued a circular, a copy of which marked Exhibit B is filed herewith and made a part of this answer; that in said circular it is stated that an appraisal made by an independent engineer as of January 1, 1935, showed the cost of reproduction new and the depreciated physical value of the property of The Indianapolis Gas Company to be in the amount alleged in Subdivision 15 of plaintiff's bill of complaint, but these answering defendants aver that such appraisal was made by an employe of the purchaser of the bonds; that these answering defendants had nothing to do with the making of said appraisal and have never represented, publicly or otherwise, to any person that the values of the property of The Indianapolis Gas Company were as therein stated, but on the contrary have always claimed and now claim that the plant and property of The Indianapolis Gas Company, both its cost of reproduction new and its depreciated physical value, are many millions of dollars less than the figures stated in said circular. That none of these answering defendants had anything to do with the printing, publication of said circular identified as Exhibit B and that the only representations made by the City of Indianapolis or these answering defendants in connection therewith were those set out in the published notice identified as Exhibit A.

On information and belief these answering defendants al-

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lege that any representations so made were in connection with the sale of said revenue bonds and that neither the plaintiff nor any of the bondholders of The Indianapolis Gas Company had the right to or did in fact rely upon any such representations or change or alter his or their position on account thereof.

These answering defendants further aver that prior to September 9, 1935, and before the transfer of the property and assets for which the Citizens Gas Company of Indianapolis was Trustee to the City of Indianapolis as Successor Trustee and towit, on the 10th day of July, 1935, The Indianapolis Gas Company was notified in writing by the Department of Utilities of the City of Indianapolis that the City of Indianapolis denied that the lease of September 30, 1913, was enforceable against it after the transfer of said property to said city; and said The Indianapolis Gas Company took no steps to prevent said transfer being made.

16. These answering defendants deny the averments of subdivision 16 of the bill of complaint that following the sale of said gas plant revenue bonds prior to September 9, 1935, the City of Indianapolis paid or provided for the payment directly to the holders of the Certificates of Beneficial Interest of the Citizens Gas Company of Indianapolis the sum of $3,125,000 in full satisfaction of the sums due them and paid or provided for payment direct to the holders of the preferred stock of the Citizens Gas Company of Indianapolis the sum of $1,050,000 in full payment of the sums due such preferred stockholders, and aver that the City of Indianapolis, by its Board of Directors for Utilities, caused the sums of $2,500,000 and of $1,050,000 to be paid to Citizens Gas Company of Indianapolis for the retirement of its common stock and redemption of its preferred stock, and thereupon said Company took appropriate steps to cause, and caused, the retirement of its common stock and redemption of its preferred stock. They admit that the Department of Utilities of the City of Indianapolis offered to pay to the holders of the outstanding bonds of the Citizens Gas Company the amounts due thereon together with interest to and including September 15, 1935, but allege that the amount of such bonds oustanding in the hands of the public at the time of such offer was only $2,745,000; but deny that such steps were taken with knowledge of any obligations of the Citizens Gas Company of Indianapolis under said lease of September 30, 1913, after such transfer, because no such obligation in fact existed, or with knowledge

that after the retirement of its capital stock said Citizens Gas Company would be without means for meeting or paying its obligations, but on the contrary allege that at the time, each and all of said steps were taken by the City of Indianap-
119 olis it was advised that said lease was not valid or enforceable against these answering defendants after the transfer of the property and assets of the Citizens Gas Company as original Trustee to the City of Indianapolis as Successor Trustee and further aver that the retirement of said stock and other obligations was made because of the fact that in the Todd case, referred to in subdivision 13 of plaintiff's bill of complaint, it had been held that a Public Charitable Trust existed in the property of the Citizens Gas Company subject to the precedent charge in favor of stockholders and creditors; that these answering defendants have been advised that while the mortgage securing the bonds of the Citizens Gas Company was not valid or within the power of the mortgagor to execute that the debt created thereby did constitute an equitable lien upon the property of said Company; that the payments so made to the holders of beneficial certificates, the holders of preferred stock and the owners of said bonds of the Citizens Gas Company of Indianapolis did not and could not in any way affect the ability of the Citizens Gas Company to perform its obligations, as the sums due were not due to the Citizens Gas Company, but on the contrary the sums due were due to persons who had a right to have such obligations discharged in connection with the transfer of the trust assets to the City of Indianapolis as Successor Trustee.

These answering defendants admit that they themselves gave no notice to the plaintiff herein or the holders of bonds of The Indianapolis Gas Company for whom the plaintiff is Trustee that said transfer was to be made, but allege on information and belief that the plaintiff had knowledge long prior to September 9, 1935, that said transfer was to be made and that many of the bondholders of The Indianapolis Gas Company had such notice and that neither the plaintiff nor such bondholders took any steps or commenced any action to prevent such transfer being made.

17. With respect to the averments in subdivision 17 of the bill of complaint. These answering defendants admit that on September 9, 1935, the Citizens Gas Company of Indianapolis executed two instruments of transfer and assignment, correct copies of which marked Exhibits E and F are made a

part of plaintiff's bill of complaint; but these answering defendants deny that in Exhibit E the transfer and assignment of the assets were made subject to the obligation of said lease of September 30, 1913. On the contrary, they aver that subdivisions 4 and 5 of said assignment contain the following provisions:

"4. This transfer and assignment also are made subject to all other legal obligations of said Company, including the legal obligations of said Company, if any, under each of the leases hereinafter mentioned.

5. The assignment of the lease agreement made and entered into the 30th day of September, 1913, between said Company and The Indianapolis Gas Company, whereby the latter company leased certain property for the manufacture and sale of gas and gas by-products to said Company for a term of ninety-nine years, and the assignment of the agreement of lease executed the 18th of July, 1933, between John J. 120 Reilly, Receiver of Majestic Building Company, and said Company, are expressly excluded from this instrument of transfer and assignment, separate instruments of assignment of such lease agreements being executed and delivered contemporaneously with this instrument.

This section in no way modifies or alters the provisions of the last preceding section that this transfer and assignment are made subject to all legal obligations of said Citizens Gas Company of Indianapolis, including the legal obligations of said Citizens Gas Company, if any, under each of said two leases."

That said above quoted language was included in said assignment because prior to the execution thereof these answering defendants had advised the Citizens Gas Company of Indianapolis that the City of Indianapolis would not accept any assignment of said lease of September 30, 1913, but would reject the same and the language of said assignment was therefore so written as to impose no obligation upon the City of Indianapolis unless such liability already existed as a matter of law, which these answering defendants deny.

That on the same day the Citizens Gas Company executed the instrument identified as Exhibit F, purporting to be an assignment of said lease of September 30, 1913, but that the City of Indianapolis and these answering defendants refused to accept the same and adopted a resolution, a correct copy of which, marked Exhibit G is made a part of plaintiff's bill of complaint.

18. With respect to subdivision 18 of the bill of complaint, these answering defendants admit that the City of Indianapolis accepted the assignment and transfer under the terms and conditions set forth in Exhibit E, but allege that they rejected the assignment of said lease of September 30, 1913, admit that they caused public notice of such rejection to be recorded in the office of the Recorder of Marion County, Indiana, and that a copy of said resolution marked Exhibit G is correctly set forth in plaintiff's bill of complaint.

These answering defendants further allege that on the same day, towit: September 9, 1935, they caused to be served on said The Indianapolis Gas Company a copy of the said resolution; also a copy of the rejection recorded in the office of the Recorder of Marion County, Indiana.

These answering defendants further allege that for a substantial time prior to September 9, 1935, they had asserted that said lease of Septetmber 30, 1913, was not valid and binding upon these answering defendants after the transfer of the assets and property of said public trust had been made to the City of Indianapolis as Successor Trustee and that continuously from no later than the 10th day of July, 1935, until the present date The Indianapolis Gas Company has been advised of this contention and has had full knowledge of the position of these answering defendants in respect of the validity of said lease.

These answering defendants further admit that the Board of Directors for Utilities of the Department of Utilities adopted a resolution referred to in subdivision 18 of the plaintiff's bill of complaint, a true and correct copy of which marked Exhibit C is filed herewith and made a part of
121 this answer; that said resolution was adopted September 9, 1935, and a copy thereof served on said The Indianapolis Gas Company on the same day. It is admitted that by the terms of said resolution the City of Indianapolis, in order to prevent an interruption of service to the consumers who were then receiving a supply of gas through the mains of The Indianapolis Gas Company did take possession of the plant of The Indianapolis Gas Company but for a temporary period and without prejudice to its rejection of said lease of September 30, 1913. These answering defendants allege that at the time such operation was commenced and continued there were approximately 50,000 persons whose available supply of gas could be obtained only through the mains of The Indianapolis Gas Company and that The Indianapolis Gas Com-

pany was fully aware of this situation. Said resolution contained the following statements:

"That the City by operating the property of The Indianapolis Gas Company for a period limited to six months, commencing September 9, 1935, did not assume or adopt said lease of September 30, 1913, nor recognize said lease as an obligation binding upon the city or its property; that the City was not to be considered as acting under said lease; that if The Indianapolis Gas Company refused to permit such temporary use of its property upon the terms stated in said resolution the City of Indianapolis would immediately discontinue such temporary use and relinquish the property of The Indianapolis Gas Company to that Company to be thenceforward operated by it; that The Indianapolis Gas Company was requested forthwith to state its position with respect to said temporary use."

These answering defendants further allege that said resolution contained an offer to pay for the temporary use of said property for a period of six months from September 9, 1935, by making payments similar to those contemplated and equal in amount to those provided for a like period of time by said lease between The Indianapolis Gas Company and the Citizens Gas Company; that on the 30th day of September, 1935, The Indianapolis Gas Company directed a letter to the Board of Directors for Utilities of the City of Indianapolis, a copy of which marked Exhibit D is attached hereto and made a part of this answer.

That in accordance with the agreement of The Indianapolis Gas Company contained in said letter of September 30, 1935, and relying upon the terms of said letter the City of Indianapolis paid, between September 30, 1935, and March 9, 1936, the sum of $292,809.95 to or for the benefit of said The Indianapolis Gas Company, of which said sum $171,575.00 was used in paying interest on bonds issued under the mortgage for which plaintiff is trustee. That thereafter and prior to March 9, 1936, by means of a letter dated March 2, 1936, addressed to The Indianapolis Gas Company and accepted by it on the same day, an agreement was entered into for the continued operations by the City of Indianapolis of the property of The Indianapolis Gas Company pending a compromise of the differences between said parties or a determination of that controversy by litigation; that a correct copy of said accepted proposition marked Exhibit E is attached hereto

and made a part of this answer; that by the terms of said 122 agreement it was agreed between the Department of Utilities of the City of Indianapolis and said The Indianapolis Gas Company that the City of Indianapolis could operate the plant and property of said Company without prejudice to its position or rights and that The Indianapolis Gas Company, by accepting the payments provided for thereunder, had not waived its right to assert that the lease of September 30, 1913, was a valid and binding lease upon the City of Indianapolis and said Department of Utilities or against any property of either.

That pursuant to the terms of said agreement of March 2, 1936, the City of Indianapolis paid to The Indianapolis Gas Company $171,575 on the 24th day of March, 1936, which sum was used in the payment of the semi-annual instalment of interest on the outstanding bonds of The Indianapolis Gas Company due March 30, 1936, being the bonds secured by the mortgage for which plaintiff is trustee; that also in pursuance of said agreement the city has deposited with The Indiana National Bank of Indianapolis as escrow agent prior to the filing of this answer the sum of $231,575.00 and has paid as taxes on behalf of The Indianapolis Gas Company the sum of $67,486.57.

On information and belief these answering defendants allege that the execution of said agreements and the payments made thereunder were with the knowledge and without the objection of the plaintiff and were with the knowledge and without the objection of a large number of the bondholders of The Indianapolis Gas Company.

These answering defendants allege that neither the plaintiff nor any bondholder at any time prior to the commencement of this action served any notice on these answering defendants or on The Indiana National Bank, Escrow Agent, under said agreement, objecting to or disapproving in whole or in part any of the acts or things done on their behalf by The Indianapolis Gas Company, all as alleged in this paragraph of answer; that the bondholders of The Indianapolis Gas Company have accepted benefits under the terms of said agreement, that is to say, the receipt of more than $350,000 in cash which they have received and retained and which has never been tendered or repaid to the City of Indianapolis; that the plaintiff and the bondholders whom it represents cannot now be heard to say that these agreements are invalid as to them and in this connection the answering defendants aver

that prior to the commencement of this action the plaintiff and the bondholders for whom it is purporting to act had full knowledge or notice of the facts alleged in this paragraph of answer and made no attempt to restore to the City of Indianapolis any part of the consideration received by virtue of such agreement by the bondholders whom it represents.

These answering defendants admit that shortly after September 9, 1935, they suggested to The Indianapolis Gas Company the possibility of a revision by mutual agreement of said lease, but deny that any negotiations looking towards such an agreement were entered into; and aver the facts in that connection to be as follows:

(a) That it was soon realized by these answering defendants and The Indianapolis Gas Company that on account of income taxation of stockholders and bondholders of the
123 Indianapolis Gas Company, no such revision could as a practical matter be accomplished; that thereupon these answering defendants expressed to The Indianapolis Gas Company a willingness to negotiate for the purchase from The Indianapolis Gas Company all of its plant and property used or useful in manufacturing or furnishing gas or by-products to the City of Indianapolis if reasonable terms for the purchase of such property could be agreed upon and the property transferred to the City of Indianapolis with the consent of The Indianapolis Gas Company, its stockholders and bondholders, but not otherwise; that such proposal necessarily involved a termination of said lease if a satisfactory agreement could be entered into, but did not involve any revision of the existing lease or any cancellation of the lease except upon purchase by the City of the plant of The Indianapolis Gas Company.

(b) That it was at all times definitely stated to The Indianapolis Gas Company that no such proposal for the purchase of the plant or the property of such Company would be made unless these answering defendants were advised that a request for such proposal was desired, not only by the stockholders of The Indianapolis Gas Company, but by a substantial portion of the bondholders of such Company.

(c) That on the 10th day of February, 1936, the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis did make a proposal to The Indianapolis Gas Company for the acquisition of its property upon terms therein stated, which proposal was made at the request of The Indianapolis Gas Company, and before such proposal

was made these answering defendants were advised by The Indianapolis Gas Company and believed such advice to be true that a substantial number, though not all, of the bondholders and stockholders of The Indnanapolis Gas Company desired such a proposal to be made.

These answering defendants aver on information and belief that all or a portion of the bondholders at whose instance and request the plaintiff claims it has commenced this action had knowledge of such negotiations as were pending and that the proposal made was invited by a substantial group of bondholders and stockholders of The Indianapolis Gas Company

19. With respect to subdivision 19 of this complaint, these answering defendants admit that upon the execution and delivery of said lease of September 30, 1913, the same became subject to the deed of trust in which plaintiff is Successor Trustee and to such provisions thereof as are valid in law, but they deny that said lease was ever valid or enforceable for any period of time after the transfer of the property of said trust to the City of Indianapolis as Successor Trustee; they admit that the lease to the extent and for the term for which it was valid, if at all, but not otherwise, became a part of the trust estate covered by said mortgage to the same extent as though it had been executed and delivered prior to the execution and delivery of said deed of trust, except they aver that the plaintiff or its predecessor trustee and the bondholders who it represents had by the terms of said lease of September 124 30, 1913, due notice and warning of the probable invalidity of said lease for a term longer than the period of the franchise contract heretofore referred to which expired on August 30, 1930, and such additional peciod as was reasonably necessary within which to complete the transfer of the trust assets to the City of Indianapolis as Successor Trustee and allege that for the reasons hereinafter specifically set forth in subdivision 27 of this answer said lease, if valid, was not valid for a longer period.

These answering defendants admit that the covenant in said lease of September 30, 1913, requiring the payment of rent was made for the benefit of The Indianapolis Gas Company and for the indirect benefit, so far as the same was applicable to the payment of interest on the mortgage bonds of the bondholders, but deny that such covenant was valid for a period of 99 years or binding upon the City of Indianapolis as Successor Trustee; and deny that the mortgage trustee is vested with a distinct and independent right to enforce the

performance of the lessee's obligations and engagements under said lease in so far as the same directly affect any supposed rights of the holders of bonds, but on the contrary aver that The Indianapolis Gas Company, in the first instance, is the sole person with any legal right to enforce whatever obligations may exist under said lease of September 30, 1913, and that the plaintiff has no standing to seek to enforce the same until there has been a refusal on the part of The Indianapolis Gas Company so to do, which these answering defendants allege on information and belief has not occurred. They therefore allege that the plaintiff has no capacity to sue in this cause and that as hereinafter more particularly averred this suit is a collusive one and cannot be maintained by this plaintiff.

20. With respect to the averments of subdivision 20 of plaintiff's bill of complaint, these answering defendants admit that the lease of September 30, 1913, if valid at all, was valid and enforceable against Citizens Gas Company according to its provisions, during the term of the trusteeship of the Citizens Gas Company and until September 9, 1935, and aver that all payments of rental due thereunder have been duly made, but for the reasons hereinbefore specifically stated these answering defendants deny that the final decree and judgment in the case of *Fishback* v. *The Public Service Commission of Indiana* and in the case of *Williams* v. *The Citizens Gas Company of Indianapolis, et al.*, estop these answering defendants from asserting the invalidity of said lease on and after September 9, 1935. With respect to the decree in *Todd v. Citizens Gas Company*, referred to in subdivision 20 of the plaintiff's bill of complaint, and more particularly described in subdivision 13 thereof, these answering defendants aver that no issue was presented for the determination of the Court or adjudicated by the Court in that cause with respect to the validity of the lease of September 30, 1913, either before or after September 9, 1935, and aver that the judgment and decree of the United States District Court for the Southern District of Indiana in said cause is not binding or res adjudicata on these answering defendants as to any questions involved in this cause, for each of the following reasons:

First. The Indianapolis Gas Company was not named as a party in the Todd suit and the bill of complaint contains no averments showing that it is entitled by representation to rely on any adjudication in that cause as an estoppel.

Second. The cause of action in the Todd case and in this case are essentially different and are not the same causes of action. The question involved in the Todd case and actually determined by the Court was whether a Public Charitable Trust was created in favor of the then gas consumers of the City of Indianapolis and the prospective users of such gas by means of the franchise ordinance of August 30, 1905, and the other relevant documents in connection therewith, whereas, the cause of action in this case is the question of the validity of the lease executed September 30, 1913, and the right of the Trustee of a Public Charitable Trust, to execute a lease as lessee which attempts to bind the trust estate by onerous terms and conditions for a period of 77 years after the expiration of the Trustee's term of office, which term was definitely fixed by the trust instrument. The causes of action not being the same there could be no estoppel by way of judgment except as to the issues actually tried and adjudicated by the Court in the Todd case. These answering defendants allege that the Court in the Todd case did not hear, determine, decide or adjudicate the questions involved in this case; that no issue as to such questions was even presented to the Court for its determination and that no evidence was heard or decision made with respect to the questions here involved.

Third. The estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered and does not prevent a re-examination of the same questions even between the same parties, where in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the parties. These answering defendants aver that the Todd case was heard, tried, determined and adjudicated prior to September 9, 1935, and that the facts and circumstances have been altered and changed since the date of said adjudication by reason of the transfer of the property of the trust on said last named date to the City of Indianapolis as Succeeding Trustee.

Fourth. That there was not in force at the date of the entry of the final decree in the Todd case any Federal Declaratory Judgment Act which authorized or empowered the Court to decide any question involving any difference between The Indianapolis Gas Company and the City of Indianapolis with respect to the rights of the parties under said lease of September 30, 1913, prior to a refusal upon the part of the City of Indianapolis to be bound by the terms of said lease.

These answering defendants further aver that there was

not at the date of the judgment and decree in the Todd case any existing controversy between The Indianapolis Gas Company and its stockholders or bondholders or this plaintiff and these answering defendants, or any of them, with respect to the validity of said lease.

21. With respect to the averments of subdivision 21 of plaintiff's bill of complaint, these answering defendants admit that the Citizens Gas Company operated under said 126 lease and operated the property included thereunder from the 28th day of November, 1913, to and including the 8th day of September, 1935, and received the income from such operations, but allege that during all of said time The Indianapolis Gas Company received the rentals contracted for and that the benefits to The Indianapolis Gas Company largely exceeded the benefits to the City of Indianapolis; they admit that the Citizens Gas Company of Indianapolis as Trustee requested the Trustee under the mortgage of The Indianapolis Gas Company to authenticate and deliver additional bonds to reimburse the Citizens Gas Company for capital expenditures on account of extensions and betterments to the plant and system of the Citizens Gas Company, but allege that the Citizens Gas Company received reimbursement therefor only to the extent of ninety per cent of the value of said improvements; and allege that the title to all of the improvements so made vested in The Indianapolis Gas Company; they deny that any of the answering defendants ever caused said bonds to be distributed and sold as bonds secured by a 99 year lease.

These answering defendants deny that they are estopped to assert that said lease of September 30, 1913, is not a valid and binding obligation on these answering defendants from and after September 9, 1935.

22. With respect to the averments of subdivision 22 of the plaintiff's bill of complaint, these answering defendants deny that by the sale of revenue bonds or by any representations made in connection with said bonds, or by acceptance of the assignment identified as Exhibit E and attached to plaintiff's bill of complaint, or by the retirement of the Certificates of Beneficial Interest and the preferred stock of Citizens Gas Company of Indianapolis or by the payment of the bonds of the Citizens Gas Company that these answering defendants have estopped themselves from asserting and maintaining that said lease of September 30, 1913, is unenforceable against these answering defendants after September 9, 1935;

and deny that in equity and good conscience they have no right to assert the invalidity of said lease at the present time; and deny that they are under any obligation to pay the plaintiff herein any sum of money whatever on account of said lease.

These answering defendants direct the Court's attention to the preceding averments of this answer wherein all the facts in connection with the averments contained in the 22nd subdivision of the plaintiff's bill of complaint have been admitted to the extent that they are true, denied or explained.

23. These answering defendants admit the averments of the 23rd subdivision of plaintiff's bill of complaint that the City of Indianapolis and all of the answering defendants denied on September 9, 1935, and continuously have since denied that the lease of September 30, 1913, is a binding and enforceable obligation against these answering defendants, or any of them, after the transfer of the trust property from the Citizens Gas Company of Indianapolis, Trustee, to the City of Indianapolis as Successor Trustee, which transfer occurred on September 9, 1935. These answering defendants admit that on September 30, 1935, in a letter of that date,
127 the City of Indianapolis did advise The Indianapolis Gas Company that it was willing to undertake the negotiation of a new lease, but alleges that negotiations to that end were never entered into by The Indianapolis Gas Company and these answering defendants, or any of them; they further aver that on February 10, 1936, the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis, at the request of The Indianapolis Gas Company, made a proposal to it looking towards the purchase of the entire plant and property of The Indianapolis Gas Company and as a part of such purchase the extinguishment of such lease, but that the City of Indianapolis has never been willing to enter into any negotiations with The Indianapolis Gas Company without the consent and approval of its bondholders or properly constituted representatives thereof and so advised The Indianapolis Gas Company repeatedly prior to the commencement of this action. These answering defendants deny that any negotiations have been undertaken or conducted by the City of Indianapolis and The Indianapolis Gas Company which would have the effect of destroying or wasting or impinging upon any rights of said trust or which would damage the bondholders of The Indianapolis Gas Company.

With respect to subdivision 24 of the bill of complaint, these answering defendants admits that an agreement was executed between The Indianapolis Gas Company and the Board of Directors for Utilities of the City of Indianapolis on March 2nd, 1936, all as hereinbefore specifically alleged, a copy of which marked Exhibit E is attached to and made a part of this answer, but these answering defendants deny that said agreement deprived the plaintiff or the bondholders of The Indianapolis Gas Company of valuable property rights and allege that at and prior to the date of the execution of the agreement the City of Indianapolis had declined to pay the sum of $171,575, which was the interest due on The Indianapolis Gas Company bonds on March 30, 1936, and was declining and had declined to make any further payments to or for the benefit of The Indianapolis Gas Company; that The Indianapolis Gas Company, by the execution of said agreement reserved to itself the full right to assert the validity of the lease of September 30, 1913, procured a payment of $171,575, which was applied in payment of interest on the bonds under the mortgage for which the plaintiff is trustee and that said bondholders accepted said interest and have never repaid or offered to repay the same to the City of Indianapolis. In addition, as hereinbefore specifically alleged, the City of Indianapolis has paid to the date of the filing of this answer $231,575.00 to The Indiana National Bank as escrow agent for The Indianapolis Gas Company, a large portion of said sum being for the benefit of the bondholders of said Company, and these answering defendants allege on information and belief that the plaintiff and the bondholders which it represents had full knowledge prior to the commencement of this action of the existence of said agreement, the contents thereof and the payments made to The Indiana National Bank as Trustee in pursuance thereof and that under the terms of said agreement the City of Indianapolis, through its Department of Utilities, was to
128 continue to operate the property owned by The Indianapolis Gas Company and never repudiated the same or served any notice on the City of Indianapolis or these answering defendants of their refusal to be found thereby, but with their knowledge, approval and consent and by their action they have induced the City of Indianapolis to continue to make said payments and to operate the property of The Indianapolis Gas Company and are now estopped by their own conduct from contesting or challenging said agreement

of March 2nd, 1936, or from asserting that it was made in violation of their rights or from claiming that the execution of said contract or the steps taken thereunder violated the rights of the plaintiff or said bondholders if any they have.

These answering defendants expressly deny that the property of The Indianapolis Gas Company now has any good will or going concern value of any kind.

These answering defendants further deny, for reasons hereafter in subdivision 27 of this answer stated, that said lease repeatedly referred to as a 99 year lease has any validity or binding effect upon these answering defendants after September 9, 1935.

25. These answering defendants deny that at the time this bill of complaint was filed, or for a long time prior thereto, The Indianapolis Gas Company and the City of Indianapolis were engaged in the negotiation of any agreement, but allege that the proposition made by the City of Indianapolis to The Indianapolis Gas Company under date of February 10, 1936, had never been accepted by said Gas Company and no counter proposal had ever been made and that the City of Indianapolis had been advised prior to the commencement of this action by The Indianapolis Gas Company that the proposal so made was unacceptable to the bondholders and stockholders of The Indianapolis Gas Company. These answering defendants further deny that they have at any time attempted to negotiate or have been willing to negotiate and conclude any settlement of the controversy between The Indianapolis Gas Company and the City of Indianapolis without the full consent and approval of the bondholders of The Indianapolis Gas Company and appropriate action evidencing such consent on the part of the bondholders as well as the stockholders of said Indianapolis Gas Company and allege on information and belief that these facts were known to the plaintiff prior to the commencement of this action.

26. These answering defendants aver on information and belief that the plaintiff has no right to maintain this action and that this suit is a collusive one because of the following, all of which are alleged on information and belief:

(a) That the controversy in this cause exists solely and exclusively between The Indianapolis Gas Company and the City of Indianapolis.

(b) That The Indianapolis Gas Company has fairly and in good faith at all times represented the interests, both of

its stockholders and bondholders, in said controversy, and has continuously asserted and is now asserting that the lease of September 30, 1913, is a valid and binding obligation upon these answering defendants for the full term thereof and
129 has at no time taken any action which was inconsistent with that position or precluded it from asserting the validity of said lease in litigation or otherwise.

(c) That no demand was made on The Indianapolis Gas Company to commence an action in the courts of the State of Indiana to obtain a declaratory judgment of the validity of said lease or to bring any other proceeding, legal or equitable, to accomplish that purpose prior to the commencement of this action, or if in the alternative such a demand was made it was with the understanding in advance that the demand would be refused in order to enable the plaintiff to maintain this action. That The Indianapolis Gas Company has at all times been able and willing to commence and prosecute such actions as were necessary for the establishment of its rights.

(d) That the action taken by The Indianapolis Gas Company in entering into the agreements which it did enter into with the City of Indianapolis were in good faith and were calculated to and did inure to the benefit of the plaintiff and to the bondholders whom it represents and that, as hereinbefore averred, the bondholders accepted the benefits of said agreements and have continued to retain such benefits including the payment of interest to them in a sum of approximately $350,000 and the plaintiff with full knowledge of the existence and character of said agreements prior to the commencement of this action has never attempted to repudiate or rescind the same and has never served notice on the City of Indianapolis that it is not bound thereby.

(e) That The Indianapolis Gas Company has cooperated with plaintiff in the preparation of the complaint filed in this cause.

27. These answering defendants allege that said lease of September 30, 1913, is not a valid or enforceable obligation against these answering defendants or the property of said Public Charitable Trust from and after September 9, 1935, for each of the following reasons:

First. The Citizens Gas Company of Indianapolis at the date of the execution of said lease was the Trustee of a Public Charitable Trust and had no express or implied power

as such Trustee to execute said lease and to agree to the terms and conditions therein contained, if at all, for any period of time beyond the terms for which it was Trustee and particularly for a period of 77 years thereafter; that the term of said lease in and of itself under the conditions stated rendered said lease invalid; and the effort to bind its successor Trustee, which is a municipal corporation, to perform the terms and conditions of said lease was ultra vires and void.

Second. That said lease contains, among others, the following provisions which are illegal and unenforceable:

(a) An agreement that the City of Indianapolis as Successor Trustee will re-finance the present outstanding bond issue of The Indianapolis Gas Company in the principal amount of approximately $6,881,000 during the remaining 77 years of the term of said lease and if the bonds of that Company should sell below par that it will pay the difference to The Indianapolis Gas Company.

130 (b) An agreement for the increase in the annual rental of $10,000 a year when gas is sold at more than 45c and less than 50c a 1,000 cubic feet and an additional increase of $5,000 a year when gas is sold at 45c or less per 1,000 cubic feet.

(c) An agreement on the part of the Successor Trustee at all events without respect to whether payment therefor can be made from the revenues of The Indianapolis Gas property and without respect to whether by making such payments the City of Indiaanpolis would become indebted beyond its constitutional debt limitation to pay the rent reserved which, including payments for the benefit of the stockholders and bondholders of The Indianapolis Gas Company and taxes, has average almost $600,000 per annum for five years immediately preceding September 9, 1935.

Third. That at the time said lease was executed, on the 30th day of September, 1913, and continuously ever since, the City of Indianapolis was and has been a city of the first class. That at the time said contract was made there was in force in Indiana the following statute:

"No executive department, officer or employee thereof shall have power to bind such city to any contract or agreement, or in any other way, to any extent beyond the amount of money at the time already appropriate by ordinance for the purposes of such department; and all contracts and

agreements, express or implied, and all obligations of any and every sort, beyond such existing appropriations are declared to be absolutely void: Provided, That the Board of Public Works shall have power to contract with any individual or corporation for lighting the streets, alleys and other public places or for supplying the city with gas, water, steam, power, heat or electricity, and for the collection, removal and disposal of garbage, ashes or refuse, on such terms and for such times, not exceeding the term fixed by Section 254 (48-7302) of this Act, as may be agreed upon; but any such contract shall be submitted to the Common Council of such city and approved by ordinance before the same shall take effect, and, if so approved, shall immediately become effective: Provided, further, That nothing herein contained shall prevent any such department from issuing any bond or other obligation expressly authorized by this act and provided for by ordinance." (Section 48-1507 Burns' Ind. Statutes Annotated 1933.)

Section 48-7302 referred to in the above quoted statute confers authority upon cities to enter into contracts to furnish the city

"with water, motive power, heat or light, * * *."

That the statute referred to contains the following proviso:

"That no such contract shall be entered into by any such city or town for furnishing such city or town and its inhabitants with water, motive power, drainage, sewerage, heat or light, upon or along the streets of such city or town for a term longer than twenty-five (25) years: and, provided further, that before any such contract shall be made by any city of the first, second, third or fourth class such con-
131 tract shall be first agreed to by the Board of Public Works of said city, after which agreement, such Board shall cause a proper ordinance approving and confirming such contract to be presented for adoption by the Common Council of such city."

These answering defendants aver that at and prior to the execution of said lease of September 30, 1913, no appropriation had ever been made by ordinance by the City of Indianapolis to make the payments called for under the terms of said lease and that said lease, prior to its execution, was not agreed to by the Board of Public Works of said City nor was any ordinance ever adopted by the City of Indianapolis approving or confirming said lease, adopting the provisions thereof or attempting to bind the City of Indian-

apolis to the performance of such lease; that the Public Service Commission Act of Indiana did not repeal directly or by implication the provisions of the statutes above referred to and that the same were on September 30, 1913, and continuously ever since have been in full force and effect.

That at no time subsequent to September 30, 1913, has the City of Indianapolis made any appropriation for the purpose of paying any sum due under said lease of September 30, 1913, nor has its Board of Public Works of its Common Council attempted to ratify, approve or confirm said lease; that under the laws of Indiana said lease, when it was executed without such approval, was absolutely void and could not be ratified.

Fourth. That said lease of September 30, 1913, was and is onerous and burdensome upon the City of Indianapolis and the property of said Public Charitable Trust and for that reason was a lease which the initial trustee had no power to make beyond the definitely fixed term of its trusteeship; that among its burdensome provisions are the following:

(a) The payment of annual rent in a sum largely exceeding a fair return on the fair value of the property of The Indianapolis Gas Company.

(b) The requirement heretofore referred to that the Lessee should during the entire term of the lease re-finance the bond issue of The Indianapolis Gas Company and if it should sell said bonds below par to pay the difference to said The Indianapolis Gas Company.

(c) The requirements heretofore referred to penalizing the Lessee in the event it reduced the price of gas.

Fifth. That said lease being burdensome and onerous in its character, as hereinbefore averred, was not binding upon the City of Indianapolis as Successor Trustee and did not constitute an asset of said trust which it was bound to accept, but on the contrary it had the right under the law of Indiana to reject the same.

Sixth. That said lease was executed in violation of the terms of said Public Charitable Trust in that under the terms of said trust the Citizens Gas Company was required to dissolve upon the termination of its trusteeship whereas under the terms of said lease it is required to continue its corporate existence for the entire term of said lease, or to cause
132 its property to be conveyed to another corporation which shall maintain its existence for the full franchise period.

counterclaim.

Counter-Claim.

These answering defendants by way of counter-claim complain of the plaintiff, The Chase National Bank of the City of New York, as Trustee, The Indianapolis Gas Company, an Indiana corporation, and Citizens Gas Company of Indianapolis, an Indiana corporation, and by way of cross counter-claim allege:

That the plaintiff, The Chase National Bank of the City of New York, is a corporation organized and existing under and by virtue of the laws of New York and is a citizen and resident of the State of New York; that it is a successor trustee under a deed of trust executed on the 1st day of October, 1902, by the defendant, The Indianapolis Gas Company, to secure the payment of the principal and interest of certain bonds which are now outstanding in the hands of the public in the total principal amount of $6,881,000.

That on the 30th day of September, 1913, the defendants, The Indianapolis Gas Company and Citizens Gas Company of Indianapolis, entered into a written lease for a term of 99 years, a copy of which written lease marked Exhibit B is made a part of the plaintiff's bill of complaint and by reference a part of this counter-claim.

That at the date of the execution of said lease said Citizens Gas Company of Indianapolis, the lessee therein, was not the absolute owner of the property consisting of a gas manufacturing and distributing plant which it was then operating, but was merely the initial trustee of a public charitable trust, created pursuant to the terms and conditions of a certain franchise, Article of Incorporation and By-laws of said Citizens Gas Company of Indianapolis, copies of which marked Exhibit C are made part of plaintiff's bill of complaint, and by reference a part of this counter-claim; that on said September 30, 1913, when said lease was executed to the Citizens Gas Company of Indianapolis, its terms of trusteeship of said public charitable trust was by the relevant documents hereinbefore referred to limited to the date when said franchise contract expired, to wit: August 30, 1930, and such time thereafter as was necessary for a transfer of said trust property to the successor trustee, the City of Indianapolis.

That said transfer was made on September 9, 1935, and that said Citizens Gas Company of Indianapolis is no longer the trustee of said public charitable trust.

There is a present existing controversy between this counter-claimant and defendant The Indianapolis Gas Company, as to whether said lease of September 30th, 1913, is a valid and enforceable obligation against these counter-claimants or the property of said public charitable trust from and after September 9, 1935; that The Indianapolis Gas Company has asserted for more than a year continuously last past and is now asserting that said lease is valid and binding upon these counter-claimants for the term thereof and that counter-claimants, and particularly the City of Indianapolis, are liable with respect to the lessee's covenants under
133 said lease as fully as if the City of Indianapolis had expressly accepted an assignment of said lease.

That the defendant Citizens Gas Company of Indianapolis has an interest in the determination of said controversy because on September 9, 1935, it tendered to these counter-claimants an assignment of said lease, a copy of which marked Exhibit F is made a part of the plaintiff's complaint and by reference a part of this counter-claim, which assignment these counter-claimants refused to accept.

That the plaintiff, The Chase National Bank of the City of New York as Trustee under said Mortgage and Deed of Trust securing bonds of The Indianapolis Gas Company, although it has no legal right so to do, is asserting that said lease is valid and binding, and is for that reason made a party defendant to this counter-claim.

These answering defendants aver that said lease of September 30, 1913, is not a valid or enforceable obligation against these answering defendants or the property of said public charitable trust from and after September 9, 1935, for each of the following reasons:

First. The Citizens Gas Company of Indianapolis at the date of the execution of said lease was the Trustee of a Public Charitable Trust and had no express or implied power as such Trustee to execute said lease and to agree to the terms and conditions therein contained for any period of time beyond the term for which it was Trustee and particularly for a period of 77 years thereafter; that the term of said lease in and of itself under the conditions stated rendered said lease invalid; and the effort to bind its successor Trustee, which is a municipal corporation, to perform the terms and conditions of said lease was ultra vires and void.

Second. That said lease contains, among others, the following provisions which are illegal and unenforceable:

(a) An agreement that the City of Indianapolis as Successor Trustee will refinance the present outstanding bond issue of The Indianapolis Gas Company in the principal amount of $6,881,000 during the remaining 77 years of the term of said lease and if the bonds of that Company should sell below par that it will pay the difference to The Indianapolis Gas Company.

(b) An agreement for the increase in the annual rental of $10,000 a year when gas is sold at more than 45c and less than 50c a 1,000 cubic feet and an additional increase of $5,000 a year when gas is sold at 45c or less per 1,000 cubic feet.

(c) An agreement on the part of the Successor Trustee at all events without respect to whether payment therefor can be made from the revenues of The Indianapolis Gas property and without respect to whether by making such payments the City of Indianapolis would become indebted beyond its constitutional debt limitation to pay the rent reserved which, including payments for the benefit of the stockholders and bondholders of The Indianapolis Gas Company and taxes, has averaged almost $600,000 per annum for the five years immediately preceding September 9, 1935.

Third. That at the time said lease was executed, on
134 the 30th day of September, 1913, and continuously ever since, the City of Indianapolis was and has been a city of the first class. That at the time said contract was made there was in force in Indiana the following statute:

"No executive department, officer or employee thereof shall have power to bind such city to any contract or agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purposes of such department; and all contracts and agreements, express or implied, and all obligations of any and every sort, beyond such existing appropriations are declared to be absolutely void: Provided, That the Board of Public Works shall have power to contract with any individual or corporation for lighting the streets, alleys and other public places or for supplying the city with gas, water, steam, power, heat or electricity, and for the collection, removal and disposal of garbage, ashes or refuse, on such terms and for such times, not exceeding the term fixed by Section 254 (48-7302) of this act, as may be agreed upon; but any such contract shall be submitted to the Common Council of such city and approved by ordinance before the same shall take effect, and.

if so approved, shall immediately become effective: Provided, further, that nothing herein contained shall prevent any such department from issuing any bond or other obligation expressly authorized by this act and provided for by ordinance." (Section 48-1507 Burns' Ind. Statutes Annotated 1933, Column 9.)

Section 48-7302 referred to in the above quoted statute confers authority upon cities to enter into contracts to furnish the city "with water, motive power, heat or light, * * * * * * *"

That the statute referred to contains the following proviso: "That no such contract shall be entered into by any such city or town for furnishing such city or town and its inhabitants with water, motive power, drainage, sewerage, heat or light, upon or along the streets of such city or town for a term longer than twenty-five (25) years; and, provided further, that before any such contract shall be made by any city of the first, second, third or fourth class such contract shall be first agreed to by the Board of Public Works of said city, after which agreement, such Board shall cause a proper ordinance approving and confirming such contract to be presented for adoption by the Common Council of such city."

These answering defendants aver that at and prior to the execution of said lease of September 30, 1913, no appropriation had ever been made by ordinance by the City of Indianapolis to make the payments called for under the terms of said lease and that said lease, prior to its execution was not agreed to by the Board of Public Works of said City nor was any ordinance ever adopted by the City of Indianapolis approving or confirming said lease, adopting the provisions thereof or attempting to bind the City of Indianapolis to the performance of such lease; that the Public Service Commission Act of Indiana did not repeal directly or by implication the provisions of the statutes above referred to and that the same were on September 30, 1913, and continuously ever since have been in full force and effect.

135 That at no time subsequent to September 30, 1913, has the City of Indianapolis made any appropriation for the purpose of paying any sum due under said lease of September 30, 1913, nor has its Board of Public Works or its Common Council attempted to ratify, approve or confirm said lease; that under the laws of Indiana said lease, when it was executed without such approval, was absolutely void and could not be ratified.

Fourth. That said lease of September 30, 1913, was and is onerous and burdensome upon the City of Indianapolis and the property of said Public Charitable Trust and for that reason was a lease which the initial trustee had no power to make beyond the definitely fixed term of its trusteeship; that among its burdensome provisions are the following:

(a) The payment of annual rent in a sum largely exceeding a fair return on the fair value of the property of The Indianapolis Gas Company.

(b) The requirement heretofore referred to that the Lessee should during the entire term of the lease re-finance the bond issue of The Indianapolis Gas Company and if it should sell said bonds below par to pay the difference to said The Indianapolis Gas Company.

(c) The requirement heretofore referred to penalizing the Lessee in the event it reduced the price of gas.

Fifth. That said lease being burdensome and onerous in its character, as hereinbefore averred, was not binding upon the City of Indianapolis as successor Trustee and did not constitute an asset of said trust which it was bound to accept, but on the contrary it had the right under the law of Indiana to reject the same.

Sixth. That said lease was executed in violation of the terms of said Public Charitable Trust in that under the terms of said trust the Citizens Gas Company was required to dissolve upon the termination of its trusteeship whereas under the terms of said lease it is required to continue its corporate existence for the entire term of said lease, or to cause its property to be conveyed to another corporation which shall maintain its existence for the full franchise period.

That these counter-claimants are entitled to a judgment and declaration of this Court that said lease of September 30, 1913, is not a valid and binding obligation against counter-claimants, but on the contrary is invalid, void and unenforceable against counter-claimants and against said trust property taken over by the City of Indianapolis as successor Trustee.

Wherefore, these answering defendants and counter-claimants pray:

1. That plaintiff's bill of complaint be dismissed for want of equity.

2. That this Court adjudge and declare:

(a) That these answering defendants and counter-claimants are not nor is any of them liable under the covenants of

said lease and that the property of said Public Charitable
136 Trust taken over by these answering defendants, or any of them, is not subject to the terms and provisions of said lease.

(b) That said lease of September 30, 1913, is invalid and void as against these answering defendants from and after September 9, 1935.

(c) That said lease of September 30, 1913, was void as against the City of Indianapolis from the date of its execution because made in violation of the Indiana statutes.

(d) That the use of the property of The Indianapolis Gas Company by these answering defendants since September 9, 1935, has been with the consent and approval of The Indianapolis Gas Company and binding upon its bondholders and this plaintiff and that no estoppel arises out of such operation against these answering defendants to deny the validity of said lease.

(e) That the agreement of March 2, 1936, between defendants, The City of Indianapolis and The Indianapolis Gas Company is valid and binding according to its terms upon plaintiff and defendant, The Indianapolis Gas Company, and that the continued use by defendant, the City of Indianapolis, of property of The Indianapolis Gas Company under and pursuant to the terms of such agreement is binding upon not only the defendant, The Indianapolis Gas Company, but also the plaintiff and the bondholders represented by it.

(f) That neither in the Todd, the Fishback nor the Williams cases was there any adjudication that said lease was binding upon these answering defendants at any time after the transfer of the trust property to the City of Indianapolis as successor Trustee.

3. For the costs of this action and all other proper relief agreeable to equity and good conscience.

James E. Deery,
Corporation Counsel.
Wm. H. Thompson,
Albert L. Rabb,
Thomas D. Stevenson,
Solicitors for said Answering Defendants.

October 1, 1936.

137 Exhibit A.

Notice of Indianapolis Gas Plant Revenue Bond Offering.

Notice is hereby given that the undersigned as City Controller of the City of Indianapolis, Indiana, by authority of the Board of Directors for Utilities of the City of Indianapolis, Indiana, will on Tuesday, May 28, 1935, between the hours of 10 a. m. and 12 noon, at his office in the City Hall in said City, receive written sealed bids in appropriate form for an offering of Indianapolis Gas Plant Revenue Bonds in the aggregate principal amount of Eight Million Dollars ($8,000,000). Such bids will be opened at noon on said date, and such bonds will be sold to the highest bidder, being the maker of the bid which will give the City the lowest interest cost for the moneys so borrowed; the right to reject any and all bids being reserved. Bids for less than all of the bonds of said issue will not be accepted. Bids will be accepted or rejected with reasonable promptness. Bids may be conditioned upon the approval of counsel to be selected and employed by the bidder as to the legality of the issue. Each bidder shall make a deposit of One Hundred Thousand Dollars ($100,000) in the form of a check certified by a responsible bank or trust company located in the City of Indianapolis, Indiana, or in the States of New York, Illinois, or Ohio, payable to the order of the City Controller of the City of Indianapolis, Indiana, such checks to be returned to those bidders whose checks are not accepted. In event a successful bidder fails to perform the terms of his bid, the City shall retain the proceeds of his check as liquidated damages; and by making deposit of such check with the City Controller the bidder shall be deemed to have agreed that the amount of such liquidated damages is reasonable.

The proceeds of such bonds are to be used for the taking over of certain property owned by Citizens Gas Company of Indianapolis and/or in which it has an interest, including the redemption or extinguishment of its capital stock and/or for the payment of certain of its obligations and for the necessary expense incurred in connection therewith, including the expense of the City incident to obtaining such funds, as well as for the purpose of making certain betterments, improvements, extensions and additions to such property.

Said bonds are to be payable solely from the income and revenues of such utility property and are not to be an in-

debtedness of the City payable out of taxes. Said bonds are to be issued in denominations of One Thousand Dollars each, and numbered consecutively, commencing with 1. They are to be registerable as to principal, but not as to interest. They are to be exempt from taxation as to principal and income as prescribed by the Indiana statutes. Payment of their principal and interest are secured by a charge upon all the revenues from the operation of all of the gas system owned and/or operated by the City of Indianapolis.

Said bonds are to be issued under the authority of the Indiana statutes, including Chapter 77 of the Acts of 1929, Chapter 67 of the Acts of 1931, and Chapter 125 of the Acts of 1933 as amended by Chapter 311 of the Acts of 1935 138 of the General Assembly of the State of Indiana (the latter having been House Bill 469).

Said bonds are to become due at such time or times, and in such manner with such accompanying pertinent provisions, as shall be specified by the terms of the accepted bid; but there shall be no bonds maturing in less than two (2) nor more than forty (40) years from the date of issuance.

The interest rate upon said bonds is to be that fixed by the terms of the accepted bid therefor, but shall not exceed five and one-half per cent per annum, and shall be evidenced by coupons attached to said bonds and payable semi-annually.

Said bonds are not to be sold at a discount in excess of five (5) per cent.

Both bonds and interest coupons are to be payable at the office of the Treasurer of Marion County, Indiana, as ex-officio Treasurer of the City of Indianapolis, and/or at such bank or trust company or office, whether in Indianapolis, or in Chicago, Illinois, or New York City, New York, or elsewhere, as may be agreed upon between said Board and the successful bidder for said bonds, or in the absence of such an agreement specified by said Board.

Said bonds are to be dated as of such date as may be agreed upon between said Board and the successful bidder, not inconsistent with law.

Bids shall specify also either:

(1) Serial maturities for said bonds, but no bonds to mature in less than two (2) years from the date of their issuance, and the ultimate maturity date to be between twenty-nine (29) and forty (40) years from their date if issuance; the City to agree to pay not less than Four Hundred and Fifty Thousand Dollars ($450,000) and not more than Five Hundred Thou-

sand Dollars ($500,000), the amount to be specified in the bid, each year after the first two years from the date of said bonds, out of the revenues from the operation of such gas system, for combined principal and interest on said bonds, to be available therefor in such proportions as the bidder may specify in his bid; or

(2) The maturity of said bonds at the expiration of not to exceed forty (40) years from their date of issuance, with sinking fund provisions, to wit: The City agrees to pay out of the revenues from the operation of said gas system, not less than $50,000 and not more than $200,000 each year after the first two years from the date of said bonds into a sinking fund to be specially applied to the redemption and payment on or before the maturity of the bonds. The moneys so paid shall be deposited in a special account hereinafter more specifically referred to. The moneys in said account for sinking fund purposes shall be used to redeem bonds as follows: This Board may cause to be purchased in the open market at the then market price thereof—but not in any event to exceed par plus two per cent of the principal plus accrued interest—as many of the bonds as can be so acquired by the moneys in said account for sinking fund purposes from time to time in the discretion of this Board; and for this purpose the Board may use any additional funds that may be deposited in said account for sinking fund purposes. Or, in the discretion of
139 this Board, it may cause notice to be published in one or more daily papers of general circulation printed and published in the City of Indianapolis that it will cause at a time and place named therein, bonds to be purchased, and inviting offers for the purchase of said bonds at prices to be named in said offers by the holders thereof, in which event the Board may accept the lowest of such offers, not exceeding in any event a price equal to par plus two per cent thereof plus accrued interest, and the bonds mentioned in the offers so accepted may thereupon be purchased by this Board to the extent of moneys in said sinking fund. If in either case this Board shall be unable to purchase at a price not exceeding par plus two per cent plus accrued interest, bonds sufficient in number to permit the investment of the money available for sinking fund purposes within sixty days after the payment of any instalment of sinking fund moneys into said account or accounts, then the Board shall cause a drawing by lot to be held, to result in the selection of numbers of said bonds in a quantity sufficient at the price of par plus two per

cent thereof plus accrued interest to absorb substantially all the available moneys in said sinking fund account, and the Board shall thereupon advertise the number upon said bonds so drawn in one daily newspaper of general circulation printed and published in the City of Indianapolis, Indiana, and in one daily newspaper of general circulation printed and published in the City of New York, New York, once a week for two successive weeks, and by such advertisement shall require said bonds so numbered to be presented for redemption at the place or places where interest upon said bonds may then be payable, on a day specified in said advertisement, such day being not less than thirty (30) days from the date of the first publication of said advertisement; and such advertisement shall also state that interest shall cease to accrue upon said day named therein for the redemption of said bonds. If any of the bonds so drawn shall be registered, a similar notice shall be sent by this Board to the registered holder thereof at his address registered with the City Controller. Interest upon the bonds so drawn shall cease accordingly on the day named in said notice and on or after said day said bonds, upon presentation and surrender thereof with all unmatured coupons, shall be paid at the price of par plus two per cent thereof plus accrued interest to said date. If any of the bonds so drawn shall not be presented and surrendered to the paying agency on the day so fixed therefor, the moneys remaining in the sinking fund account applicable to the redemption of such bonds shall thereafter be set aside and remain segregated in a special trust for the redemption of such bonds when the same shall be presented and surrendered. All bonds purchased in either such manner or so redeemed shall forthwith be cancelled and become void for every purpose; or

(3) Either of said alternatives, together with a provision permitting any bonds outstanding and unpaid from and after ten years from the date of their issuance to be called and paid by the City at any interest paying date at such price as may be agreed upon between the Board and the successful bidder.

The City agrees to fix, maintain and collect reasonable and just charges for gas service and faithfully to comply with all pertinent provisions of law, including the requirement of Chapter 190 of the Acts of 1933 of the General Assembly of Indiana, viz. that a reasonable and just charge shall be such as produces sufficient revenue to pay, among other things, interest upon bonds, provide a sinking fund for

liquidation of bonds, maintenance costs, operating charges, adequate funds for working capital, repairs and upkeep.

A copy of the Resolution of the Board of Directors for Utilities of the City of Indianapolis, Indiana, dated May 7, 1935, authorizing such bond issue, may be examined by any interested person upon application to the undersigned.

Walter C. Boetcher,
City Controller,
City Hall, Indianapolis, Ind.

EXHIBIT B.

Exempt from All Present Federal Income Taxation.

Tax Exempt in the State of Indiana.

$8,000,000.

City of Indianapolis, Indiana
Gas Plant Revenue
4½% Bonds.

Dated June 1, 1935.

Due serially June 1, 1938 to 1967, both inclusive.

Principal and semi-annual interest (June 1 and December 1) payable at the option of the holder at the office of Halsey, Stuart & Co. in Chicago, Illinois, or in New York City or at The Union Trust Company in Indianapolis, Indiana, or at the principal office of The Cleveland Trust Company in Cleveland, Ohio. Coupon bonds in the denomination of $1,000, registerable as to principal.

Under a resolution adopted May 7, 1935, by the Board of Directors for Utilities of the City of Indianapolis, the City authorized the issuance of these Gas Plant Revenue bonds for the purpose of obtaining funds to exercise its franchise rights to acquire the properties and business of Citizens Gas Company of Indianapolis and for improvements and extensions to such properties.

These bonds constitute, in the opinion of counsel, valid and binding obligations of the City of Indianapolis, Indiana, in accordance with the terms and provisions thereof, se-
141 cured by a charge upon all of the income and revenues of all the gas utility system now or hereafter owned and/or

operated by said City and payable solely and exclusively out of such income and revenues.

Under said resolution adopted May 7, 1935, the City covenants to fix, maintain and collect reasonable and just charges for gas service and faithfully to comply with all pertinent provisions of law including the requirement of Chapter 190 of the Acts of 1933 General Assembly of the State of Indiana, viz., that a reasonable and just charge shall be such as produces sufficient revenue to pay, among other things, principal of and interest on these bonds, maintenance cost, operating charges, adequate funds for working capital, repairs and upkeep.

The City further covenants that it will cause to be deposited in any one or more responsible banks or trust companies in the City of Indianapolis in a special account under such condition as that the monies cannot be withdrawn from such account or accounts except for the payment of interest on and principal of these bonds, on the fifteenth day of each month during the operation by the City of said gas system out of the revenues derived from the operation, a sum equal to one-twelfth of the annual amount due and payable for principal and interest on these bonds, and the City agrees that there will be credited in this manner to such bond and interest fund not less than $360,000 annually in the years 1936 and 1937; $450,000 annually in the years 1938 to 1940, both inclusive; $500,000 annually in the years 1941 to 1967, both inclusive.

Amounts and Maturities.

$ 90,000 June 1, 1938	$258,000 June 1, 1953
94,000 June 1, 1939	270,000 June 1, 1954
99,000 June 1, 1940	282,000 June 1, 1955
152,000 June 1, 1941	295,000 June 1, 1956
159,000 June 1, 1942	308,000 June 1, 1957
166,000 June 1, 1943	322,000 June 1, 1958
174,000 June 1, 1944	336,000 June 1, 1959
182,000 June 1, 1945	351,000 June 1, 1960
190,000 June 1, 1946	367,000 June 1, 1961
198,000 June 1, 1947	384,000 June 1, 1962
207,000 June 1, 1948	401,000 June 1, 1963
216,000 June 1, 1949	419,000 June 1, 1964
226,000 June 1, 1950	438,000 June 1, 1965
236,000 June 1, 1951	458,000 June 1, 1966
247,000 June 1, 1952	475,000 June 1, 1967

Legality of these bonds has been approved by Thompson, Rabb and Stevenson for the City and by Matson, Ross, McCord and Clifford for the bankers. Their opinion will be furnished upon delivery of the bonds.

Halsey, Stuart & Co.
Incorporated
Chicago, 201 South La Salle Street
New York, 35 Wall Street
And Other Principal Cities

The information contained herein has been carefully compiled from sources considered reliable and while not guaranteed as to completeness or accuracy, we believe it to be correct as of this date.

Circular No. 2506. July 1, 1935.

Purpose of Issue.

Pursuant to a resolution adopted by the Board of Directors for Utilities of the City of Indianapolis, Indiana, on May 7, 1935, entitled "A resolution (No. 2-1935) for the issuance of Gas Plant Revenue Bonds," and in compliance with all applicable provisions of law including Chapter 77 of the Acts of 1929, Chapter 67 of the Acts of 1931 and Chapter 125 of the Acts of 1933, as amended by Chapter 311 of the Acts of 1935 of the General Assembly of the State of Indiana, 142 these bonds are issued to provide funds that the City may exercise its franchise rights to acquire property owned by Citizens Gas Company of Indianapolis and/or in which it has an interest including monies required to be paid for the redemption or extinguishment of its capital stock and/or for the payment of certain of its obligations (including funded debt) and for the necessary expenses incurred in connection therewith, including the expenses of the City incident to obtaining such funds as well as for the purpose of making certain betterments, improvements, extensions and additions to such property.

Territory Served.

Upon consummation of this acquisition the City advises it will control a business supplying the entire domestic and commercial gas requirements of the City of Indianapolis and its

suburbs. Indianapolis, the capital of the State of Indiana and the county seat of Marion County, is located in the central part of the State. It is an important manufacturing, commercial and financial center. According to the 1930 census the City had a population of 364,161 with an estimated population including the suburban area of more than 427,000. Seven railroads and numerous bus lines entering the city supply ample transportation.

History and Business of Citizens Gas Company of Indianapolis.

We are advised Citizens Gas Company of Indianapolis was incorporated under the laws of Indiana in May, 1906, and until 1913 supplied gas in part of the City. In that year the company leased for a period of 99 years the properties and business of the Indianapolis Gas Company, thereby gaining control of the entire gas business of the City of Indianapolis and its environs. By the terms of this lease, the lessee pays a rental consisting of (a) the interest on the Indianapolis Gas Company First Consolidated Mortgage 5% Gold Bonds due October 1, 1952, of which there were $6,881,000 principal amount outstanding at December 31, 1934, and the interest on such additional bonds as may be issued from time to time for refunding or extensions to the leased property; (b) an amount equivalent to 6% per annum on the $2,000,000 of capital stock of Indianapolis Gas Company (with a possible increase of $15,000 if the price of gas to the consumer does not exceed 45 cents per thousand cubic feet); (c) $300 annually for organization expense and (d) such amounts equal to the taxes levied against the property including Federal Income Tax. As of January 1, 1935, the company served through owned and leased property approximately 73,800 domestic, 866 commercial and 523 industrial consumers.

An appraisal made by an independent engineer found that as of January 1, 1935, the owned property of Citizens Gas Company consisted of a coke oven plant, known as Prospect Street Station, comprising three batteries of forty 14-ton Wilputte ovens with a total capacity of 11,000,000 cubic feet and two 8′ 6″ water gas sets having a total daily capacity of 1,800,000 cubic feet and 9,000,000 cubic feet of holder capacity. The distribution system consists of approximately 336 miles

of cast iron and steel mains. The leased prop-
143 erty, owned by Indianapolis Gas Company accord-
ing to the same appraisal, consists of a coke oven plant of one battery of forty-one 15-ton Semet-Solvay coke ovens with a daily capacity of 3,500,000 cubic feet, also two 11′ 0″ and two 7′ 6″ water gas sets, with a total daily capacity of 6,000,000 cubic feet and holder capacity of 3,000,000 cubic feet. The distribution system consists of approximately 531 miles of cast iron and steel mains. Based on this appraisal which took into consideration an allowance of $700,000 for working capital for Citizens Gas Company, as well as present day average costs, the age of the equipment and the amount and kind of deferred maintenance, the following costs of reproduction new and depreciated physical values as of January 1, 1935, were estimated:

	Cost of Reproduction—New	Depreciated Physical Value
Citizens Gas Company	$17,607,310	$13,431,230
Indianapolis Gas Company	12,730,490	9,181,960
	$30,337,800	$22,613,190

At the present time we are advised the coke oven and water gas plants of the leased property are not used in operations but it is anticipated that the coke oven plant will be in operation by October 1, 1935. The by-products from the coke operations include coke, ammonia and coal tar, which in the past have been sold in the open market through various sales agencies. The coal requirements of Citizens Gas Company have been purchased principally from the Milburn By-Products Coal Company, Milburn, West Virginia, the entire capital stock of which is owned by Citizens Gas Company. Other coal purchases are made from other coal producers of the quality and quantity necessary for blending purposes. We are advised the capacity of the Milburn coal mine is greatly in excess of the Company's plant requirements. Income Statement Calender Years 1931-35*

The following comparative earning statement, based on municipal ownership and operation, of Citizens Gas Company was compiled from the independent engineer's report submitted us June 22, 1935:

	1931	1932	1933	1934	1935*
Total Income	$5,049,486	$4,326,724	$4,148,698	$4,773,273	$5,103,650
Operating Expenses, Taxes, and Rentals	4,224,566	3,731,900	3,628,957	4,104,460	4,351,400
Balance	$ 824,920	$ 594,824	$ 519,741	$ 668,813	$ 752,250
Add: Estimated savings in taxes through municipal ownership and operation (see note)	$ 166,664	$ 142,516	$ 122,733	$ 113,811	$ 121,000
Balance available for bond service and depreciation	$ 988,584	$ 737,340	$ 642,474	$ 782,624	$ 873,250

The annual service charge on this issue is $360,000 1936-1937; $450,000 1938-1940; $500,000 1941-1967.

(Note)—The City states that through municipal ownership and operation of Citizens Gas Company there will be a savings of Federal Income and City taxes which in the years covered above would have approximated the amounts shown.

The Feasibility of Natural Gas.

The City has been considering the possibility of introducing natural gas into Indianapolis provided it can be purchased at a sufficiently attractive price. An independent survey by recognized engineers finds it would be entirely feasible for the City to serve mixed natural and manufactured gas to domestic and commercial consumers and straight natural gas to industrial consumers. The change from manufactured gas to natural or mixed gas operation would, in engineer's
144 opinion, necessitate a further investment of approximately $2,500,000 to extend the distribution facilities, but the belief is that such operation will materially improve the earning power of these properties. The sale of the present issue of $8,000,000 bonds, together with cash now on hand provides approximately $1,500,000 cash over and above the cost of acquisition of the property It is the engineer's estimate that for the first normal year after the introduction of natural gas, gross revenues should slightly exceed $5,000,000, net income before depreciation and bond service should approximate $990,000, while in the fifth year gross should approximate $10,600,000 and net income before depreciation and bond service should exceed $3,000,000.

* 1935—5 months actual, 7 months estimated.

Security.

These Gas Plant Revenue bonds constitute, in the opinion of counsel, valid and legally binding obligations of the City of Indianapolis, secured by a charge upon all of the revenues derived from the entire gas system owned and/or operated by the City of Indianapolis and principal and interest on the bonds are payable solely from such revenues.

Covenants of the City.

With respect to these bonds the City covenants:

That it will cause to be deposited in any one or more responsible banks or trust companies in the City of Indianapolis, in a special account under such conditions as that the monies cannot be withdrawn from such account or accounts, except for the payment of interest on and the principal of these bonds, on the fifteenth day of each month during the operation of said gas system by the City out of the revenues derived from the operation of said gas system a sum equal to one-twelfth of the annual amount due and payable for principal and interest on the next succeeding date of said bonds and the City agrees that there will be credited to this bond and interest fund, $360,000 annually 1936-1937; $450,000 annually 1938-1940 and $500,000 annually 1941-1967;

That it will fix, maintain and collect reasonable and just charges for gas service and faithfully to comply with all pertinent provisions of law including the requirement of Chapter 190 of the Acts of the 1933 General Assembly of the State of Indiana, viz., that a reasonable and just charge shall be such as produces sufficient revenue to pay, among other things, principal of and interest on these bonds, maintenance cost, operating charges, adequate funds for working capital, repairs and upkeep;

That upon acquisition of the property operated by the Citizens Gas Company, it will cause the same to be continually operated as a gas system in an efficient manner and at reasonable cost and maintained in good operating condition; and it will use all reasonable efforts to resist competition and maintain the exclusive right to serve gas in the City of Indianapolis and in Marion County, Indiana, and the towns therein;

That so long as any of these bonds are outstanding and unpaid the City shall maintain insurance on the insurable parts of said gas system of a kind and in an amount as would

normally be carried by privately owned companies en-
145 gaged in a similar business; which insurance shall be placed and maintained in responsible and qualified companies and the proceeds of such insurance shall be used in replacing, repairing or rehabilitating property destroyed or damaged, or in extensions, additions or improvements and if not so used shall be used in the purchase and retirement of outstanding bonds;

That so long as any of these bonds are outstanding and unpaid, not to sell, mortgage or dispose of said gas system or any substantial and useful part thereof unless the proceeds of such sale or disposition are used for the payment of the principal and interest of the then outstanding and unpaid bonds. The right to lease such utility property and gas system on terms and in a manner consistent with law, may be exercised provided the terms do not adversely affect the rights and interest of the holders of these bonds. The city prior to the execution of any such lease of any part of the gas system under the terms hereof, agrees to give notice if or when it intends to execute any such lease through publication in one newspaper, printed in the English language, of general circulation, in the City of Indianapolis, Indiana, in the City of Chicago, Illinois, and in the City of New York, New York, at least four weeks prior to the execution of such lease.

That so long as any of these bonds are outstanding and unpaid, it shall not issue additional bonds or other obligations payable out of the revenues of said gas system except for refunding said outstanding bonds or for the acquisition of revenue producing property, betterments, extensions and/or additions.

We Recommend These Bonds for Investment.

Price on Application.
Halsey, Stuart & Co.
Incorporated.

Chicago, 201 South La Salle Street
New York, 35 Wall Street
And Other Principal Cities

The information contained herein has been carefully compiled from sources considered reliable and while not guaranteed as to completeness or accuracy, we believe it to be correct as of this date.

Circular No. 2506. July 1, 1935.

146 EXHIBIT C.

Resolution for Temporary Use of Property of The Indianapolis Gas Company Adopted September 9, 1935.

Whereas, The Indianapolis Gas Company, an Indiana corporation, is the owner of certain property used and useful in the distribution of gas in the City of Indianapolis and Marion County, Indiana, and which as such has been used by Citizen's Gas Company of Indianapolis under the terms of a certain lease bearing date of September 30, 1913; and

Whereas, the City of Indianapolis by this Board of Directors for Utilities has in the exercise of the discretion conferred upon it by law refused to adopt, assume, or take over said lease or to accept an assignment thereof or to operate said property thereunder; and

Whereas, various consumers of gas in Indianapolis and Marion County, Indiana, will suffer interruption of service commencing at the time of the acquisition by the City of Indianapolis of other property of said Citizens Gas Company of Indianapolis, unless property of said The Indianapolis Gas Company is temporarily used therefor; and

Whereas, solely to prevent such an interruption of service, and for no other purpose, the City of Indianapolis is willing to use the property of said The Indianapolis Gas Company to the extent necessary for such purpose, for a period of six months from the time of the acquisition by the City of other property of said Citizens Gas Company, the City during such period to make to and on behalf of said The Indianapolis Gas Company payments similar to those contemplated, for a like period of time, by said lease between said The Indianapolis Gas Company and said Citizens Gas Company; but the City not to be acting under said lease, or to be considered as acting under said lease, or as having adopted it in any respect, or as having recognized said lease as an obligation in any manner; and during such period the City is willing to negotiate terms for the continued user of such property of said The Indianapolis Gas Company; and

Whereas, the City by this Board has made known such desire to available officials of said The Indianapolis Gas Company, but the officials of said Company have as yet taken no action in the name or on behalf of said Company with respect to such user temporarily by the City; and

Whereas, immediate action by the City of Indianapolis by this Board is necessary to prevent interruption of service to all gas consumers in the City of Indianapolis and Marion County, Indiana;

Now Therefore Be It Resolved by the Board of Directors for Utilities of the City of Indianapolis, Indiana, acting in the exercise of the discretion conferred upon them by law and in the name of said City:

1. That to the extent necessary to prevent interruption of service to the consumers and in the territory heretofore served by Citizens Gas Company of Indianapolis, and solely for the purpose of preventing any such interruption, the City of Indianapolis in the operation of the property acquired by it used and useful in the manufacture and distribution of gas shall use property of The Indianapolis Gas Company, an
147 Indiana corporation, for a period of six months commencing September 9, 1935; for which user the City of Indianapolis by this Board of Directors for Utilities shall pay, out of funds available to the order of said Board, payments to or on behalf of said The Indianapolis Gas Company equivalent to those contemplated for a like period of time by the certain lease dated September 30, 1913, between said The Indianapolis Gas Company and said Citizens Gas Company of Indianapolis; but by so doing the City does not assume or adopt such lease or any assignment thereof nor does the City recognize such lease as an obligation binding upon the City or upon any property acquired by the City from said Citizens Gas Company of Indianapolis, and the City is not to be considered as acting under such lease or upon any agreements or covenants contained therein or pertaining thereto.

2. If said The Indianapolis Gas Company refuses to permit such temporary use of its property by the City, the City shall at once discontinue such temporary use and relinquish to said The Indianapolis Gas Company such possession as the City may have temporarily exercised over said property, to be thenceforward operated by said The Indianapolis Gas Company.

3. That said The Indianapolis Gas Company be forthwith requested on behalf of the City to take a position with respect to such temporary use of its property by the City, whether to consent or refuse consent thereto; and also to negotiate with the City for fair terms appropriate to use by the City of such property.

4. That a certified copy of this resolution be forthwith served upon said The Indianapolis Gas Company as evidence of the intent, desire, and attitude of the City upon these matters.

Resolution for Rejection of Assignment of Lease Between the Indianapolis Gas Co. and Citizens Gas Company of Indianapolis, Adopted September 9, 1935.

Whereas, pursuant to rights and duties heretofore established, Citizens Gas Company of Indianapolis, an Indiana corporation, has this day executed and tendered to the City of Indianapolis and its Board of Directors for Utilities, instruments of transfer of all of its property, including a deed of conveyance of real estate, assignments of lease interests, and assignments of personal property, subject to the legal obligations of said Company including the obligation of a certain lease bearing date of September 30, 1913, by and between The Indianapolis Gas Company an Indiana corporation, and Citizens Gas Company of Indianapolis recorded in Miscellaneous Record 78 at page 257 and following in the office of the Recorder of Marion County, Indiana; and

Whereas, said Citizens Gas Company of Indianapolis has also this day executed and tendered to the City of Indianapolis and its Board of Directors for Utilities an instrument purporting specifically to assign said The Indianapolis Gas Company lease to said City, subject to the terms and conditions contained in said lease; and

Whereas, this Board deems said lease to be onerous
148 and disadvantageous to the City of Indianapolis, and in the discretion of this Board said lease should not be taken over, adopted, or assumed, but should be wholly rejected, its assignment not accepted, and said lease should not be recognized as one of the obligations, if such it is, of said Citizens Gas Company of Indianapolis to which any property of said Company is subjected when in the possession of the City of Indianapolis; and

Whereas, this Board in its discretion determines that the other property of said Citizens Gas Company of Indianapolis tendered by it to the City of Indianapolis should be accepted upon condition that such property is not subject to any obligation to said The Indianapolis Gas Company;

Now therefore be it resolved by the Board of Directors for Utilities of the City of Indianapolis, Indiana, in the exercise of the discretion conferred upon it by law, and on behalf of the City of Indianapolis:

1. That the City of Indianapolis by this Board accept the tendered assignments, transfers, and conveyances of all of the property of Citizens Gas Company of Indianapolis, an Indiana corporation, excepting, however the certain lease executed by The Indianapolis Gas Company, an Indiana corporation, to said Citizens Gas Company, bearing date of September 30, 1913; and on assumption and condition that such acceptance in no way obligates the City of Indianapolis to said The Indianapolis Gas Company under said lease.

2. That the City of Indianapolis by this Board refuses to assume and be bound in any manner by the terms and provisions of said lease.

3. That the City of Indianapolis by this Board rejects and refuses to accept the assignment of said lease tendered by said Citizens Gas Company of Indianapolis to the City.

4. That the City of Indianapolis by this Board refuses to recognize said lease as an obligation of said Citizens Gas Company of Indianapolis which the City is bound to accept, or which in any respect whatsoever is one to which the property of said Citizens Gas Company of Indianapolis, when transferred to this City, is in any manner subject or which constitutes a charge upon such property.

5. That the following instrument be executed and served upon The Indianapolis Gas Company and recorded in the office of the Recorder of Marion County, Indiana;

Rejection of Assignment of Lease and Refusal to Assume, Take Over, or Be Bound Thereby.

The City of Indianapolis, Indiana, by its Board of Directors for Utilities of its Department of Utilities, hereby refuses to take over, adopt, or assume the certain lease bearing date of September 30, 1913, executed by The Indianapolis Gas Company, an Indiana corporation, to Citizens Gas Company of Indianapolis, an Indiana corporation, and recorded in the office of the Recorder of Marion County, Indiana, in Miscellaneous Record 78 at page 257 and following; rejects the assignment of said lease tendered to said City by said Citizens Gas Company of Indianapolis; and refuses to recognize said lease as an obligation of said Citizens Gas Company of Indianapolis which this City is bound to accept,
149 or which in any respect whatsoever is one to which the property of said Citizens Gas Company of Indianapolis,

when transferred to said City, is in any manner subject or which constitutes a charge thereon.

Dated at Indianapolis, Indiana, September 9, 1935.

Board of Directors for Utilities of the
City of Indianapolis, Indiana.
By .....
Its President.

Attest:

.....
Its Secretary.

State of Indiana, }
County of Marion, } ss.:

Before the undersigned, a notary public in and for said County and State, personally appeared said Henry L. Dithmer as President of the Board of Directors for Utilities of the City of Indianapolis and acknowledged the execution of the foregoing instrument as and for its and his voluntary act and deed.

.....
Notary Public.

6. That a copy of this resolution, certified by the Secretary of this Board, be served upon said The Indianapolis Gas Company as evidence of the attitude and intention of this Board.

7. That a copy of this resolution, certified by the Secretary of this Board, and a copy of said "Rejection of Assignment," be served upon said Citizens Gas Company of Indianapolis as evidence of the attitude and intention of this Board.

EXHIBIT D.

1004 Majestic Building,
Indianapolis, Indiana,
September 30, 1935.

Thompson, Rabb & Stevenson,
115 North Pennsylvania Street,
Indianapolis, Indiana.

Gentlemen:

Your letters of July 23, August 31, and September 16, 1935, have been brought to the attention of the Board of Di-

rectors of The Indianapolis Gas Company. An earlier meeting of the Board was prevented by the absence of many of its members.

In acknowledging these letters, I am directed by the Board of Directors to say that the Board assumes the validity of the lease entered into by it with the Citizens Gas Company of Indianapolis on September 30, 1913, which was approved by the Public Service Commission of Indiana, and that all of its provisions continue to have binding force.

If the Department of Public Utilities of the City of Indianapolis desires to discuss with The Indianapolis Gas Company any of the provisions of that lease, or any questions relating thereto, The Indianapolis Gas Company will, of course, be glad to take part in such a discussion at a time and place mutually agreeable to the representatives of the Company and the Department of Utilities.

Pending the determination of the questions which you may desire to consider, The Indianapolis Gas Company, not desiring to disrupt or inconvenience the public service, will be glad to enter into a mutual stipulation with you, if you so desire, that compliance with the terms of the lease shall be without prejudice to the legal rights and claims either of the Department of Utilities or of The Indianapolis Gas Company.

Very truly yours,
The Indianapolis Gas Company,
By Wm. J. Yule,
Secretary.
Indianapolis, Indiana.

EXHIBIT E.

March 2, 1936.

The Indianapolis Gas Company,
1004 Majestic Building,
Indianapolis, Indiana.

Gentlemen:

The Department of Utilities of the City of Indianapolis will pay to The Indianapolis Gas Company on or before March 25th, 1936, a sum equal to the semi-annual instalment of interest due on the outstanding bonds of The Indianapolis Gas Company, which interest is due March 30, 1936, in the estimated amount of $171,575, together with the regular charges of the Trustee for disbursing such sum of money

and will also pay during the period of this agreement all State, County and Municipal taxes due on account of assessments on the property of The Indianapolis Gas Company covered by a lease between that Company and the Citizens Gas Company dated September 30, 1913.

The Department of Utilities will also pay the Federal income taxes of The Indianapolis Gas Company on account of any money paid by the Citizens Gas Company or the Department of Utilities to The Indianapolis Gas Company during the year 1935, and the instalment of Indiana Gross Income Tax due on or before April 15, 1936, and all insurance premiums on any property covered by said lease.

The Department of Utilities of the City of Indianapolis will also deposit in escrow with The Indiana National Bank of Indianapolis, Indiana, during the continuance of this agreement, a sum equal to the semi-annual instalments
151 of interest on the presently outstanding bonds of The Indianapolis Gas Company and a sum equal to the dividends on the presently outstanding stock of said Company, said deposits to be made as and when the sums referred to shall become due in accordance with the terms of said lease, subject to the following conditions and agreements:

1st. That the amount so deposited shall be held by The Indiana National Bank at Indianapolis and shall be disbursed under the following conditions only:

(a) If a settlement of the presently existing controversy between The Indianapolis Gas Company and the Department of Utilities of the City of Indianapolis as to the validity of said lease dated September 30, 1913, and its binding force upon and as against the City of Indianapolis and this Department of Utilities of said City, or against any of the property acquired by said City or said Department, from Citizens Gas Company of Indianapolis, is reached and an agreement of settlement is made, then in accordance with the agreement of the parties.

(b) In the event no settlement of such controversy is reached, then if it shall be finally determined in a litigated case that said lease of September 30, 1913, is a valid and binding obligation upon the City of Indianapolis and/or the Department of Utilities of said City or upon the property acquired by such City or Department thereof from Citizens Gas Company of Indianapolis, the sum so deposited shall be delivered by the escrow to The Indianapolis Gas Company and shall be applied in the payment of the rent due under said lease.

(c) In the event of such litigation and a final determination that said lease of September 30, 1913, is not a valid and binding obligation on the City of Indianapolis or the Department of Utilities of said City or against any of the property of either there shall be first paid to The Indianapolis Gas Company out of said sum reasonable compensations for the use of the plant and property covered by said lease from July 1st, 1936, to the date of such final adjudication, such compensation to be fixed by agreement of the parties or a decree of Court, and then whatever remains shall be paid over by said escrow to the order of said Department of Utilities of the City of Indianapolis.

It is understood that the payments referred to, including the deposits made with the escrow, are made without prejudice to our position or rights and that we may continue to operate the plant and equipment covered by said lease of September 30, 1913, until the present controversy is adjusted or finally terminated by a decree of Court, without such operation or such payments or the execution of this agreement constituting an admission on our part that said lease of September 30, 1913, is valid or binding on the City of Indianapolis or said Department of Utilities of said City of Indianapolis, or any of its or their property.

It is further understood that your acceptance of this agreement and of such payment and your agreement that such sums may be deposited in escrow and that we may operate the plant referred to shall not prejudice your position or rights and that you are at full liberty to assert, notwithstanding this agreement and the payment made in pur-
152 suance thereof, that said lease is a valid and binding lease upon the City of Indianapolis and said Department of Utilities of said City or against any property of either in accordance with its terms.

Very truly yours,
Department of Utilities of the
City of Indianapolis,
By (signed) Henry L. Dithmer,
President of its Board of Directors.

Accepted this 2nd day of March, 1936.
The Indianapolis Gas Company,
By (signed) William G. Irwin,
its President.

Attest:
(Signed) Wm. J. Yule,
its Secretary.

Resolved, That the action of the Officers of this Company in executing on March 2, 1936, the agreement with the Department of Utilities of the City of Indianapolis be, and it is, hereby approved, ratified and confirmed.

The undersigned, Wm. J. Yule, as Secretary of The Indianapolis Gas Company, hereby certifies that the above is a true and complete copy of a resolution duly adopted by the Board of Directors of said Company at a regularly held meeting on the 4th day of March, 1936.

(Signed) Wm. J. Yule,
(Corporate Seal.) *Secretary of The Indianapolis Gas Company.*

Entered Oct 153 And afterwards to wit at the April Term of said Court, on the 22nd day of October, 1936, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Come now the defendants City of Indianapolis, et al, by their solicitors, and file motion to amend answer, which motion is as follows:

(H. I.)

And the Court being duly advised grants said motion.

And said defendants City of Indianapolis, et al, now file amendment to answer, which is as follows:

154 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Oct. 1936.
* * (Caption—1844) * *

AMENDMENT TO SEPARATE AND SEVERAL ANSWER AND COUNTERCLAIM OF DEFENDANTS THE CITY OF INDIANAPOLIS, A MUNICIPAL CORPORATION, WILLIAM J. MOONEY, A. DALLAS HITZ, ALFRED M. GLOSSBRENNER, EDWARD W. HARRIS AND CHARLES S. RAUH, AS MEMBERS OF THE BOARD OF TRUSTEES FOR UTILITIES OF THE CITY OF INDIANAPOLIS, HENRY L. DITHMER, BROADHURST ELSEY, FRED W. JUNGCLAUS, ROY SAHM, DONALD J. ANGUS, ISAAC E. WOODARD, AND RUSSELL J. RYAN, AS MEMBERS OF THE BOARD OF DIRECTORS FOR UTILITIES OF THE CITY OF INDIANAPOLIS.

James E. Deery,
Corporation Counsel.
City Hall, Indianapolis.
William H. Thompson,
Albert L. Rabb,
Thomas D. Stevenson,
1350 Consolidated Bldg.,
Indianapolis, Ind.
Solicitors for Said Answering Defendants.

155 * * (Caption—1844) * *

The City of Indianapolis, a municipal corporation, William J. Mooney, A. Dallas Hitz, Alfred M. Glossbrenner, Edward W. Harris and Charles S. Rauh, as Members of the Board of Trustees for Utilities of the City of Indianapolis, Henry L. Dithmer, Broadhurst Elsey, Fred W. Jungclaus, Roy Sahm, Donald J. Angus, Isaac E. Woodard and Russell J. Ryan, as Members of the Board of Directors for Utilities of the City of Indianapolis, defendants in the above entitled cause, and by leave of Court first obtained, hereby amend their separate and several answer and counter-claim heretofore filed in this cause in the following particulars:

(1) By striking out Subdivision 19 of said answer and inserting a new subdivision 19 in the following words:

"19. With respect to Subdivision 19 of said complaint,

these answering defendants deny that upon the execution and delivery of said lease of September 30, 1913, the same became subject to the deed of trust in which plaintiff is successor trustee and they deny that said lease became a part of the trust estate covered by said mortgage to the same extent as though it had been executed and delivered prior to the execution and delivery of said deed of trust, or to any extent.

These answering defendants admit that the covenant in said lease of September 30, 1913, requiring the payment of rent was made for the benefit of The Indianapolis Gas Company and for the indirect benefit of others, including bondholders of said Company so far as the same was applicable to the payment of interest on the mortgage bonds of the bondholders, but deny that such lease was valid for a period of 99 years or binding upon the City of Indianapolis as
156 Successor Trustee; and deny that the mortgage trustee is vested with a distinct and independent right to enforce the performance of the lessee's obligations and engagements under said lease in so far as the same directly affect any supposed rights of the holder of bonds, but on the contrary aver that The Indianapolis Gas Company, in the first instance, is the sole person with any legal right to enforce whatever obligations may exist under said lease of September 30, 1913, and that the plaintiff has no standing to seek to enforce the same until there has been a refusal on the part of The Indianapolis Gas Company so to do, which these answering defendants allege on information and belief has not occurred. They therefore allege that the plaintiff has no capacity to sue in this cause and that as hereinafter more particularly averred this suit is a collusive one and cannot be maintained by this plaintiff.

These answering defendants deny that said lease was valid when executed and further allege that the plaintiff or its predecessor trustee and the bondholders whom it alleges had by the terms of said lease of September 30, 1913, due notice and warning of the probable invalidity of said lease for any term longer than the period of the franchise contract heretofore referred to which expired on August 30, 1930, and such additional period as was reasonably necessary within which to complete the transfer of the trust assets to the City of Indianapolis as successor trustee, and allege that for the reasons hereinafter specifically set forth in subdivision 27 of

this answer said lease, if valid, was not valid for a longer period.

Alternatively, these answering defendants allege that the mortgage of which plaintiff is successor trustee does not constitute a lien upon the lease of September 30, 1913, or upon any rentals which might be due thereunder, and that if plaintiff has any right to maintain an action to determine the validity of said lease such right arises solely out of the fact that said lease was made for the indirect benefit of The Indianapolis Gas Company's bondholders and stockholders; that in any such action The Indianapolis Gas Company is an indispensable party because of the validity or invalidity of said lease cannot be determined as against these answering defendants in an action to which it is not a party and in which the judgment or decree would not be binding on it; that The Indianapolis Gas Company has been made and is a party defendant to this cause but should be aligned in interest with the plaintiff, and that upon such alignment being made there will be one plaintiff who is a citizen and resident of the State of Indiana and all the defendants are citizens and residents of the State of Indiana. Accordingly no diversity of citizenship exists, and there being no other ground of Federal jurisdiction alleged in the bill of complaint, it should be dismissed for lack of jurisdiction of the subject matter.

These answering defendants, however, deny that said lease was ever valid or enforceable for any period of time after the transfer of said trust property to the City of Indianapolis as successor trustee and deny that the plaintiff has any right to bring any action to enforce the performance thereof or obtain a declaration of the validity of said lease."

157 2. By adding subdivision 2½ to the prayer of said answer in the following words:

"2½. That if the Court should hold that the plaintiff has a sufficient interest to enable it to obtain a declaratory judgment as to the validity of said lease of September 30, 1913, that it adjudge and decree that The Indianapolis Gas Company is an indispensable party to such an action; that thereupon The Indianapolis Gas Company be aligned as a party plaintiff and this cause dismissed for want of jurisdiction of the subject matter because one plaintiff and all defendants are citizens and residents of the State of Indiana and no

federal jurisdiction exists on the ground of diversity of citizenship or otherwise."

James E. Deery,
Corporation Counsel.
William H. Thompson,
Albert L. Rabb,
Thomas D. Stevenson,
Solicitors for Said Answering Defendants.

October 21, 1936.

Filed Nov. 14, 1936. 158 And afterwards to wit at the November Term of said Court, on the 14th day of November, 1936, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Comes now the plaintiff, by its solicitors, and files answer to the counter-claim of certain defendants, which answer is as follows:

159 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—1844) * *

PLAINTIFF'S ANSWER TO THE COUNTERCLAIM OF CERTAIN DEFENDANTS.

Now comes The Chase National Bank of the City of New York, Trustee, the plaintiff in the above entitled cause, and, leave of Court having first been duly obtained, makes the following answer to the counterclaim of defendants, the City of Indianapolis and others:

Plaintiff admits that it is a corporation and is a citizen and resident of the State of New York and that it is a successor trustee under a deed of trust executed on the first day of October, 1902, by the defendant, The Indianapolis Gas Company, to secure the payment of certain bonds now outstanding in the total principal amount of $6,881,000. Plaintiff denies that it is a corporation organized and existing under and by virtue of the laws of New York and alleges that in fact it is a corporation existing under and by virtue of the banking laws of the United States.

Plaintiff admits that on the 30th day of September, 1913, the defendants, The Indianapolis Gas Company and Citizens

Gas Company of Indianapolis, entered into a written lease for a term of ninety-nine years, a copy of which, marked "Exhibit B", is made a part of the plaintiff's bill of complaint.

160 Plaintiff admits that at the time of the execution of said lease the physical assets and property of the Citizens Gas Company of Indianapolis were the subject of a public charitable trust, created pursuant to the terms and conditions of a certain franchise and articles of incorporation and by-laws of said Citizens Gas Company of Indianapolis, the precise meaning and purpose of which is to be determined from the provisions thereof, for which purpose reference is made thereto; and plaintiff says that whether the trustee of said public charitable trust was the Citizens Gas Company of Indianapolis or its Board of Directors or the Board of Trustees created for the purpose of holding and voting all of said company's outstanding stock, if material to a determination of any of the issues presented in this cause, which plaintiff denies, is a question for the Court to decide, all of the pertinent facts relating thereto within plaintiff's knowledge being set forth in plaintiff's bill of complaint; and plaintiff admits that the trust property hereinabove referred to was, on or about September 9, 1935, transferred to the City of Indianapolis. As to the alleged controversy, and the particulars thereof, between the counterclaimants and defendant, The Indianapolis Gas Company, plaintiff has no independent or firsthand knowledge and therefore is unable to admit or deny the allegations with reference thereto.

Plaintiff admits that defendant, Citizens Gas Company of Indianapolis, tendered to the counterclaimants an assignment of said lease, a copy of which, marked "Exhibit F", is made a part of plaintiff's bill of complaint, and that the counterclaimants purported to refuse to accept said assignment.

Plaintiff admits that as Trustee under the Deed of Trust securing the bonds of The Indianapolis Gas Company
161 it asserts that said lease is valid and binding upon the counterclaimants, but denies that it has no legal right so to do.

Plaintiff denies that said lease of September 30, 1913, is not a valid or enforceable obligation against the counterclaimants or the property of said public charitable trust, from and after September 9, 1935.

Answering the allegations of the paragraph of defendants' said counterclaim marked "First", plaintiff denies each and every allegation in said paragraph contained.

Answering the allegations of the paragraph of defendants' counterclaim marked "Second", plaintiff admits that said lease contains provisions dealing with refinancing the outstanding bond issue of The Indianapolis Gas Company, with increases in annual rentals if gas is sold for less than certain prices stated therein, and dealing with the payment of the rent reserved therein, for the precise language of which provisions plaintiff refers to the lease itself, but plaintiff denies that any provision of said lease on these subjects is illegal or unenforceable. Plaintiff is not informed concerning the payments which have been made by the lessee for rent and taxes under the terms of said lease.

Answering the allegations of the paragraph of defendants' counterclaim marked "Third", plaintiff admits that at the time said lease was executed and continuously ever since, the City of Indianapolis was and has been a city of the first class. Respecting the provisions of the statutes of In-
162 diana referred to in said paragraph "Third", plaintiff says that the relevant and applicable statutes speak for themselves, but plaintiff denies that the aforesaid lease was void when executed or is now void in any respect whatever, and denies that said lease could not be ratified. Plaintiff is without knowledge as to what appropriations have been made by the City of Indianapolis and as to what steps or actions may have been taken by the City of Indianapolis or by its Board of Public Works or its Common Council, and asks that strict proof be made of the allegations of said counterclaim on these subjects.

Answering the allegations of the paragraphs of defendants' said counterclaim marked "Fourth", "Fifth" and "Sixth", plaintiff denies each and every allegation in said paragraphs contained.

Plaintiff denies that the counterclaimants are entitled to any judgment against it declaring said lease of September 30, 1913, invalid or unenforceable against the counterclaimants or against the properties of Citizens Gas Company of Indianapolis taken over by the City of Indianapolis as successor trustee and denies each and every remaining allegation in defendant's counterclaim not specifically admitted or denied herein. For further answer plaintiff refers to and

incorporates herein each and every allegation in its bill of complaint contained.

Wherefore, plaintiff prays that the counterclaim of defendants, the City of Indianapolis and others, be dismissed and that it have judgment against said defendants for its costs.

Newton D. Baker,
Raymond T. Jackson,
William L. Taylor,
Solicitors for Plaintiff.

163 And afterwards to wit at the November Term of said Court on the 17th day of November, 1936, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit: Filed

Comes now the defendant Indianapolis Gas Company, by its solicitors, and files reply to counter-claim of co-defendants, which reply is as follows:

164 In the District Court of the United States.
* * (Caption—1844) * *

SEPARATE AND SEVERAL REPLY OF THE INDIANAPOLIS GAS COMPANY TO COUNTERCLAIM OF CO-DEFENDANTS.

The Indianapolis Gas Company, a Corporation, defendant in the above entitled cause, for its separate and several reply to the counterclaim of defendants, the City of Indianapolis, a municipal corporation, and others, filed herein, by way of such reply says:

It admits that The Chase National Bank of the City of New York is a corporation and is a citizen and resident of the State of New York and that it is a successor Trustee under a Deed of Trust executed by this counter-defendant securing bonds in the total principal amount of $6,881,000.

That the Indianapolis Gas Company and the Citizens Gas Company of Indianapolis entered into said written lease for ninety-nine years, a copy of which, marked "Exhibit B", is made a part of said counterclaim. It denies that at the date

of execution of said lease the Citizens Gas Company of
165 Indianapolis was not the owner of the property it was
then operating but alleges that it was only such property as should be held by that company at the expiration of its franchise as was then to be conveyed to the City of Indianapolis "subject to * * * (all) legal obligations against said company" which was impressed with a public charitable trust. And avers that said company held title thereto, with full power under the law to bind said property as Lessee of this counter-defendant's property by the execution of said lease, thereby obtaining the use and control of the property of this answering counter-defendant.

It denies that at said time the Citizens Gas Company of Indianapolis was not the owner of the gas manufacturing and distributing plant and property it was then operating and denies that it was without power and authority to execute said lease binding it and the property it then owned and held for performance of said lease the full period of ninety-nine years, and denies that the binding force of such lease was limited to the date of August 30, 1930, or to any other period, except as provided and expressed in and by the provisions of said lease.

It denies that the transfer or attempted transfer by Citizens Gas Company of its property or any part thereof to the City of Indianapolis on September 9, 1935, or at any time operated to release Citizens Gas Company, or any of the property it so transferred, from any of the obligations previously imposed thereon by the terms of the lease dated
September 30, 1913, but avers that each and all of the
166 provisions thereof are still binding upon each and all
of the parties thereto, and upon the property of the Citizens Gas Company, and of the counter-claimants herein, who, this counter-defendant avers upon information and belief, did not pay to said Company any consideration for its said property, but accepted from it a wholly voluntary conveyance thereof, leaving the grantor penniless.

It admits that a controversy between it and counter-claimants as to whether or not said lease of September 30, 1913, is a valid and enforce obligation against these counter-claimants, and that this defendant, Indianapolis Gas Company, asserts and has asserted and it now avers that said lease is valid and binding as against and upon Citizens Gas Company and its assignee and all its property to

counter-claimants, and also binding and enforceable against these counter-claimants. This defendant avers, they received, accepted and took over all the property and assets, duties and obligations of Citizens Gas Company without any consideration paid to or received by said company, and thereby left it wholly without property and assets and without any ability to perform its contract obligation, and they took possession of the leased property as part thereof and proceeded to operate the same without notice to or action by this counter-defendant, or any owner thereof or person interested therein except only said Lessee.

it does not know whether or not Citizens Gas Company tendered to counter-claimants any assignment of the lease marked "Exhibit F", nor what counter-claimant did
167 with reference thereto, nor for what reason the Citizens Gas Company is made a party defendant to the counterclaim, and asks strict proof of the allegations concerning same.

It admits that The Chase National Bank as Trustee under said Mortgage Deed of Trust securing bonds of the Indianapolis Gas Company is asserting that the lease is valid and binding, but does not admit that it has no right to do so.

It denies that said lease of September 30, 1913, is not a valid or enforceable obligation against cross-complainants for any reason whatever and more particularly:

First. The Citizens Gas Company of Indianapolis has express as well as implied authority, by law and valid ordinances, to execute said lease for 99 years with the approval of the Public Service Commission of Indiana, which approval was given, and said lease was and continues to be valid and binding upon said Company and upon its assignees; and by accepting the voluntary assignment of all the property and franchises of said Company and by the acts they have done pursuant thereto, counter-claimants have become and are bound by the terms of said lease, which is not and never was ultra vires, but is and at all times has been valid.

168 Second. The Indianapolis Gas Company admits that the 99-year lease in question, made part of plaintiff's bill of complaint marked Exhibit B, contains provisions on the subjects of (a) refinancing the present outstanding bond issue of the Indianapolis Gas Company, and (b) as to an increase in the amount of the annual rental upon a contingency therein stated, and (c) to make certain payments, including taxes, all as written in said lease. But it denies that those pro-

visions are correctly recited in the counter claim and asks that the court will read said Exhibit B, which is by reference made part of this reply, to disclose what really are its provisions, and particularly denies that any such provisions, whether in themselves valid or not, vitiate or render invalid the said lease and its other provisions. And it avers that counter-claimants and their assignor, Citizens Gas Company, have had exclusive possession and control of the leased property for more than twenty-three years, towit, since September 30, 1913, and continuously have had and now have exclusive knowledge of how much money they paid out which is designated by them as "including payments for the benefit of the stockholders and bondholders of the Indianapolis Gas Company and taxes," and the only knowledge this counter-defendant has thereof is such as said Citizens Gas Company of Indianapolis and they have given out; and counter-defendant disclaims knowledge of what such payments have averaged, and asks that counter-claimant make strict proof.

Third. Said counter-defendant admits the City of Indianapolis was and is a city of the first class, but expressly de-
169 nies that on September 30th, 1913, there was any provision of law in force which made the execution of a lease of the property and franchises of the Indianapolis Gas Company or of any public utility whatever operating under an existing franchise to another public utility corporation also operating under a franchise, at all subject in any way or degree to the control or to the approval or to any action whatever on the part of the Board of Public Works or of the Common Council as provided by sections 85 and 254 of the Act of 1905, Chapter 129, page 219 (271, 396) "concerning municipal Corporations" (Burns Ind. Stat. Ann. 1933, sec. 48-1507 and 48-7302). And expressly denies that either of said sections of the statute (city charter) recited (in part) in the counter-claim is in any way pertinent or material to the issues joined in this action.

It is not informed as to what appropriations the City of Indianapolis may have made or may not have made prior to September 30, 1913, or at any other time and asks for strict proof of all and any pertinent facts in relation thereto.

It is informed, and therefore avers, that so far, if at all, as the sections of the statute above referred to or either of them otherwise would or might have limited the right and power of Citizens Gas Company and Indianapolis Gas Company, both operating public utilities in the City of Indianapolis, to enter into the lease under consideration dated Sep-

tember 30, 1913 and marked Exhibit B, the Public Service Commission Act of March 4, 1913 (Ch. 76, pp. 167-214; Burns Ind. 1933, secs. 54-101 to 54-725) superseded and to that extent repealed them, and that said lease is and continuously has been a valid and binding contract.

170 Fourth. It denies that said lease of September 30, 1913, was or is onerous or burdensome upon any owner of an interest in the Citizens Gas Company or its property, or exceeded the power of the parties to make it.

(a) The annual rent reserve was and is only a fair return on the value of the leased property of this counter-defendant.

(b) No requirement as to refinancing the outstanding bond issue of the Indianapolis Gas Company was burdensome or unfair, and moreover, any invalidity of such provisions, if established, would not and could not affect the binding force of the lease before and up until refinancing by the sale of bonds below par should or might become necessary, and none of said bonds will mature until the year 1952.

(c) Counter-defendant is informed and believes and therefore avers that neither at the time the lease was executed nor at any time since has a fair price for gas produced from the leased plant and marketed by the lessor been, nor is it now produced and marketed at a cost as low as 45 cents per 1000 cubic feet, nor in fact nearly so low as that rate, and that the restriction upon reducing the price of gas below that figure was and is only a reasonable restriction to prevent the lessee from selling gas produced by the plant of a rival competitor below the cost of production and sale while holding possession of its property under a lease, and thereby reducing and

171 destroying the value of such property and then turning it back to the lessor worthless and without earning value. And such restriction is in no sense burdensome to the lessee or to its assignees, these cross-complainants.

Fifth. This is merely an assertion of legal conclusions, in reply to which the Indianapolis Gas Company says that said lease is neither burdensome nor onerous in its character, but was and is binding upon the Citizens Gas Company of Indianapolis in relation in which it acquired and has held and now holds the leased premises, and is binding upon the City of Indianapolis and all the counter-claimants as assignees and upon all and every part of the property, franchises and assets of said lessee company, leaving it nothing with which to meet its own obligations, and as having taken possession of the leased premises so turned over to them by the Lessee on Sep-

tember 9, 1935, and operated them as part of said leasee's gas plant for a long time, without any right and privilege so to do except as taking and holding the same under said lessee company; and that it has no right under the law of Indiana now to reject the same while continuing to hold all the property and franchises of its grantor the lessee.

Sixth. That no terms of any Public Charitable Trust were violated by the execution of said lease; that the lease does not require the corporate existence of any corporation to
172 continue for the entire term of the lease, whether of the trustee or the owner of any other relation. And on information and belief this counter-defendant avers that the Citizens Gas Company of Indianapolis was incorporated in 1905 for the term of 50 years, and that its term of existence has not expired; that under the law of Indiana in 1913 when this lease was made individuals or partners could lawfully own and operate a public utility franchise, and could and still can lawfully act as trustee of a Public Charitable Trust or any other kind.

That these counter-claimants are not entitled to any judgment whatever as against the Indianapolis Gas Company of Indianapolis, but that said lease is valid and binding and should be upheld, and denies each and every remaining allegation in defendants' counter-claim not specifically admitted or denied herein.

Wherefore said The Indianapolis Gas Company prays:

That the counter-claimants take nothing as against it, that said counter-claim be dismissed and that it have judgment against them for its costs, together with reasonable expenses of this defendant in the defense of this suit including reasonable attorney fees for its solicitors.

William R. Higgins
Louis B. Ewbank
Solicitors for Said
Replying Defendant.

173 And afterwards towit at the November Term of said Court, on the 30th day of November, 1936, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit: Filed Nov. 193

Comes now the defendant Citizens Gas Company, by its solicitors, and files separate answer and counter-claim, which is as follows:

174 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—1844) * *

(*1) SEPARATE ANSWER AND THE COUNTERCLAIM OF THE DEFENDANT CITIZENS GAS COMPANY OF INDIANAPOLIS.

Citizens Gas Company of Indianapolis, a defendant in the above entitled cause, for its separate answer to the plaintiff's bill of complaint, and by way of counterclaim, says:

175 I.

(*2) This defendant admits the averments contained in Subdivision 1 of plaintiff's bill of complaint.

II.

This defendant admits the averments contained in Subdivision 2 of plaintiff's bill of complaint.

III.

This defendant admits the averments of Subdivision 3 of plaintiff's bill of complaint that this suit is brought by the plaintiff as Trustee under a deed of trust executed on the 1st day of October, 1902, by the defendant The Indianapolis Gas Company to secure the payment of the principal and interest of certain first mortgage bonds of the said The Indianapolis Gas Company; that the plaintiff seeks a declaratory judgment to determine and fix the rights of the plaintiff as Mortgagee and as Trustee as aforesaid, and to determine the rights of the plaintiff and the obli-

gations of the several defendants herein under or growing out of a certain lease indenture, as described in said plaintiff's bill of complaint, executed by and between the defendant The Indianapolis Gas Company and this defendant on September 30th, 1930, which said lease indenture, and the property leased thereunder, is part and parcel of the property of the trust of which the said plaintiff is Trustee, and that the plaintiff seeks further relief by way of injunction to preserve and protect the said property and the corpus of its trust, to prevent loss, waste and damage to the same, and to prevent irreparable loss

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(*3) and damage to the holders of said bonds; that there is a real and actual controversy as to the validity and as to the rights and obligations under the said lease.

This defendant has no knowledge as to whether this suit is brought by the plaintiff as Trustee for and on behalf of the holders and owners of said bonds and pursuant to the rights granted to the original Trustees and their successor or successors under said deed of trust, and at the specific instance and request of the holders and owners of $415,000.00 in principal amount of said bonds, and neither admits nor denies said averments, but requests that plaintiff be required to make strict proof thereof.

That this defendant makes no answer to the averment in said subdivision that the plaintiff has no plain, complete or adequate remedy at law, and that adequate relief can only be administered in a court of equity, for the reason that such averment is a conclusion upon an issue of law involved in this suit.

IV.

This defendant admits the averments contained in Subdivision 4 of plaintiff's bill of complaint.

V.

This defendant admits the averments contained in Subdivision 5 of plaintiff's bill of complaint.

VI.

177 This defendant admits the averments contained in (*4) Subdivision 6 of plaintiff's bill of complaint except that this defendant denies that it has at all times continued to operate under the provisions of the certain franchise and contract granted and entered into on the 25th day of August, 1905, by and between the City of Indianapolis and three individual citizens, viz., Alfred E. Potts, Frank D. Stalnaker and Lorenz Schmidt.

This defendant avers that from the date of its organization, on the 23d day of May, 1906, it continued to operate under the terms of the said franchise until August 27th, 1921, at which time, pursuant to the laws of the State of Indiana, it filed its declaration of surrender of said franchise and accepted in lieu thereof an indeterminate permit, under which it continued to operate as a public utility until September 9th, 1935. That on September 9th, 1935, this defendant conveyed and transferred to the City of Indianapolis all of the property owned and held by it of every nature and description whatsoever, and since said date this defendant has not been engaged in any business of any nature whatsoever and has owned and held no property of any nature or description whatsoever except as specifically set forth in Subdivision XVI of this answer. Said conveyance and transfer was made by this defendant in the manner and form, and pursuant to the right, duty and obligation of this defendant so to do as specifically set forth in Subdivision IX of this answer.

VII.

This defendant admits the averments contained in Subdivision 7 of plaintiff's bill of complaint except that this defendant makes no answer to any conclusion of law therein regarding the legal effect upon the issues involved in this suit of the facts averred therein.

178 (*5) VIII.

This defendant admits the averments contained in Subdivision 8 of plaintiff's bill of complaint except that this defendant makes no answer to any conclusion

of law therein regarding the legal effect upon the issues involved in this suit of the facts averred therein.

IX.

This defendant admits the averments contained in Subdivision 9 of plaintiff's bill of complaint except that this defendant makes no answer to any conclusion of law therein regarding the legal effect upon the issues involved in this suit of the facts averred therein.

X.

This defendant admits the averments contained in Subdivision 10 of plaintiff's bill of complaint except that this defendant has no knowledge as to whether these additional bonds were widely sold and distributed and were acquired and purchased in reliance that the same were secured by a valid and enforceable ninety-nine year lease to a responsible corporation, that said corporation, its successors and assigns, were legally obligated to pay the interest thereon as a part of the rental under said lease, and that the validity of said lease had been judicially and finally determined by the Public Service Commission of Indiana and by the courts of Indiana, and neither admits nor denies said averments, but requests that plaintiff be required to make strict proof
179 (*6) thereof.

XI.

This defendant admits the averments contained in Subdivision 11 of plaintiff's bill of complaint.

XII.

This defendant admits the averments contained in Subdivision 12 of plaintiff's bill of complaint.

XIII.

This defendant admits the averments contained in Subdivision 13 of plaintiff's bill of complaint.

XIV.

This defendant admits the averments contained in Subdivision 14 of plaintiff's bill of complaint except that this defendant makes no answer to any conclusion of law therein regarding the legal effect upon the issues involved in this suit of the facts averred therein.

XV.

This defendant has no knowledge of the averments contained in Subdivision 15 of the plaintiff's bill of complaint, and neither admits nor denies said averments, but requests that plaintiff be required to make strict proof thereof.

XVI.

This defendant denies the averments of Subdivision 16 of plaintiff's bill of complaint, but alleges that prior to September 9th, 1935, the City of Indianapolis deposited with The Indiana National Bank of Indianapolis, in a special
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(*7) account to the credit of this defendant, the sums of $2,500,000 and $1,050,000 to be held on deposit by this defendant as trust funds to be used for the sole purpose of retiring, respectively, the outstanding common stock of this defendant at the par value thereof plus accumulated dividends thereon at the rate of 10% per annum, and retiring the outstanding preferred stock of this defendant at 105% of the par value thereof; that the City of Indianapolis, by and through the Board of Directors for Utilities of said City, by appropriate resolution, relinquished any and all interest which it may have had, if any, in the said funds, to the end that said funds might be held in trust solely and irrevocably for the benefit of the holders of such common and preferred stock entitled thereto; that this defendant by appropriate resolution adopted by this Board of Directors declared that such funds were to be held by this defendant solely and irrevocably for the sole benefit of the holders of the common and preferred stock of the Company entitled thereto, and that the trust created by the deposits, as aforesaid, should forever remain irrevocable.

That, as of November 1, 1936, all the outstanding common stock of this defendant had been retired as aforesaid except common stock of the total par value of $1475.00, and all of the outstanding preferred stock of this defendant had been retired as aforesaid. The funds remaining in said trust fund have at all times been sufficient to retire, pay off and discharge the amount due the holders of the certificates for such remaining common stock upon the proper presentation of the said certificates.

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(*8) This defendant has no knowledge as to whether the City of Indianapolis paid, or provided for payment, direct to the holders of the outstanding bonds of this defendant the sum of $2,858,500 representing the full amount of such outstanding bonds, with full knowledge of the obligations of this defendant under the said ninety-nine year lease and without notice to the plaintiff, or the holders of bonds of The Indianapolis Gas Company for whom plaintiff is Trustee, and neither admits nor denies said averments, but requests that plaintiff be required to make strict proof thereof.

This defendant has no knowledge as to the averment that the City of Indianapolis had full knowledge that after the retirement of all of this defendant's capital stock, it would be without means for meeting or paying its said obligations and neither admits nor denies said averment but requests that plaintiff be required to make strict proof thereof. In connection therewith this defendant alleges that upon the conveyance and transfer of all of its property to the City of Indianapolis, in the manner and form, and pursuant to the rights, duties and obligations of this defendant so to do, as specifically set forth in Subdivision XX of this answer, on September 9th, 1935, this defendant had no further duty or obligation under the said ninety-nine year lease. For the reasons specifically set forth in Subdivision XX of this answer, this defendant, upon the conveyance and transfer of its property to the City of Indianapolis as aforesaid, fully and completely discharged all obligations imposed

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(*9) upon it by the said ninety-nine year lease or otherwise, and this defendant thereupon was entirely released and discharged from any and

all future obligations or duties under the said ninety-nine year lease, and said ninety-nine year lease does not constitute a valid obligation of this defendant.

XVII.

This defendant admits the averments contained in Subdivision 17 of plaintiff's bill of complaint.

XVIII.

This defendant admits the averments contained in Subdivision 18 of plaintiff's bill of complaint that the City of Indianapolis, through its Department of Utilities, accepted the assignment and transfer under the terms and conditions as set forth in Exhibit E and adopted a resolution purporting to reject the assignment of the lease from The Indianapolis Gas Company to this defendant, and that the City of Indianapolis on September 9th, 1935, took possession of all and singular the properties of this defendant, and took over the operation of the said gas system.

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(*10) This defendant has no knowledge as to all the remaining averments contained in said subdivision and neither admits nor denies the same but requests that plaintiff be required to make strict proof thereof.

XIX.

This defendant makes no answer to the averments in Subdivision 19 of plaintiff's bill of complaint for the reason that all of such averments are conclusions upon issues of law involved in this suit.

XX.

This defendant denies the averments of Subdivision 20 of plaintiff's bill of complaint that by virtue of the findings and orders of the Public Service Commission of

Indiana, the final decree and judgment in the case of Fishback *vs.* Public Service Commission of Indiana, et al., the final decree and judgment in the case of Todd *vs.* Citizens Gas Company of Indianapolis, et al., and the final decree and judgment in the case of Williams *vs.* Citizens Gas Company of Indianapolis, et al., this defendant is estopped to deny that the said ninety-nine year lease, on the date of its execution, was and still is a valid obligation of this defendant. This defendant makes no answer to the averment that the defendants other than this defendant are estopped to deny that said ninety-nine year lease from the date of its execution was and still is a valid obligation of said other defendants, for the reason that such averment is a conclusion upon an issue of law involved in this suit which does not in any way affect this defendant or in which this defendant has any interest.

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(*11) This defendant alleges that it was organized on the 23d day of May, 1906, under the general laws of the State of Indiana providing for the incorporation of manufacturing and mining companies, its purposes and obligations being fixed and controlled entirely by its articles of incorporation, its by-laws, and the certain franchise and contract granted and entered into on the 25th day of August, 1905, by and between the City of Indianapolis and Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, copies of which instruments are made a part of plaintiff's bill of complaint, identified as Exhibit C, and are by reference made a part of this answer.

This defendant alleges that by virtue of such instruments this defendant became the Trustee of a public charitable trust for the benefit of the present and prospective gas consumers of the City of Indianapolis and all of the rights, property and assets then or thereafter acquired by this defendant were held by it as such Trustee, and for the purposes and upon the terms and conditions set forth in said instruments and no other. Said instruments provided, among other things, that when the outstanding preferred stock of this defendant shall have been retired and when the holders of the certificates representing the common stock of this defendant shall have received by dividends or otherwise upon such certificates an amount equal to the face value thereof together with interest thereon

at the rate provided for, the said certificates shall all be deemed fully paid and cancelled, and it shall thereupon be the duty of the Trustees and Directors of this defendant to convey to the City of Indianapolis all the right, title

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(*12) and interest of this defendant in all of its said property subject to all of the legal obligations of this defendant, to be owned and operated by the said City of Indianapolis, and that thereafter this defendant shall be wound up.

This defendant further alleges that from the date of its organization, as aforesaid, it continued to operate under the terms of the said franchise and contract until August 27th, 1921, at which time, pursuant to the laws of the State of Indiana, it filed its declaration of surrender of said franchise and accepted in lieu thereof an indeterminate permit, under which it continued to operate and hold the said property as a public utility until September 9th, 1935. This defendant avers that said indeterminate permit did not have the effect of modifying or rendering nugatory the terms of said franchise and contract insofar as they created and governed the public charitable trust as aforesaid, and the rights and obligations of this defendant as the Trustee thereof.

This defendant further alleges on information and belief that prior to the 30th day of September, 1913, and at all times subsequent thereto, this plaintiff, the defendant The Indianapolis Gas Company, and all of the holders of the said bonds either had actual knowledge of, or were bound in law by knowledge of, the terms and provisions of the said franchise and contract, the articles of incorporation of this defendant and its by-laws, and that this defendant at the end of the period of said franchise and contract, towit: on August 30th, 1930, and when the conditions fixed therein precedent to the conveyance and transfer had been fully compiled with, was under the

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(*13) duty and obligation to convey and transfer all of the said property to the City of Indianapolis, and to thereafter be wound up.

This defendant further alleges that prior to September 9th, 1935, all of the conditions fixed in the said franchise and contract, articles of incorporation and by-laws as precedent to the duty of this defendant to convey and transfer its said property as aforesaid had been fully and

completely performed so that on said date nothing further remained to be performed or done by the City of Indianapolis to entitle it in law to have all of said property conveyed and transferred to it as aforesaid. Accordingly, on said date, this defendant, by its proper corporate officers, executed and delivered instruments of conveyance and transfer of all of its said property to the City of Indianapolis, in the manner and form and pursuant to its duty so to do as aforesaid.

This defendant avers that the said ninety-nine year lease is not a valid and legal obligation of this defendant, but that it was entirely and completely released and discharged from any such obligation at the time such conveyance and transfer was made to the City of Indianapolis, on September 9th, 1935, for each of the reasons following:

(1) Said ninety-nine year lease and the obligation of this defendant thereunder has at all times been subject to the condition implied by law that this defendant was under the duty to make the conveyance and transfer as aforesaid, retire and discharge all of its outstanding preferred and common stock and thereafter wind up its affairs.

(2) Said ninety-nine year lease and the obligation
187 (*14)
of this defendant thereunder has at all times been subject to the condition implied by law that upon the termination of said franchise period and the conveyance and transfer as aforesaid, this defendant should be entirely and completely released and discharged from any further obligation as lessee under said lease.

(3) This defendant conveyed and transferred all of its said property to the City of Indianapolis subject to all outstanding legal obligations of this defendant, including the legal obligation of this defendant under said lease, if any there be, and whether or not the City of Indianapolis or the property so conveyed and transferred is subject to the said lease for any period beyond September 9th, 1935, this defendant has fully and completely, so far as the plaintiff and the other defendants herein are concerned, carried out and performed the purpose of its organization and the duties and obligations to which it was subject as hereinbefore set forth.

(4) The Indianapolis Gas Company, and this plaintiff, are estopped to deny that this defendant has been entirely and completely released and discharged from any

and all obligation under said lease as the result of the said conveyance and transfer, and that the said lease is not a valid obligation of this defendant at this time.

XXI.

This defendant denies the averments of Subdivision 20 of plaintiff's bill of complaint that by reason of the operations of the Citizens Gas Company of Indianapolis, the acceptance by it and by the City of Indianapolis for more than twenty-one years of all of the benefits under
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(*15) said ninety-nine year lease, including the benefits of consolidated operation of the leased property, and by reason of the acts of the defendants in causing the Trustee under the aforesaid mortgage deed of trust to authenticate and deliver additional bonds to reimburse the Citizens Gas Company of Indianapolis for capital expenditures on account of extensions and betterments to the plant and system of The Indianapolis Gas Company theretofore made by it as lessee, and by reason of the other acts of the several defendants in causing said bonds to be sold and distributed as bonds secured by a valid ninety-nine year lease to the Citizens Gas Company of Indianapolis, its successors in trust and assigns, this defendant is estopped to deny that the said ninety-nine year lease is a valid obligation of this defendant. This defendant makes no answer to the averment that the defendants other than this defendant are estopped to deny that said ninety-nine year lease from the date of its execution was and still is a valid obligation of said other defendants, for the reason that such averment is a conclusion upon an issue of law involved in this suit which does not in any way affect this defendant or in which this defendant has any interest.

This defendant avers that for the reasons specifically set forth in Subdivision XX of this answer, the said ninety-nine year lease is not a valid and legal obligation of this defendant but that it was entirely and completely released and discharged from any such obligation at the time such conveyance and transfer was made to the City of Indianapolis, on September 9th, 1935.
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(*16) XXII.

This defendant makes no answer to the averments contained in Subdivision 22 of plaintiff's bill of complaint for the reason that such averments are conclusions upon issues of law involved in this suit which do not in any way affect this defendant or in which this defendant has any interest.

XXIII.

This defendant has no knowledge as to the averments contained in Subdivision 23 of plaintiff's bill of complaint, and neither admits nor denies said averments, but requests that plaintiff be required to make strict proof thereof.

XXIV.

This defendant has no knowledge as to the averments contained in Subdivision 24 of plaintiff's bill of complaint, and neither admits nor denies said averments, but requests that plaintiff be required to make strict proof thereof.

XXV.

This defendant has no knowledge as to the averments contained in Subdivision 25 of plaintiff's bill of complaint, and neither admits nor denies said averments, but requests that plaintiff be required to make strict proof thereof.

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(*17) Counterclaim

This defendant, by way of counterclaim, complains of the plaintiff, The Chase National Bank of the City of New York, as Trustee, The Indianapolis Gas Company, an Indiana corporation, the City of Indianapolis, a municipal corporation, William J. Mooney, Sr., A. Dallas Hitz, Alfred M. Glossbrenner, Edward W. Harris, and Charles H. Rauh, as members of the Board of Trustees for Utilities of the City of Indianapolis, Henry L. Dithmer, Broadhurst Elsey, Fred W. Jungclaus, Roy Sahm, David J. Angus, Isaac E. Woodward, and Russell J. Ryan, as members of the Board of Directors for Utilities of the City of Indianapolis, and by way of cross counterclaim alleges:

That the plaintiff, The Chase National Bank of the City of New York, is a corporation organized and existing under and by virtue of the laws of New York and is a citizen and resident of the State of New York; that it is a Successor-Trustee under a deed of trust executed on the 1st day of October, 1902, by the defendant The Indianapolis Gas Company to secure the payment of the principal and interest of certain bonds which are now outstanding in the hands of the public in the total principal amount of $6,881,000.

That this defendant was organized on the 23d day of May, 1906, under the general laws of the State of Indiana providing for the incorporation of manufacturing and mining companies, its purposes and obligations being fixed and controlled entirely by its articles of incorporation, its by-laws, and the certain franchise and contract granted

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and entered into on the 25th day of August, 1905 by and between the City of Indianapolis and Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, copies of which instruments are made a part of plaintiff's bill of complaint, identified as Exhibit C, and are by reference made a part of this counterclaim.

That by virtue of such instruments this defendant became the Trustee of a public charitable trust for the benefit of the present and prospective gas consumers of the City of Indianapolis and all of the rights, property and assets then or thereafter acquired by this defendant were held by it as such Trustee, and for the purposes and upon the terms and conditions set forth in said instruments and no other. Said instruments provided, among other things, that when the outstanding preferred stock of this defendant shall have been retired and when the holders of the certificates representing the common stock of this defendant shall have received by dividends or otherwise upon such certificates an amount equal to the face value thereof together with interest thereon at the rate provided for, the said certificates shall all be deemed fully paid and cancelled, and it shall thereupon be the duty of the Trustees and Directors of this defendant to convey to the City of Indianapolis all the right, title and interest of this defendant in all of its said property subject to all of the legal obligations of this defendant, to be owned and operated by the said City of Indianapolis, and

that thereafter this defendant shall be wound up.

That from the date of its organization, as aforesaid, it continued to operate under the terms of the said fran-
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(*19) chise and contract until August 27th, 1921, at which time, pursuant to the laws of the State of Indiana, it filed its declaration of surrender of said franchise and accepted in lieu thereof an indeterminate permit, under which it continued to operate and hold the said property as a public utility until September 9th, 1935. This defendant avers that said indeterminate permit did not have the effect of modifying or rendering nugatory the terms of said franchise and contract insofar as they created and governed the public charitable trust as aforesaid, and the rights and obligations of this defendant as the Trustee thereof.

That on the 30th day of September, 1913, this defendant and the defendant The Indianapolis Gas Company entered into a written lease, a copy of which written lease, marked "Exhibit B", is made a part of the plaintiff's bill of complaint and by reference a part of this counterclaim.

That prior to the 30th day of September, 1913, and at all times subsequent thereto, this plaintiff, the defendant The Indianapolis Gas Company, and all of the holders of the said bonds either had actual knowledge of, or were bound in law by knowledge of, the terms and provisions of the said franchise and contract, the articles of incorporation of this defendant and its by-laws, and that this defendant at the end of the period of said franchise and contract, towit: on August 30th, 1930, and when the conditions fixed therein precedent to the conveyance and transfer had been fully complied with, was under the
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(*20) duty and obligation to convey and transfer all of the said property to the City of Indianapolis, and to thereafter be wound up.

That prior to September 9th, 1935, all of the conditions fixed in the said franchise and contract, articles of incorporation and by-laws as precedent to the duty of this defendant to convey and transfer its said property as aforesaid had been fully and completely performed so that on said date nothing further remained to be performed or done by the City of Indianapolis to entitle it in law to

have all of said property conveyed and transferred to it as aforesaid. Accordingly, on said date, this defendant, by its proper corporate officers, executed and delivered instruments of conveyance and transfer of all of its said property to the City of Indianapolis, in the manner and form and pursuant to its duty so to do as aforesaid.

That there is a present existing controversy between this defendant and the plaintiff and the defendant The Indianapolis Gas Company as to whether the said ninety-nine year lease is still a valid and enforceable obligation against this defendant; that the defendants other than this defendant and The Indianapolis Gas Company have an interest in the determination of said controversy for the reason that they are asserting that the assignment of said lease, a copy of which is marked "Exhibit F" and made a part of plaintiff's complaint and by reference a part of this counterclaim, was not accepted by said defendants and that they had the legal right to accept the assignment of all of the remainder

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(*21) of the property of this defendant and to refuse to accept the assignment of said lease.

This defendant avers that the said ninety-nine year lease is not a valid and legal obligation of this defendant, but that it was entirely and completely released and discharged from any such obligation at the time such conveyance and transfer was made to the City of Indianapolis, on September 9th, 1935, for each of the reasons following:

(1) Said ninety-nine year lease and the obligation of this defendant thereunder has at all times been subject to the condition implied by law and this defendant was under the duty to make the conveyance and transfer as aforesaid, retire and discharge all of its outstanding preferred and common stock and thereafter wind up its affairs.

(2) Said ninety-nine year lease and the obligation of this defendant thereunder has at all times been subject to the condition implied by law that upon the termination of said franchise period and the conveyance and transfer as aforesaid, this defendant should be entirely and completely released and discharged from any further obligation as lessee under said lease.

(3) This defendant conveyed and transferred all of

its said property to the City of Indianapolis subject to all outstanding legal obligations of this defendant, including the legal obligation of this defendant under said lease, if any there be, and whether or not the City of Indianapolis or the property so conveyed and transferred is subject to the said lease for any period beyond Sep-
195 (*22) tember 9th, 1935, this defendant has fully and completely, so far as the plaintiff and the other defendants herein are concerned, carried out and performed the purpose of its organization and the duties and obligations to which it was subject as hereinbefore set forth.

(4) The Indianapolis Gas Company, and this plaintiff, are estopped to deny that this defendant has been entirely and completely released and discharged from any and all obligation under said lease as the result of the said conveyance and transfer, and that the said lease is not a valid obligation of this defendant at this time.

(5) This defendant fully and completely complied with all the terms and provisions of the said ninety-nine year lease up to and including September 9th, 1935, on which date this defendant, pursuant to its duty so to do as aforesaid, conveyed, transferred and assigned all of its said property, including its interest in and to the said ninety-nine year lease, to the City of Indianapolis, subject to all the legal obligations of this defendant, including the legal obligation under the said ninety-nine year lease, if any there be, and, whether or not the City of Indianapolis had the legal right to refuse to accept the assignment of said lease and to refuse to become bound by the obligations thereof, this defendant has fully and completely performed all of its obligations under the said ninety-nine year lease and is entirely and completely released from any obligation thereunder.

That this defendant is entitled to a judgment and declaration of this Court that the said ninety-nine year
196 (*23) lease is not a valid and binding obligation against this defendant, but that it was entirely and completely released and discharged from any such obligation at the time such conveyance, transfer and assignment was made to the City of Indianapolis, on September 9th, 1935.

This defendant further alleges that the defendants

other than this defendant and The Indianapolis Gas company, are asserting that the City of Indianapolis not only has the right to reject the assignment of the said lease as aforesaid, but that the said City of Indianapolis had the legal right to accept the transfer of all the remainder of the property of this defendant subject to all outstanding legal obligations of this defendant except the legal obligation under the said lease, if any there be. This defendant avers that, for the reasons hereinbefore specifically set forth and by virtue of the acceptance of the transfer of such property, the City of Indianapolis has assumed each and all of the obligations of the said lease, if any there be, and that all of the said property so transferred to and accepted by the said City of Indianapolis is subject to the charge and obligation of the said lease, if any there be; and that this defendant is entitled to a judgment and declaration accordingly.

This defendant avers that it, its directors, officers and trustees, had complete power and authority to execute and enter into the said lease in the manner and form as aforesaid, and admits that the said lease was valid and binding upon this defendant and its property from the date of the execution thereof to the time

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(*24) this defendant conveyed, transferred and assigned all of its property to the City of Indianapolis as aforesaid. For the reasons and upon the facts as hereinbefore specifically set forth, the primary controversy in this proceeding, is whether or not the City of Indianapolis and the property conveyed and transferred to it as aforesaid, are subject to the provisions of the said lease for the remainer of the term thereof as a result of the conveyance, transfer and assignment as aforesaid. Whether or not the City of Indianapolis and such property are subject to the said lease, this defendant has fully and lawfully performed its duties as Trustee of the said public charitable trust and is under no further obligation to the plaintiff or other defendants herein. This defendant, therefore, has no interest in and assumes no position with reference to the primary controversy between the plaintiff herein, The Indianapolis Gas Company and the other defendants herein, as aforesaid.

Wherefore, this defendant and counterclaimant prays:

(1) That plaintiff's bill of complaint be dismissed for want of equity.

(2) That this Court adjudge and declare that the said ninety-nine year lease is not a valid or legal obligation of this defendant, and that this defendant was entirely and completely released and discharged from any present or future obligation or liability under the said lease upon the conveyance, transfer and assignment of all of its said property to the City of Indianapolis, on September 9th, 1935.

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(*25) (3) That this Court adjudge and declared that by virtue of the transfer of this property to the City of Indianapolis as hereinbefore set forth, the said City of Indianapolis has assumed each and all of the obligations of said lease, if any there be, and that all of the property so transferred and accepted by the said City of Indianapolis is subject to the charge and obligation of the said lease, if any there be.

(4) For its costs in this action and all other proper relief agreeable to equity and good conscience.

Smith, Remster, Hornbook & Smith
Solicitors for the Citizens Gas Company of Indianapolis.

Paul Y. Davis
William G. Sparks
Of Counsel

199 (Entry for November 30, 1936, continued.)

And said defendant Citizens Gas Company also files separate reply to counterclaim of defendants City of Indianapolis, et al., which separate reply is as follows:

200 In the District Court of the United States. Filed Nov 30, 1936
* * (Caption—1844) * *

SEPARATE REPLY OF CITIZENS GAS COMPANY OF INDIANAPOLIS TO THE COUNTERCLAIM OF THE DEFENDANTS THE CITY OF INDIANAPOLIS, A MUNICIPAL CORPORATION, WILLIAM J. MOONEY, A. DALLAS HITZ, ALFRED M. GLOSSBRENNER, EDWARD W. HARRIS AND CHARLES S. RAUH, AS MEMBERS OF THE BOARD OF TRUSTEES FOR UTILITIES OF THE CITY OF INDIANAPOLIS, HENRY L. DITHMER, BROADHURST ELSEY, FRED W. JUNGCLAUS, ROY SAHM, DAVID J. ANGUS, ISAAC E. WOODARD AND RUSSELL J. RYAN, AS MEMBERS OF THE BOARD OF DIRECTORS FOR UTILITIES OF THE CITY OF INDIANAPOLIS.

201 Citizens Gas Company of Indianapolis, a defendant in the above entitled cause, for its separate reply to the counterclaim of the defendants The City of Indianapolis, a municipal corporation, William J. Mooney, A. Dallas Hitz, Alfred M. Glossbrenner, Edward W. Harris and Charles S. Rauh, as members of the Board of Trustees for Utilities of the City of Indianapolis, Henry L. Dithmer, Broadhurst Elsey, Fred W. Jungclaus, Roy Sahm, David J. Angus, Isaac E. Woodard and Russell J. Ryan, as members of the Board of Directors for Utilities of the City of Indianapolis, says:

I.

This defendant admits the averments contained in Paragraph 1 of said defendants' counterclaim.

II.

This defendant admits the averments contained in Paragraph 2 of said defendants' counterclaim.

III.

This defendant admits the averments contained in Paragraph 3 of said defendants' counterclaim.

IV.

This defendant admits the averments contained in Paragraph 4 of said defendants' counterclaim.

V.

This defendant admits the averments contained in Paragraph 5 of said defendants' counterclaim.

202 VI.

This defendant admits the averments contained in Paragraph 6 of said defendants' counterclaim.

VII.

This defendant admits the averments contained in Paragraph 7 of said defendants' counterclaim, except that this defendant makes no answer to the conclusion of law therein that the plaintiff herein has no legal right to assert that the said lease is valid and binding.

VIII.

With respect to Paragraph 8 of said defendants' counterclaim, this defendant denies that said lease of September 30th, 1913, is not a valid or enforceable obligation against the said counterclaimants or the property of said public charitable trust from and after September 9th, 1935, to the extent and for the reasons following:

(1) The conveyance, transfer and assignment by this defendant of all of its property to the City of Indianapolis in the manner and form and pursuant to its right and duty so to do, as specifically set forth in this defendant's counterclaim in this action, the averments of which are by reference made a part of this reply, entirely and completely released and discharged this defendant from any present or future obligation or liability under the said lease as of the date of said conveyance, transfer and assignment.

203 (2) This defendant conveyed, transferred and assigned all of its property to the City of Indianapolis subject to all outstanding legal obligations of this defendant, including the legal obligation of this defendant under said lease,

if any there be, and the said counterclaimants accepted the conveyance and transfer of said property and immediately took possession thereof. This defendant avers that if it is subject to any present or future obligation or liability under the said lease, that as a result of the said conveyance, transfer and assignment, the said City of Indianapolis has assumed the said lease and is subject to any such obligation, and the said property is subject to any such obligation of the said lease.

(3) As a result of the conveyance, transfer and assignment of said property to the City of Indianapolis in the manner and form and pursuant to its right and duty so to do as aforesaid, which conveyance, transfer and assignment was accepted by the said City of Indianapolis, the said counterclaimants are estopped to deny that it has not assumed each and all of the obligations of said lease, if any there be, and that all of the property so transferred and accepted by the said City is subject to the charge and obligation of the said lease, if any there be.

IX.

With respect to Paragraph 9 of said defendants' counterclaim this defendant denies that the said lease of September 30th, 1913, is not a valid and binding obligation against the said counterclaimants and is invalid, void and unenforceable against said counterclaimants and against said trust property taken over by the City of Indianapolis, to the extent and for the reasons hereinbefore specifically set forth 204 in Subdivision VIII of this reply.

Wherefore, this defendant prays:

(1) That the said defendants' counterclaim be dismissed for want of equity.

(2) For its costs herein and all other proper relief agreeable to equity and good conscience.

Charles Remster,
Albert P. Smith,
Paul Y. Davis,
Kurt F. Pantzer,
Ernest R. Baltzell,
William G. Sparks,
Solicitors for the Citizens Gas Company of Indianapolis.

(Signed) Paul Y. Davis,
(Signed) William G. Sparks,
Of Counsel.

d Dec. 936.

205 And afterwards towit at the November Term of said Court on the 22nd day of December, 1936, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit:

Come now the defendants City of Indianapolis, et al., by their solicitors, and file separate reply to counter-claim of Citizens Gas Company of Indianapolis, which reply is as follows:

206 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—1844) * *

SEPARATE REPLY OF CITY OF INDIANAPOLIS, ET AL., TO COUNTERCLAIM OF CITIZENS GAS COMPANY OF INDIANAPOLIS.

Defendants City of Indianapolis, a municipal corporation, Willim J. Mooney, A. Dallas Hitz, Alfred M. Glossbrenner, Edward W. Harris and Charles S. Rauh, as members of the Board of Trustees for Utilities of the City of Indianapolis, Henry L. Dithmer, Brodehurst Elsey, Fred W. Jungclaus, Roy Sahm, Isaac I. Woodard, Donald J. Angus and Russell J. Ryan, as members of the Board of Directors for Utilities of the City of Indianapolis, for their separate and several reply to the counterclaim of defendant Citizens Gas Company of Indianapolis, say:

1. They admit the averments of the first paragraph of said counterclaim, but aver that The Chase National Bank of the City of New York is a National Banking Association under the laws of the United States; and aver also, upon information and belief, that approximately $120,000 aggregate face value of said bonds are not in the hands of the public but are held by defendant The Indianapolis Gas Company.

2. They admit the averments of the second paragraph of said counterclaim.

3. They admit the averments of the third paragraph of said counterclaim and aver that the term of such trusteeship expired on or prior to September 9, 1935.

207 4. They admit the averments of the fourth paragraph of said counterclaim.

5. They admit the averments of the fifth paragraph of

said counterclaim but they deny that said lease was ever valid and enforceable.

6. They admit the averments of the sixth paragraph of said counterclaim.

7. They admit the averments of the seventh paragraph of said counterclaim; but deny that there was any obligation on said defendant Citizens Gas Company to assign and transfer to the City of Indianapolis the certain ninety-nine year lease executed by defendant The Indianapolis Gas Company to defendant Citizens Gas Company of Indianapolis, or in the part of the City of Indianapolis to accept it; and they aver that the assignment of said lease to the City of Indianapolis was expressly rejected and that it was not assumed by the City of Indianapolis and is not valid or enforceable against it.

8. They admit that there is a present existing controversy as to the force and effect of said lease, but they aver that said lease is wholly invalid and unenforceable as against defendant City of Indianapolis; and they assert that to the extent that defendant Citizens Gas Company of Indianapolis seeks a declaration of the validity of said lease, and to the further extent that it seeks a declaration that said lease, if valid, is binding against said City of Indianapolis, said defendant Citizens Gas Company of Indianapolis is an indispensable party aligned in interest with plaintiff and with defendant The Indianapolis Gas Company; and being so aligned, and an Indiana corporation, the diversity of citizenship necessary to sustain the jurisdiction of the court over this cause is destroyed.

9. They make no answer to the conclusions of law contained in the ninth paragraph of said counterclaim, they admit that defendant Citizens Gas Company of Indianapolis conveyed and transferred all of its property to the City of
208 Indianapolis subject to all outstanding legal obligations of that Company, but they aver that said lease was not and is not one of such obligations, and they aver that the tendered assignment of said lease was expressly rejected by the City of Indianapolis, that said lease was not assumed by the City, and is wholly invalid and unenforceable as against defendant City of Indianapolis; and they assert that to the extent that defendant Citizens Gas Company of Indianapolis seeks a declaration of the validity of said lease and to the further extent that it seeks a declaration that said lease, if valid, is binding against said City of Indianapolis, said defendant

Citizens Gas Company of Indianapolis is an indispensable party aligned in interest with plaintiff and with defendant The Indianapolis Gas Company; and being so aligned, and an Indiana corporation, the diversity of citizenship necessary to sustain the jurisdiction of the court over this cause is destroyed. It is admitted that no liability now exists against defendant Citizens Gas Company of Indianapolis under or on account of said lease, up to and including September 9, 1935.

10. They make no answer to the conclusions of law that constitute the tenth paragraph of said counterclaim, but they aver that said lease is wholly invalid and unenforceable as against defendant City of Indianapolis; and they assert that to the extent that defendant Citizens Gas Company of Indianapolis seeks a declaration of the validity of said lease and to the further extent that it seeks a declaration that said lease, if valid, is binding against said City of Indianapolis, said defendant Citizens Gas Company of Indianapolis is an indispensable party aligned in interest with plaintiff and with defendant The Indianapolis Gas Company; and being so aligned, and an Indiana corporation, the diversity of citizenship necessary to sustain the jurisdiction of the court over this cause is destroyed.

209 11. They admit that they are asserting that the city of Indianapolis had the right to reject an assignment of said lease and to accept the property of said Citizens Gas Company of Indianapolis free from any supposed obligation under said lease; but they aver that said lease is wholly invalid and unenforceable as against defendant City of Indianapolis; and they assert that to the extent that defendant Citizens Gas Company of Indianapolis seeks a declaration of the validity of said lease and to the further extent that it seeks a declaration that said lease, if valid, is binding against said City of Indianapolis, said defendant Citizens Gas Company of Indianapolis is an indispensable party aligned in interest with plaintiff and with defendant The Indianapolis Gas Company; and being so aligned, and an Indiana corporation, the diversity of citizenship necessary to sustain the jurisdiction of the court over this cause is destroyed.

12. They deny that defendant Citizens Gas Company of Indianapolis, its directors, officers, and/or trustees, had any right at all to execute and enter into said lease, for the reasons set out in paragraph 27 of the answer of these defend-

ants in this cause; and aver that said lease is wholly invalid and unenforceable as against defendant City of Indianapolis, and they assert that to the extent that defendant Citizens Gas Company of Indianapolis seeks a declaration of the validity of said lease, and to the further extent that it seeks a declaration that said lease, if valid, is binding against said City of Indianapolis, said defendant Citizens Gas Company of Indianapolis is an indispensable party aligned in interest with plaintiff and with defendant The Indianapolis Gas Company; and being so aligned, and an Indiana corporation, the diversity of citizenship necessary to sustain the jurisdiction of the court over this cause is destroyed.

210 Wherefore, said defendants pray that said counterclaim be dismissed with costs; and for all other proper relief.

Thompson, Rabb & Stevenson
Solicitors for said Replying Defendants.

211 And afterwards to wit at the November Term of said Court, on the 6th day of January, 1937, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit: Filed Jan. 6 1937.

Comes now the plaintiff, by its solicitors, and files answer to counter-claim of the defendant Citizens Gas Company of Indianapolis, which answer is as follows:

212 In the District Court of the United States.
* * (Caption—1844) * *

PLAINTIFF'S ANSWER TO THE COUNTERCLAIM OF DEFENDANT, CITIZENS GAS COMPANY OF INDIANAPOLIS.

Now comes The Chase National Bank of the City of New York, Trustee, the plaintiff herein, and makes the following answer to the counterclaim of defendant, Citizens Gas Company of Indianapolis:

Answering the second paragraph on page 17 of said defendant's separate answer and counterclaim, plaintiff denies that it is a corporation organized and existing under and by virtue of the laws of New York, alleges that in fact it is a

corporation existing under and virtue of the banking laws of the United States, and admits the remaining allegations contained in said paragraph.

Answering the paragraphs commencing at the bottom of page 17, plaintiff admits that the defendant, Citizens Gas Company, was duly organized as therein alleged, that it adopted certain articles of incorporation and by-laws and that it accepted a certain franchise and contract, copies of which instruments are identified as "Exhibits C" to plaintiff's Bill of Complaint, but plaintiff denies that said defendant's purposes or its obligations are fixed and controlled entirely by said instruments.

213 Answering the paragraph commencing at the top of page 18, plaintiff admits that by virtue of said franchise, articles of incorporation and by-laws a public charitable trust was created for the benefit of present and prospective gas consumers of the City of Indianapolis, that all of the rights, property and assets then or thereafter acquired by defendant, Citizens Gas Company, were the subject of this public charitable trust, and that said instruments contained provisions substantially as set forth in the aforesaid paragraph. Plaintiff denies that the aforesaid rights, property and assets were held by said defendant for no other purposes than those set forth in said instruments and denies that they were held by said defendant upon no other terms and conditions than those set forth therein; and plaintiff says that whether the trustees of said public charitable trust was said defendant itself or its Board of Directors of the Board of Trustees created for the purpose of holding and voting all of its outstanding stock, if material to a determination of any of the issues presented in this cause, which plaintiff denies, is a question for the decision of the Court, for which purpose reference is made to plaintiff's Bill of Complaint, wherein all the pertinent facts relating thereto within plaintiff's knowledge are fully set forth.

Answering the paragraph commencing at the bottom of page 18, plaintiff admits that defendant, Citizens Gas Company, began to operate under the terms of the aforesaid franchise and contract from the date of its organization. Plaintiff is not informed concerning the remaining allegations contained in said paragraph and therefore neither admits or denies the same, but demands strict proof thereof, if deemed material.

Plaintiff admits the allegations contained in the first complete paragraph on page 19.

214 Answering the paragraph commencing at the bottom of page 19, plaintiff admits that it had knowledge some time after the execution thereof of the 99 year lease dated September 30, 1913, between The Indianapolis Gas Company and Citizens Gas Company of Indianapolis and of the approval of said lease in the proceedings referred to in plaintiff's Bill of Complaint; but plaintiff denies that it had actual or constructive knowledge, as alleged in the said paragraph of defendant's counter-claim, of any of the terms and provisions of the aforesaid franchise and contract, or of the articles of incorporation or by-laws of defendant, Citizens Gas Company. Plaintiff is not informed of the extent to which, or the time when, the holders of bonds for which it is trustee had actual knowledge, if any, of the terms and provisions of said franchise and contract, articles of incorporation and by-laws, but denies that any of the holders of said bonds may be charged with constructive knowledge thereof, and if actual knowledge of any of said terms and provisions is material, plaintiff asks that strict proof be made thereof.

Answering the first complete paragraph on page 20, plaintiff admits that on or about September 9, 1935, defendant, Citizens Gas Company, executed and delivered certain instruments of conveyance and transfer of all its property to the City of Indianapolis, but plaintiff is not informed whether all the conditions fixed by said defendant's franchise or by its articles of incorporation or by its by-laws as precedent to said defendant's obligation to convey its property to the City of Indianapolis had been fully and completely performed prior to the time of said conveyance and transfer and plaintiff asks strict proof thereof, if deemed material.

Plaintiff admits all the allegations contained in the paragraph commencing at the bottom of page 20.

215 Plaintiff denies each and every allegation contained in the first complete paragraph on page 21.

Plaintiff denies each and every allegation contained in the paragraph on page 21 marked "(1)".

Plaintiff denies each and every allegation contained in the paragraph on page 21 marked "(2)".

Answering the paragraph on page 21 marked "(3)", plaintiff admits that defendant, Citizens Gas Company, conveyed and transferred all its property to the City of Indianapolis, subject to all outstanding legal obligations of said defendant,

including its legal obligations under said lease, but plaintiff denies that said defendant has completely carried out or has performed the purposes of its organization and denies that said defendant has fully and completely, so far as plaintiff is concerned, carried out or performed the duties and obligations to which it was and is subject.

Plaintiff denies each and every allegation contained in the paragraph on page 22 marked "(4)".

Answering the paragraph on page 22 marked "(5)", plaintiff admits that on or about September 9, 1935, defendant, Citizens Gas Company, conveyed all its property, including its interest in said lease, to the City of Indianapolis, subject to all the legal obligations of said defendant, including its obligations under said lease; but plaintiff is not informed whether said defendant fully and completely complied with all the terms and provisions of said lease up to and including September 9, 1935, and asks that strict proof be made thereof, and plaintiff denies that said defendant has fully and completely performed all of its obligations under said lease and denies that said defendant is released from any obligations thereunder.

216 Plaintiff denies each and every allegation contained in the paragraph commencing at the bottom of page 22.

Plaintiff admits all of the allegations contained in the first complete paragraph on page 23.

Answering the paragraph commencing at the bottom of page 23, plaintiff admits that defendant, Citizens Gas Company, its directors, officers, and trustees, had complete power and authority to execute and to enter into the said lease, and plaintiff admits that said lease was valid and binding upon said defendant and its property from the date of the execution thereof. Plaintiff denies that said lease ceased to be valid and binding upon said defendant when it conveyed its property to the City of Indianapolis, denies that said defendant has fully and lawfully performed its duties under the aforesaid public charitable trust, denies that said defendant is under no further obligation to the plaintiff, and denies that said defendant has no interest in the controversy between plaintiff and the other defendants herein.

Plaintiff denies each and every remaining allegation in said defendant's counter-claim not hereinbefore specifically admitted. For further answer plaintiff refers to and incorporates herein each and every allegation contained in its Bill of Complaint.

Wherefore, plaintiff prays that the counter-claim of coun-

ter-claimant, Citizens Gas Company of Indianapolis, be dismissed as to plaintiff and that plaintiff have judgment against said counter-claimant for its costs.

Newton D. Baker
Raymond T. Jackson
William L. Taylor
Solicitors for Plaintiff.

217 And afterwards to wit at the November Term of said Court, on the 16th day of January, 1937, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit: Filed Jan. 1937

Comes now the defendant Indianapolis Gas Company, by its solicitors, and files answer to counter-claim of the defendant Citizens Gas Company of Indianapolis, which answer is as follows:

218 In the District Court of the United States.
* * (Caption—1844) * *

DEFENDANT THE INDIANAPOLIS GAS COMPANY'S ANSWER TO THE COUNTER-CLAIM OF DEFENDANT CITIZENS GAS COMPANY OF INDIANAPOLIS.

Comes now The Indianapolis Gas Company, counter-defendant herein, and makes answer to the counter-claim of defendant Citizens Gas Company of Indianapolis, as follows:

Said counter-defendant admits that The Chase National Bank of the City of New York is a corporation and is a citizen and resident of the State of New York, and that it is a successor Trustee under a deed of trust executed on the first day of October, 1902, by the defendant The Indianapolis Gas Company to secure the payment of the principal and interest of certain bonds which are now outstanding in the hands of the public in the total principal amount of $6,881,000. It does not know under the laws of what jurisdiction the Chase National Bank of the City of New York is organized as a corporation and demands proof concerning the same.

219 Answering the rhetorical paragraph which commences with the 24th line of page 17 of said defendant's answer and counter-claim, this counter-defendant admits that the defendant Citizens Gas Company of Indianapolis was duly or-

ganized as therein alleged, that it adopted articles and by-laws and accepted a certain franchise and contract, copies of which instruments are filed with the plaintiff's bill of complaint as Exhibit "C" thereof, all as alleged in said counter-claim; but plaintiff does not know that its purposes and obligations were fixed and controlled entirely by said instruments, nor admit the same, but is advised that the averment thereof is a conclusion of law, and asks to be excused from answering the same.

Answering the rhetorical paragraph commencing at line 7 of page 18 of said counter-claim this counter-defendant admits that by virtue of said instruments the persons therein designated became the trustees of a Public Charitable Trust for the benefit of present and prospective gas consumers of the City of Indianapolis, and that subject to the provisions thereof all the rights, property and assets then or thereafter acquired by the counter-claimant were so held as such Trustee, subject to the payment of its legal obligations, and for the purposes and upon the terms and conditions set forth in said instruments. It does not know whether or not they were held "for the purposes and upon the conditions therein set forth and no other." And counter-claimant says it does not know as a matter of fact whether the Trustee of such Public Charitable Trust was the Citizens Gas Company itself, or its Board of Directors, or the Board of Trustees which held and voted its outstanding stock, but counter-defendant is advised that this is a question for the decision of the court from
220 a consideration of said instruments and the attending fact which involves questions of law, and asks that if it be material to the determination of any issue presented in this cause the court will determine the same and advise this counter-defendant.

This counter-defendant admits that the said instruments so identified as Exhibit C with the plaintiff's complaint and with the counter-claim contains provisions substantially as set forth in the aforesaid rhetorical paragraph, which expressly make any title conveyed to the City of Indianapolis, as Trustee or otherwise, subject to all legal obligations of the Citizens Gas Company.

Answering the rhetorical paragraph commencing in line 29, page 18 of said counter-claim, this counter-defendant admits that from or immediately after the date of its organization the defendant Citizens Gas Company began to operate under the terms of the aforesaid franchise and contract, and

further admits that thereafter, on or about August 27, 1921, it filed a declaration of surrender of said franchise and accepted in lieu thereof an indeterminated permit, under which it continued to operate and hold the property. But as to the remaining allegations of said rhetorical paragraph this counter-defendant has no actual knowledge concerning the Citizens Gas Company ceasing to operate or hold said property, nor the exact date thereof, and is informed that the legal effect of such indeterminate permit is a matter of law for the determination of this court and asks that it be not required to answer the same.

221 This counter-claimant admits the allegations concerning the written lease, marked Exhibit B, contained in the rhetorical paragraph commencing at line 13 on page 19.

Answering the rhetorical paragraph which commences at line 19, page 19 of the Citizens Gas Company's counter-claim this counter-defendant is not informed as to what actual knowledge this counter-defendant or any of the holders of bonds secured by the mortgage on its property had concerning the term and provisions of said franchise and contract, articles of incorporation and by-laws of the defendant Citizens Gas Company or of their legal effect, and does not even know who were then holders of the bonds secured by the mortgage of The Indianapolis Gas Company referred to, but is informed that in the succeeding 22 years a large number if not all of such bondholders have died; and it is advised that whether or not this counter-defendant company and the holders of said bonds were bound in law to know such terms and conditions and legal effect is a question of law which counter-defendant asks to be excused from answering.

Answering the rhetorical paragraph commencing at line 4 of page 20 of said counter-claim, this counter-defendant admits that at sometime in 1935 officers of the defendant Citizens Gas Company of Indianapolis in its name and purporting to act on its behalf executed certain instruments which purported to convey and transfer all of its property to the City of Indianapolis, and that on or about September 9, 1935 the said City, through its Trustees and Directors for Utilities received and accepted possession of such property. But this counter-defendant is not fully informed and does not know how far all of the conditions fixed in said franchise and contract, articles of incorporation and by-laws aforesaid

222 had been or have been performed and whether such performance and conveyance were in the manner and form

pursuant to its duty thereunder, and ask strict proof thereof, if deemed material.

This counter-defendant admits all the allegations contained in the rhetorical paragraph of said counter-claim commencing at line 17 on page 20 thereof.

This counter-defendant denies each and every allegation contained in the rhetorical paragraph commencing at line 3, page 21 of said counter-claim and avers that the said 99 year lease is a valid and legal obligation of counter-claimant Citizens Gas Company from which it has not been entirely and completely released.

Counter-defendant is informed and therefore alleges that the averments in the rhetorical paragraph commencing at line 10 on page 21 of the counter-claim, marked "(1)" states matters of law and not facts, and asks to be excused from answering the same; and it denies any and all facts therein stated.

This counter-defendant is likewise informed and therefor alleges that the rhetorical paragraph commencing at line 17 on page 21 of the counter-claim, marked "(2)", states matters of law and not fact and therefore asks to be excused from answering the same; and it denies each and all averments of fact, if any therein contained.

This counter-defendant answering the rhetorical paragraph commencing at line 24 on page 21 of the counter-claim marked "(3)", admits that said counter-claimant conveyed and transferred all its property to the City of Indian-
223 apolis, subject to all legal obligations, including the legal obligation of said counter-claimant under said lease; but this counter-defendant denies that so far as it is concerned said counter-claimant has carried out or performed the purposes of its organization or the duties and obligations to which it was and still is subject.

This counter-defendant answering the rhetorical paragraph commencing at line 6 on page 22 of said counter-claim marked "(4)", denies that it is estopped to insist that said counter-claimant has not been entirely and completely released and discharged from any and all obligations under said lease or to insist that the said lease is a valid obligation of the counter-claimant at this time.

This counter-defendant, answering the rhetorical paragraph which commences at line 12 on page 22 of said counter-claim, marked "(5)", admits that heretofore in the year 1935 said counter-claimant conveyed all its property, including its in-

terest in and to the said 99 year lease to the City of Indianapolis, subject to all legal obligations of said counter-claimant, including its legal obligation under the said 99-year lease. Counter-defendant denies that said counter-claimant fully and completely complied with all the terms and provisions of said 99-year lease up to the date of such conveyance, and denies that counter-claimant is entirely and completely released from any obligation thereunder.

Answering the rhetorical paragraph which commences at line 28 of page 22 of said counter-claim, this counter-defendant denies that the counter-claimant is entitled to a judgment determining that the 99-year lease is not a valid and bind-
224 ing obligation against it or that it has been released and discharged from its obligation thereunder by its conveyance to the City of Indianapolis or otherwise.

This counter-defendant admits the allegations of the rhetorical paragraph commencing at line 6 on page 23 of the counter-claim to the effect that certain defendants contend that the City of Indianapolis had the legal right to accept the transfer of certain gas properties subject to outstanding legal obligations of counter-claimant except its legal obligation under said 99-year lease; but that in fact the City of Indianapolis has assumed each and all of the obligations of said lease, and holds all of the property so conveyed to and accepted by it subject to the charge and obligation of said 99-year lease.

Counter-defendant, answering the averments of the rhetorical paragraph which commences at line 25 on page 23 of said counter-claim, admits that the Citizens Gas Company, its Directors, Officers and Trustees, had complete power and authority to execute and to enter into the said 99-year lease aforesaid and admits that said lease was valid and binding upon said counter-claimant and its property from the date of the execution thereof.

Counter-defendant denies that the Citizens Gas Company, this counter-claimant, has fully performed its duties as Trustee of said Public Charitable Trust and denies that it is under no further obligation to this counter-defendant; and further denies that said counter-claimant is without interest in the controversy between the plaintiff herein and The Indian-
225 apolis Gas Company and other defendants. This counter-defendant, The Indianapolis Gas Company, denies each and every remaining averment in the said counter-claim of said Citizens Gas Company not hereinabove specifically admitted.

Wherefore this counter-defendant, The Indianapolis Gas Company, prays that the counter-claim of defendant Citizens Gas Company of Indianapolis be dismissed as to this counter-defendant and that it have judgment against said counter-claimant for its costs.

Louis B. Ewbank,
Wm. R. Higgins,
Solicitors for Defendant, The Indianapolis Gas Company.

Entered Jan. 26, 1937.

226 And afterwards towit at the November Term of said Court, on the 26th day of January, 1937, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit:

Come now the defendants City of Indianapolis, et al and file request for separate determination of question of jurisdiction of this Court over the subject matter of this action, which request is as follows:

227 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—1844) * *

REQUEST OF DEFENDANTS THE CITY OF INDIANAPOLIS AND THE TRUSTEES AND DIRECTORS OF THE DEPARTMENT OF UTILITIES OF THE CITY OF INDIANAPOLIS FOR SEPARATE DETERMINATION OF QUESTION OF JURISDICTION OF THIS COURT OVER THE SUBJECT MATTER OF THIS ACTION.

The defendants City of Indianapolis and the Trustees and Directors of the Department of Utilities of the City of Indianapolis request the Court to determine the question of the jurisdiction of this Court over the subject matter of this action as raised by subdivision 19 of the answer of these defendants as amended before a hearing of this cause on its merits.

Respectfully submitted,
Floyd J. Mattice,
Corporation Counsel.
Thompson & Rabb,
Solicitors for said defendants.

228 And afterwards towit at the April Term of said Court, on the 26th day of July, 1937, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit: Entered Jul 26, 1937.

This day this cause came on to be heard on the ground separately pleaded in the 19th paragraph as amended of the Separate and Several Answer and Counter-claim of the defendants The City of Indianapolis, a municipal corporation, William J. Mooney, Sr., A. Dallas Hitz, Alfred M. Glossbrenner, Edward W. Harris and Charles S. Rauh, as Members of the Board of Trustees for Utilities of the City of Indianapolis, Henry L. Dithmer, Broadhurst Elsey, Fred W. Jungclaus, Roy Sahm, David J. Angus, Isaac E. Woodard and Russell J. Ryan, as Members of the Board of Directors of Utilities of the City of Indianapolis, that the Court has no jurisdiction of this action, and was argued by counsel, and the Court, being fully advised in the premises, finds:

(a) That defendant The Indianapolis Gas Company is an indispensable party to the relief sought by plaintiff in this cause.

(b) That, in the controversies presented by the Bill of Complaint herein, there is no collision between the interests of the plaintiff and the interests of The Indianapolis Gas Company.

(c) That the Indianapolis Gas Company should therefore be re-aligned with the plaintiff as a party plaintiff, for the purpose of testing the jurisdiction of this Court.

229 (d) That there is not complete diversity of citizenship between the plaintiff's as so re-aligned and the defendants and that this Court therefore has no jurisdiction of this cause.

It Is Therefore Ordered, Adjudged, and Decreed that the Bill of Complaint herein and the Counter-claim of the defendants herein above named be dismissed for want of jurisdiction, provided, however, that the plaintiff has leave to serve an amended Bill of Complaint in this cause within 30 days after the entry of this order to each of which findings and the order of the Court the plaintiff excepts, and its exceptions are hereby taken.

Entered Aug. 18, 1937.

230 And afterwards towit at the April Term of said Court, on the 18th day of August, 1937, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit:

Come now the parties and plaintiffs asks leave to file an Amendment and Supplement to plaintiff's Bill of Complaint, which Amendment and Supplement is in the words and figures, following, towit:

(H. I.)

It Is Ordered that the plaintiff be given leave to file said Amendment and Supplement to the plaintiff's Bill of Complaint, which is now done.

Come also Citizens Gas Company of Indianapolis, a corporation, by (Smith, Remster, Hornbook & Smith), now Davis, Pantzer, Baltzell, and Sparks, Solicitors, The Indianapolis Gas Company, a corporation, by Louis B. Ewbank and William R. Higgins, Solicitors, The City of Indianapolis, a municipal corporation, William J. Mooney, Sr., A. Dallas Hitz, Alfred M. Glossbrenner, Edward W. Harris and Charles S. Rauh, as members of the Board of Trustees for Utilities of the City of Indianapolis, Henry L. Ditmmer, Broadhurst Elsey, (Fred W. Jungclaus) Joseph McDuffee, Roy Sahm, Donald J. Angus, Isaac E. Woodard and (Russell Ryan) Leroy J. Keach, as members of the Board of Directors for Utilities of the City of Indianapolis, by Floyd J. Mattice, Corporation Counsel, Michael B. Reddington, Assistant City Attorney, and William H. Thompson and Albert L. Rabb, Solicitors, and waive summons and service thereof of notice of the filing of such Amendment and Supplement.

231 In the District Court of the United States.

* * (Caption—1844) * *

AMENDMENT AND SUPPLEMENT TO PLAINTIFF'S BILL OF COMPLAINT.

William L. Taylor,
State Life Building,
Indianapolis, Indiana.
Newton D. Baker,
Raymond T. Jackson,
Union Trust Building,
Cleveland, Ohio,
Solicitors for Plaintiff.

August 18, 1937.

232 * * (Caption—1844) * * Filed Aug. 1937

The plaintiff, The Chase National Bank of the City of New York, Trustee, by leave of court first obtained, hereby amends and supplements its bill of complaint filed in this cause in the following particulars:

(1) By inserting in paragraph 3, following the fifteenth line of page 3 of the bill of complaint, the following words:

"Plaintiff also seeks to preserve and protect said lease and the property leased thereunder, to prevent loss from waste and damage to the same, to preserve and protect its rights and the rights of the holders of bonds for which it is trustee, to recover the interest on said bonds as it becomes due from the lessees in accordance with the provisions of said lease, and to recover the unpaid interest, together with interest thereon, which is now due or may hereafter become due from the several defendants."

(2) By inserting in Paragraph 11 after the word "Indianapolis" in the second line on page 12 of the bill of complaint the following words:

"During said period said lessee from time to time duly paid installments of interest on the outstanding bonds of The Indianapolis Gas Company by making payment directly to the Trustee of said bonds or to the bondholders themselves."

(3) By striking out all of paragraph 24, commencing at the thirty-fifth line of page 19 and ending at the twenty-second line of page 20 of the bill of complaint, and inserting in place thereof the following words:

"24. On or about March 2, 1936 the City of Indianapolis and The Indianapolis Gas Company entered into a written agreement which provides, among other things, that the City shall use and operate the gas properties of The Indianapolis Gas Company until such time as an agreement of settlement is reached between the City and The Indianapolis Gas Company or, in the event the said parties are unable to reach an agreement, until such time as the differences between them shall have been finally adjudicated in a litigated case. Said agreement further provides that, pending such agreement or adjudication, in lieu of paying the interest upon the outstanding bonds of The Indianapolis Gas Company and the other obligations under the 99 year lease as provided therein, the

City will deposit with The Indiana National Bank on the dates when the same shall be papable under the provisions of the lease a sum equal to such interest plus a sum equal to the accrued dividends upon the stock of The Indianapolis Gas Company, these sums to be held by said bank and paid to the parties to said agreement as follows:

(a) in the event the City and The Indianapolis Gas Company shall agree upon a settlement, then in accordance with the settlement agreement;

233 (b) in the event of a final adjudication in favor of the validity of the 99 year lease, then the entire fund shall go to The Indianapolis Gas Company; and

(c) in the event of a final adjudication against the validity of the 99 year lease, then that part of the fund which represents, as the parties may agree or as the Court may determine, the reasonable value of the use of the property shall be paid to The Indianapolis Gas Company and the balance shall be paid to the City.

No provision was made in said agreement for performance by either party, during its continuation, of any of the obligations of the mortgage of which plaintiff is trustee. No provision was made in said agreement for any payment, subsequent to March 30, 1936, to the plaintiff or to the bondholders of The Indianapolis Gas Company on account of interest upon the outstanding bonds, or on account of interest upon any defaulted payments upon such outstanding bonds, either during the life of said agreement or upon the expiration thereof. Plaintiff further alleges that said agreement of March 2, 1936, has never been modified or supplemented in any respect; that no settlement agreement as provided therein has ever been entered into between The Indianapolis Gas Company and the City of Indianapolis; that neither of said parties has even taken any steps to obtain a judicial determination of the validity of the lease of September 30, 1913; that The Indianapolis Gas Company has no assets or property of any substantial value other than the property covered by said mortgage and lease, and since the Citizens Gas Company has heretofore conveyed all of its property to the City of Indianapolis, the agreement of March 2, 1936 is tantamount to an agreement among the several defendants that no interest shall be paid upon the outstanding bonds by any of them unless and until the City and The Indianapolis Gas Company

shall so agree; that as a direct result of said agreement of March 2, 1936, default was made in the payment of interest due upon the outstanding bonds of The Indianapolis Gas Company on October 1, 1936, and default was made in the payment of interest due on April 1, 1937; that both the City of Indianapolis and The Indianapolis Gas Company have failed and refused to pay any sum whatever on account of such defaulted interest which now amounts to more than $350,000.00; that by reason of said defaults and the acts and things done by the several defendants as hereinbefore alleged, the market value of the outstanding bonds of The Indianapolis Gas Company has steadily declined, and the value of said bonds and the value of the mortgaged property is imminently threatened with further depreciation and irreparable injury. Plaintiff further alleges that the mortgaged property has become so merged with the property formerly owned and held by the Citizens Gas Company that it is no longer practical or economical to separate the properties or to operate either of them as independent or competing properties; that the aforesaid agreement of March 2, 1936 was entered into by The Indianapolis Gas Company and the City of Indianapolis with full knowledge of these facts and without knowledge, consent or approval and in violation of the rights of the plaintiff herein and of the bondholders for whom plaintiff is Trustee; that the purpose and intent of said agreement was to bring about a default in the payment of interest, to depreciate the value of the outstanding bonds, to place the income derived from the operation of the mortgaged property beyond the reach of the bondholders, and by these means to coerce the plaintiff and the bondholders for whom plaintiff is Trustee to surrender the rights secured to them under the mortgage and under the lease of September 30, 1913, and
234 thereby make possible a settlement agreement acceptable to the stockholders of The Indianapolis Gas Company and to the City of Indianapolis. A true copy of said agreement of March 2, 1936, is hereto attached, made a part hereof and marked Exhibit H."

(4) By striking out the period at the end of the 6th paragraph of the prayer at page 21 of the bill of complaint and inserting, as a part of said paragraph, the following words: "and that this Court by final judgment declare that the agreement of March 2, 1936 between the City of Indianapolis

and The Indianapolis Gas Company is not binding upon the plaintiff, does not in any way alter or impair its rights and the rights of the bondholders whom it represents under and by virtue of said lease and the mortgage deed of trust and does not in any way affect the liabilities and obligations of the City and The Indianapolis Gas Company to the plaintiff and to the bondholders."

(5) By inserting between paragraphs 8 and 9 of the prayer on page 22 of the bill of complaint, the following:

8½ That this Court in its final decree:

(a) find that the fund theretofore deposited with The Indiana National Bank of Indianapolis under the agreement of March 2, 1936, or such portion thereof as represents the unpaid interest payable under the mortgage deed of trust, together with interest thereon at the rate of six per cent per annum from the several dates upon which such interest payments accrued, is the property of and in equity belongs to the holders of the bonds of The Indianapolis Gas Company, and

(b) order that the City of Indianapolis and The Indianapolis Gas Company pay out of such fund such expenses as this Court may allow to the plaintiff herein and join in delivering the balance of said fund or the aforesaid portion thereof to the plaintiff herein to be held and paid over to the holders of said bonds in accordance with their respective pro rata interest therein.

William L. Taylor,
Newton D. Baker,
Raymond T. Jackson,
Solicitors for Plaintiff.

August 18th, 1937.

State of New York,
County of New York, ss.

S. Armstrong, being duly sworn, deposes and says: That he is a vice president of The Chase National Bank of the City of New York, the plaintiff named in the above entitled action; that he has read the foregoing amendment and supplement to plaintiff's bill of complaint and knows the contents thereof, and that the allegations therein contained are true as he verily believes.

S. Armstrong.

Subscribed and sworn to before me this 16th day of August, 1937.

C. E. Van Name,
Notary Public.

(Notarial Seal)

C. E. Van Name
Notary Public, Richmond County
Certificate Filed in
New York County Clerk's No. 15
Register's No. 9-V-10
Queens County Clerk's No. 1283
Register's No. 5249
Commission expires March 30, 1939

235 EXHIBIT G.

Contract of March 2, 1936 Between City of Indianapolis and the Indianapolis Gas Company.

236-237 * * * * * *

"(Here is copied as 'Exhibit H' the contract of March 2, 1936, between the Department of Utilities of the City of Indianapolis and The Indianapolis Gas Company, which contract is in the form of a letter dated March 2, 1936, from the Department of Utilities of the City of Indianapolis to The Indianapolis Gas Company. In all respects this is the identical contract printed as 'Exhibit E' to the separate and several answer and counter-claim of defendants, The City of Indianapolis and the directors and trustees of its Utility District.)"

238 In the District Court of the United States.
* * (Caption—1844) * *

WAIVER OF NOTICE AND SERVICE THEREOF OF THE FILING BY THE PLAINTIFF, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, OF AMENDMENT AND SUPPLEMENT TO BILL OF COMPLAINT.

The undersigned attorneys for the defendants named, hereby waive issuance and service of summons and formal notice of the filing of the Amendment and Supplement to the Bill of

Complaint by The Chase National Bank of the City of New York, Trustee, Plaintiff in the above entitled cause.

Citizens Gas Company of Indianapolis, a corporation,
By Davis, Pantzer, Baltzell & Sparks
By P. Y. Davis,
Solicitors.

The Indianapolis Gas Company, a corporation,
By Louis B. Ewbank,
Wm. R. Higgins,
Solicitors.

The City of Indianapolis, a municipal corporation,
William J. Mooney, Sr.,
A. Dallas Hitz,
Alfred M. Glossbrenner,
Edward W. Harris and
Charles S. Raub,
as members of the Board of Trustees for Utilities of the City of Indianapolis,
Henry L. Dithmer,
Broadhurst Elsey,
(Fred W. Jungclaus) Joseph McDuffee,
Roy Sahm,
Donald J. Angus,
Isaac E. Woodard and
(Russell J. Ryan) Leroy J. Keach,
as members of the Board of Directors for Utilities of the City of Indianapolis,
By Floyd J. Mattice, by ALR,
Corporation Counsel.
Thompson & Rabb,
By Albert L. Rabb,
Solicitors.

239 (Entry for August 18, 1937, Continued)

And defendants ask and are given to and including September 10, 1937, within which to answer said amendment and supplement.

240 And afterwards to wit at the April Term of said Court on the 10th day of September, 1937, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit: Filed Sep 1937

Comes now the defendant Indianapolis Gas Company, by its solicitors, and files answer, which is as follows:

241 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—1844) * *

SEPARATE ANSWER OF DEFENDANT THE INDIANAPOLIS GAS COMPANY.

The Indianapolis Gas Company, a defendant in the above entitled cause, for its separate answer to the plaintiff's supplemented and amended bill of complaint says:

1. This defendant admits the averments contained in subdivision 1 of plaintiff's bill of complaint.

242 2. This defendant admits the averments contained in subdivision 2 of plaintiff's bill of complaint.

3. This defendant admits the averments contained in subdivision 3 of plaintiff's bill of complaint.

4. This defendant admits the averments contained in subdivision 4 of plaintiff's bill of complaint.

5. This defendant admits the averments contained in subdivision 5 of plaintiff's bill of complaint.

6. This defendant admits the averments contained in subdivision 6 of plaintiff's bill of complaint.

7. This defendant admits the averments contained in subdivision 7 of plaintiff's bill of complaint.

8. This defendant admits the averments contained in subdivision 8 of plaintiff's bill of complaint.

9. This defendant admits the averments contained in subdivision 9 of plaintiff's bill of complaint.

10. Answering the tenth subdivision of the bill, this defendant admits that at the time of the execution of said ninety-nine year lease its first mortgage bonds in the principal amount of $4,833,000.00 had been and were issued and outstanding and that subsequent to the execution of said lease, and during the operation of its property thereunder by defendant, the Citizens Gas Company of Indianapolis, addi-

tional bonds in the principal amount of $2,048,000.00 [illegible] authenticated by the Trustee and delivered by this defendant to defendant, Citizens Gas Company of Indianapolis, to reimburse said latter company for capital expenditures made upon this defendant's property. This defendant denies any knowledge or information sufficient to make answer to the allegation in this subdivision of the bill, that its bonds sold sub-
243 sequent to the execution of said lease were sold in reliance upon the validity and effect of the said lease.

11. This defendant admits the averments contained in subdivision 11 of plaintiff's bill of complaint.

12. This defendant admits the averments contained in subdivision 12 of plaintiff's bill of complaint.

13. This defendant admits the averments contained in subdivision 13 of plaintiff's bill of complaint.

14. This defendant admits the averments contained in subdivision 14 of plaintiff's bill of complaint.

15. This defendant admits the averments contained in subdivision 15 of plaintiff's bill of complaint.

16. This defendant admits the averments contained in subdivision 16 of plaintiff's bill of complaint.

17. This defendant admits the averments contained in subdivision 17 of plaintiff's bill of complaint.

18. This defendant admits the averments contained in subdivision 18 of plaintiff's bill of complaint.

19. This defendant admits the averments contained in subdivision 19 of plaintiff's bill of complaint.

20. Answering subdivision twenty and twenty-one of the bill, this defendant denies that it has ever contended or admitted that the sid ninety-nine year lease was not and is not a valid and binding obligation upon itself, and defendant, The Citizens Gas Company of Indianapolis; or the City of Indianapolis as assignee and successor in trust to said last named company.

21. Answering subdivision twenty-two of the bill, this defendant says that it is not sufficiently informed concerning
244 what is alleged in said subdivision to make answer thereto, and asks that plaintiff make proof thereof.

22. Answering the twenty-third subdivision of the bill, this defendant admits the defendant, City of Indianapolis, through its department of utilities, has denied any liability and obligation as assignee and successor to the Citizens Gas Company of Indianapolis, under the terms and provisions of

said ninety-nine year lease, and did so notify this defendant by letter. This defendant further admits that it undertook with defendant, City of Indianapolis through its Department of Utilities, negotiations looking to a settlement of the controversy concerning the use of its said property covered by said lease, but it denies that it at any time abandoned or waived or negotiated to abandon or waive any rights which at law or in equity belong to this plaintiff or the trust which it represents, or to affect them in any way unless with the full consent of plaintiff and the bondholders for whom it is trustee.

23. Answering the twenty-fourth subdivision of the bill, this defendant admits the averments therein set out that this defendant with the City of Indianapolis entered into a written agreement on March 2, 1936, a true copy of which said agreement is set out in said bill as Exhibit H; but it denies that in so doing it gave any consent to the withholding of payment of any interest on any bonds, or deprived or agreed to the deprivation of this plaintiff, or the holders of bonds for whom it is suing, of any valuable property right or security underlying said bonds. This defendant further says that said agreement, providing that no waiver of any rights by any
245 party thereto should result from such operation of the defendant's property, was entered into by it to prevent a failure and breakdown of public service in the furnishing and distribution of gas to the citizens and gas users of the City of Indianapolis, which in the then belief of this defendant appeared to be otherwise imminent and unavoidable. By the terms of said agreement all rights under and pursuant to the terms and provisions of said ninety-nine year lease, which properly belong to this plaintiff as Trustee under said Mortgage Deed of Trust, so far as could be done if said purpose to avert a break-down of said public service be accomplished, this defendant believes and therefor avers were expressly reserved and protected.

This defendant admits that said agreement of March 2, 1936 was entered into without the knowledge, consent and approval of the plaintiff, but it denies that the purpose and intent of said agreement was to bring about a default in the payment of interest on or to depreciate the value of the outstanding bonds or to coerce the plaintiff and the bondholders for whom it is Trustee to surrender any rights secured to them under the mortgage and under the lease of September 30, 1913.

24. Answering the twenty-fifth subdivision of the bill, this

defendant denies that it is now negotiating with defendant, City of Indianapolis, for the use of its property by said City under any agreement, lease or arrangement which deprives or would deprive this plaintiff or the holders of this defendant's outstanding bonds of any rights or privileges which either at law or in equity properly inure to them by the
246 terms and provisions of said Mortgage Deed of Trust.

This defendant has at all times and does now, admit the obligation and liability of its entire property, both real and personal, to the performance of the terms and provisions of the said Mortgage Deed of Trust, and this obligation and liability it has never at any time denied or sought to evade by any agreement with any co-defendant in this cause, nor does it do so now.

25. This defendant denies each and every allegation in the bill not hereinabove admitted, controverted or specifically denied.

Wherefore This defendant denies that the plaintiff is entitled to the relief prayed for in the bill of complaint against this defendant, and prays that as to it the bill of complaint as supplemented and amended be dismissed with costs.

The Indianapolis Gas Company,
By Louis B. Ewbank,
Wm. R. Higgins,
Its Solicitors.

247 (Entry for September 10, 1937, continued.)

Come now the defendants City of Indianapolis, et al., by their solicitors, and file answer to amendment and supplement to plaintiff's bill of complaint, which answer is as follows:

Filed Sept. 10, 1937. 248 In the District Court of the United States.
* * (Caption—1844) * *

ANSWER OF CITY OF INDIANAPOLIS AND THE DIRECTORS AND TRUSTEES OF ITS UTILITY DISTRICT TO AMENDMENT AND SUPPLEMENT TO PLAINTIFF'S BILL OF COMPLAINT.

The City of Indianapolis, a municipal corporation; William J. Mooney, A. Dallas Hitz, Alfred M. Glossbrenner, Edward W. Harris, and Charles S. Rauh, as members of the Board

of Trustees for Utilities of the City of Indianapolis; Henry L. Dithmer, Brodehurst Elsey, Roy Sahm, Donald J. Angus, Isaac E. Woodard, Joseph H. McDuffee and Leroy J. Keach (the two latter being the successors in office of Fred W. Jungclaus and Russell J. Ryan) as members of the Board of Directors for Utilities of the City of Indianapolis, for answer to the Amendment and Supplement to Plaintiff's Bill of Complaint herein, says:

1. They deny that plaintiff seeks to preserve and protect the lease and the property lease thereunder or to prevent loss from waste and damage to the same; and aver that moneys to become due under the said lease of mortgaged property are not subject to the lien of such mortgage until reduced to possession by the mortgage, and that plaintiff has no interest in the payments made under such lease.

249 2. They deny that the lessee paid instalments of interest on the outstanding bonds of The Indianapolis Gas Company directly to the Trustee of said bonds.

3. They admit that on or about the 2nd day of March, 1936, the City of Indianapolis and the Indianapolis Gas Company entered into a certain written agreement, a correct copy of which agreement is set out as Exhibit E to the answer filed by these defendants to plaintiff's original bill of complaint, and a copy of which is also set out as Exhibit H to said complaint by way of said Amendment and Supplement. They deny the accuracy of plaintiff's paraphrase of said agreement; they deny that said agreement is tantamount to an agreement among the several defendants that no interest shall be paid upon the outstanding bonds by any of them unless and until the City and The Indianapolis Gas Company shall so agree; they deny that as a direct result of said agreement a default was made in the payment of interest due upon the outstanding bonds of The Indianapolis Gas Company on October 1, 1936, or on April 1, 1937; they deny that the market value of the outstanding bonds of The Indianapolis Gas Company has steadily declined due to the acts and things done by the several defendants as alleged in said bill of complaint, as amended and supplemented; and they deny that the value of said bonds and the value of the mortgaged property is imminently threatened with further depreciation and irreparable injury. They deny that the City of Indianapolis could not duplicate the properties owned by The Indianapolis Gas Company, and then operate the same separate from such

properties. They deny the said agreement was entered into in violation of the rights of plaintiff and of the bondholders for whom plaintiff is Trustee. They deny that the purpose or intent of said agreement was to bring about a default in the payment of interest or to depreciate the value of
250 the outstanding bonds or to place the income derived from the operation of the mortgaged property beyond the reach of the bondholders or to coerce plaintiff and the bondholders for whom plaintiff is Trustee to surrender the rights secured to them under the mortgage and under the lease of September 30, 1913, or thereby to make possible a settlement agreement acceptable to the stockholders of The Indianapolis Gas Company and to the City of Indianapolis. These answering defendants aver that plaintiff and the bondholders whom it represents had full knowledge prior to the commencement of this action of the existence of said agreement, and contents thereof, and the payments made thereunder; that plaintiff and the bondholders whom it represents have by their conduct and acquiescence in said agreement and the operations thereunder induced the City of Indianapolis to continue to make such payments and to continue to operate the properties of The Indianapolis Gas Company and are now estopped to assert the invalidity of such agreement or of the acts of the parties thereunder. These answering defendants further aver that the lease referred to by plaintiff as a 99 year lease has no validity or effect as against these defendants for the reasons specifically stated in subdivision 27 of the answer of these defendants.

4. They deny that plaintiff is entitled to a final judgment declaring that said agreement of March 2, 1936, is not binding upon plaintiff, does not in any way alter or impair its rights or the rights of the bondholders whom it represents, and does not in any way affect the liabilities and obligations of the City and The Indianapolis Gas Company to plaintiff or the bondholders.

5. They deny that plaintiff is entitled to a final decree that the fund deposited with The Indiana National Bank of Indianapolis under said agreement of March 2, 1936, or
251 such portion thereof as represents unpaid interest, together with interest thereon at the rate of six per cent per annum from the several dates upon which such interest payments accrued, is the property of or in equity belongs to holders of the bonds of The Indianapolis Gas Company; and

they deny that plaintiff is entitled to an order that the City of Indianapolis and The Indianapolis Gas Company pay out of such fund such expenses as this Court may allow to plaintiff here or any expenses or that the balance of such fund or any part of it be paid to plaintiff for any purpose.

6. They aver that The Indianapolis Gas Company, one of the defendants herein, is an indispensable party to this suit; that its interest is that the said lease between The Indianapolis Gas Company and Citizens Gas Company of Indianapolis be declared valid and enforceable against the City of Indianapolis; that therefore The Indianapolis Gas Company should be aligned as a party plaintiff, and this suit dismissed for want of the requisite diversity of citizenship.

Floyd J. Mattice,
Corporation Counsel, City of Indianapolis;
Michael B. Reddington,
City Attorney, City of Indianapolis;
William H. Thompson,
Albert L. Rabb,
Solicitors for said Answering Defendant.

252 And afterwards towit at the April Term of said Court on the 15th day of September, 1937, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit: Entered Sept. 15, 1937

It appearing to the Court that Fred W. Jungclaus and Russell J. Ryan are no longer members of the Board of Directors for Utilities of the City of Indianapolis and that Joseph H. McDuffee and Leroy J. Keach have succeeded said Fred W. Jungclaus and Russell J. Ryan as such members, said Joseph H. McDuffee and Leroy J. Keach, as members of the Board of Directors for Utilities of the City of Indianapolis are made parties defendant in this suit and the suit shall proceed.

Filed Sept. 21, 1937.

253 And afterwards towit at the April Term of said Court on the 21st day of September, 1937, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit:

Comes now the defendant Citizens Gas Company, by its Solicitors, and files answer to amendment and supplement to plaintiff's bill of complaint, which answer is as follows:

254 In the District Court of the United States.
* * (Caption—1844) * *

SEPARATE ANSWER OF CITIZENS GAS COMPANY OF INDIANAPOLIS TO AMENDMENT AND SUPPLEMENT TO PLAINTIFF'S BILL OF COMPLAINT.

Citizens Gas Company of Indianapolis, a defendant in the above entitled cause, for separate answer to the amendment and supplement to the plaintiff's bill of complaint, says:

255 1. This defendant has no knowledge concerning the purpose or motive of the plaintiff set forth in the averments contained in Subdivision 1 of said amendment and supplement, and neither admits nor denies said averments, but requests that plaintiff be required to make strict proof thereof.

2. This defendant admits the averments contained in Subdivision 2 of said amendment and supplement.

3. This defendant has no knowledge of the averments contained in Subdivision 3 of the said amendment and supplement, and neither admits nor denies said averments, but requests that plaintiff be required to make strict proof thereof.

Wherefore this defendant, having fully answered the said amendment and supplement to plaintiff's bill of complaint, prays that it may go hence without day.

Davis, Pantzer, Baltzell & Sparks,
Solicitors for said Defendant.

256 And afterwards towit at the November Term of said Court, on the 15th day of November, 1937, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit: Entered Nov 15, 1937

This day this cause came on to be heard on the ground separately preaded in the 19th paragraph as amended of the Separate and Several Answer and Counter-claim of the defendants, The City of Indianapolis, a municipal corporation, William J. Mooney, Sr., A. Dallas Hitz, Alfred M. Glossbrenner, Edward W. Harris and Charles S. Rauh, as Members, of the Board of Trustees for Utilities of the City of Indianapolis, Henry L. Dithmer, Broadhurst Elsey, Joseph H. McDuffee, Roy Sahm, David J. Angus, Isaac E. Woodard and Leroy J. Keach, as Members of the Board of Directors for Utilities of the City of Indianapolis, that the Court has no jurisdiction of this action, (which ground is also pleaded in the 6th paragraph of the Answer of said defendants just enumerated to the Amendment and Supplement to Plaintiff's Bill of Complaint), and was argued by counsel, and the Court, being fully advised in the premises, finds:

(a) That defendant The Indianapolis Gas Company is an indispensable party to the relief sought by plaintiff in this cause.

(b) That, in the controversies presented by the Bill of Complaint herein, there is no collision between the interests of the plaintiff and the interests of The Indianapolis Gas Company.

(c) That The Indianapolis Gas Company should therefore be realigned with the plaintiff as a party plaintiff, for
257 the purpose of testing the jurisdiction of this Court.

(d) That there is not complete diversity of citizenship between the plaintiffs as so re-aligned and the defendants and that this Court therefore has no jurisdiction of this cause.

It is therefore ordered, adjudged, and decreed that the Bill of Complaint herein as Amended and Supplemented and the Counter-claim of the defendants herein-above named be dismissed for want of jurisdiction, to each of which findings and the order of the Court the plaintiff excepts, and its exceptions are hereby taken.

ed Nov. 27, 1937

258 And afterwards towit at the November Term of said Court on the 27th day of November, 1937 before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit:

Comes now the plaintiff by its solicitors and files petition for appeal, which petition is as follows:

259 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—1844) * *

PETITION FOR APPEAL

The above named The Chase National Bank of the City of New York, Trustee, the plaintiff in the above entitled cause, considering itself aggrieved by the order and final decree made and entered on the 15th day of November, 1937, in the above entitled cause, does hereby appeal from said order and final decree to the United States Circuit Court of Appeals
260 for the Seventh Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and the plaintiff prays that this appeal may be allowed, that a citation may be issued as provided by law and that a transcript of the record, proceedings, papers and exhibits upon which said order and final decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Seventh Circuit under the rules of said Court in such cases made and provided, and the plaintiff further prays that the amount of security which the plaintiff shall give and furnish upon said appeal may be fixed by the order of this Court allowing the appeal.

(William L. Taylor) William L. Taylor,
(Newton D. Baker) Newton D. Baker,
(Howard F Burns) Howard F. Burns,
Solicitors for Plaintiff.

261 (Entry for November 27, 1937, continued.)

And the plaintiff also files assignment of errors, which are as follows:

262 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Nov 1937
* * (Caption—1844) * *

ASSIGNMENT OF ERRORS ON BEHALF OF PLAINTIFF.

Now comes The Chase National Bank of the City of New York, Trustee, the plaintiff in the above-entitled cause and the petitioner in the petition for appeal this day filed herein, by its solicitors, and respectfully represents that in the record and proceedings had in the above-entitled cause and
263 in the rendition of the order and final decree entered herein on the 15th day of November, 1937, there is manifest error for which said order and decree should be reversed.

As cause for reversal of said order and final decree and in connection with its petition for appeal herein, the plaintiff, The Chase National Bank of the City of New York, Trustee, makes the following assignment of errors, to wit:

(1) The Court erred in its order entered herein on July 26, 1937, in sustaining the defense separately pleaded in subdivision 19, as amended, of the separate and several answer and counterclaim of defendants, the City of Indianapolis and the directors and trustees of its utility district, that this Court has no jurisdiction of this action.

(2) The Court erred, in its said order entered herein on July 26, 1937 sustaining the defense that this Court has no jurisdiction of this action, in ordering and decreeing that plaintiff's bill of complaint herein be dismissed for want of jurisdiction of this action.

(3) The Court erred, in its said order entered herein on July 26, 1937 sustaining the defense that this Court has no jurisdiction of this action, in holding that defendant, The Indianapolis Gas Company, is an indispensable party to the relief sought by plaintiff in its bill of complaint

(4) The Court erred, in its said order entered herein on July 26, 1937 sustaining the defense that this Court has no jurisdiction of this action, in holding that there is no collision between the interests of the plaintiff and the interests of
264 defendant, The Indianapolis Gas Company, in the controversies presented by plaintiff's bill of complaint.

(5) The Court erred, in its said order entered herein on July 26, 1937 sustaining the defense that this Court has no

jurisdiction of this action, in holding that defendant, The Indianapolis Gas Company, should be realigned with the plaintiff as a party plaintiff for the purpose of testing the jurisdiction of this Court to hear and determine the controversies presented by plaintiff's bill of complaint.

(6) The Court erred, in its said order entered herein on July 26, 1937 sustaining the defense that this Court has no jurisdiction of this action, in holding that there is not complete diversity of citizenship between plaintiff and each and all of the defendants herein if properly realigned with respect to the issues presented by plaintiff's bill of complaint, and that this Court therefore has no jurisdiction to hear and determine the controversies presented by said bill of complaint.

(7) The Court erred, in its order and final decree entered herein on November 15, 1937, in sustaining the defense separately pleaded in subdivision 19, as amended, of the separate and several answer and counterclaim of defendants, the City of Indianapolis and the directors and trustees of its utility district, and also pleaded in paragraph 6 of the same defendants' answer to the amendment and supplement to the bill of complaint, that this Court has no jurisdiction of this action.

(8) The Court erred, in its said order and final decree entered herein on November 15, 1937, in ordering and decree-
265 ing that plaintiff's bill of complaint herein, as amended and supplemented, be dismissed for want of jurisdiction of this action.

(9) The Court erred, in its said order and final decree entered herein on November 15, 1937, in holding that defendant, The Indianapolis Gas Company, is an indispensable party to the relief sought by plaintiff in this cause in its bill of complaint, as amended and supplemented.

(10) The Court erred, in its said order and final decree entered herein on November 15, 1937, in holding that there is no collision between the interests of the plaintiff and the interests of defendant, The Indianapolis Gas Company, in the controversies presented by plaintiff's bill of complaint, as amended and supplemented.

(11) The Court erred, in its said order and final decree entered herein on November 15, 1937, in holding that defendant, The Indianapolis Gas Company, should be realigned with the plaintiff as a party plaintiff for the purpose of testing the jurisdiction of this Court to hear and determine the controversies presented by plaintiff's bill of complaint, as amended and supplemented.

(12) The Court erred, in its said order and final decree entered herein on November 15, 1937, in holding that there is not complete diversity of citizenship between plaintiff and each and all of the defendants herein if properly realigned with respect to the issues presented by plaintiff's bill of complaint, as amended and supplemented, and that this Court therefore has no jurisdiction to hear and determine the controversies presented by said bill of complaint, as amended and supplemented.

266 (13) The Court erred, in its said order and final decree entered herein on November 15, 1937, in entering judgment against plaintiff for the costs of this action.

Wherefore, plaintiff prays that said order and final decree entered herein on the 15th day of November, 1937, may be reversed, that this cause may be remanded to the District Court for trial and that plaintiff may be granted such other and further relief as the Court may deem just and proper.

Dated November 27, 1937.

William L. Taylor,
Newton D. Baker,
Howard F. Burns,
Solicitors for plaintiff.

267 (Entry for November 27, 1937, continued.) Entered No 27, 1937.

Upon the petition for appeal of the plaintiff, The Chase National Bank of the City of New York, Trustee, accompanied by its assignment of errors,

It Is Ordered that an appeal to the United States Circuit Court of appeals for the Seventh Circuit from the order and final decree of this Court entered herein on the 15th day of November, 1937, be and the same hereby is allowed, that citation issue as provided by law, that a transcript of the record, proceedings, papers and exhibits upon which said order and final decree was made, duly authenticated, be transmitted to the United States Circuit Court of Appeals for the Seventh Circuit under the rules of said Court, and that the bond which plaintiff shall give upon said appeal be and it hereby is fixed at the sum of Five Hundred Dollars ($500.00).

And the plaintiff also files appeal bond in the sum of $500.00 with American Surety Company as surety thereon, which bond is approved by the Court, and is as follows:

268 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—1844) * *

BOND ON APPEAL.

Know All Men By These Presents that we, The Chase National Bank of the City of New York, Trustee, as principal, and American Surety Co. of New York, as surety, are held and firmly bound unto Citizens Gas Company of Indianapolis, a corporation, The City of Indianapolis, a municipal corporation, The Indianapolis Gas Company, a corporation,
269 William J. Mooney, Sr., A. Dallas Hitz, Alfred M. Glossbrenner, Edward W. Harris, and Charles S. Rauh, as members of the Board of Trustees for Utilities of the City of Indianapolis, Henry L. Dithmer, Broadhurst Elsey, Joseph H. McDuffee, Roy Sahm, Donald J. Angus, Isaac E. Woodard, and Leroy J. Keach, as members of the Board of Directors for Utilities of the City of Indianapolis; (hereinafter referred to as the "obligees") in the aggregate amount of Five Hundred 00/100 Dollars ($500.00/100), to be paid to said obligees, their attorneys, executors, administrators, successors or assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 27 day of November in the year of our Lord One Thousand Nine Hundred and Thirty-seven.

Whereas, lately, at a regular term of the District Court of the United States for the Southern District of Indiana, Indianapolis Division, in a suit pending in said Court between The Chase National Bank of the City of New York, Trustee, as plaintiff, and Citizens Gas Company of Indianapolis, The City of Indianapolis, The Indianapolis Gas Company, William J. Mooney, Sr., A. Dallas Hitz, Alfred M. Glossbrenner, Edward W. Harris, and Charles S. Rauh, as members of the Board of Trustees for Utilities of the City of Indianapolis, Henry L. Dithmer, Broadhurst Elsey, Joseph H. McDuffee, Roy Sahm, Donald J. Angus, Isaac E. Woodard, and Leroy J. Keach, as members of the Board of Directors for Utilities of the City of Indianapolis; as defendants, an order and final decree was made and entered against said plaintiff, hereinbefore referred to as the principal, and said plaintiff petitioned

for and obtained an appeal to reverse said order and final decree in the aforesaid suit, and a citation has been issued
270 directed to said obligees, citing and admonishing them to be and appear at a session of the United States Circuit of Appeals for the Seventh Circuit to be held in the City of Chicago, State of Illinois, in said Circuit, on the 24 day of December, 1937;

Now, the condition of the above obligation is such that if said plaintiff, hereinbefore designated as principal, shall prosecute its appeal to effect and answer all costs if it fails to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

The Chase National Bank of the City of New York, Trustee,
By Howard F. Burns,
Atty. in Fact,
Principal.

American Surety Company of N. Y.,
Richard L. Thorpe,
Atty. in Fact,
Surety.

(Seal)
Sealed and delivered in the presence of:
William L. Taylor.

Approved:
Robert C. Baltzell,
Judge of the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

275 (Entry for November 27, 1937, Continued)

And the plaintiff also files praecipe for transcript of record, which praecipe is as follows:

Filed Nov. 27, 1937.

276 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—1844) * *

PLAINTIFF'S PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Seventh Circuit, pursuant to an appeal allowed the plaintiff in the above-entitled cause, and to include in such transcript of record the following, and no other papers or exhibits, to wit:

1. The bill of complaint filed June 8, 1936, and all exhibits attached thereto, being Exhibits A to G, inclusive.

277 2. The separate answer of defendant, The Indianapolis Gas Company, filed October 1, 1936.

3. The separate and several answer and counter-claim of defendants, the City of Indianapolis and the directors and trustees of its Utility District, filed October 1, 1936, and all exhibits attached thereto, being Exhibits A to E, inclusive.

4. The amendment to said separate and several answer and counter-claim of defendants, the City of Indianapolis and others, filed October 22, 1936.

5. Plaintiff's answer to the counter-claim of defendants, the City of Indianapolis and the directors and trustees of its Utility District, filed November 14, 1936.

6. The separate and several reply of defendant, The Indianapolis Gas Company, to the counter-claim of its co-defendants, the City of Indianapolis and the directors and trustees of its Utility District, filed November 17, 1936.

7. The separate answer and counter-claim of defendant, Citizens Gas Company of Indianapolis, filed November 20, 1936.

8. The separate reply of defendant, Citizens Gas Company of Indianapolis, to the counter-claim of its co-defendants, the

City of Indianapolis and the directors and trustees of its Utility District, filed November 30, 1936.

9. The separate reply of defendants, the City of Indianapolis and the directors and trustees of its Utility District,
278 to the counter-claim of defendant, Citizens Gas Company of Indianapolis, filed December 22, 1936.

10. Plaintiff's answer to the counter-claim of defendant, Citizens Gas Company of Indianapolis, filed January 6, 1937.

11. The separate answer of defendant, The Indianapolis Gas Company, to the counter-claim of defendant, Citizens Gas Company of Indianapolis, filed January 16, 1937.

12. The request of defendants, the City of Indianapolis and the directors and trustees of its Utility District, for the separate determination of the question of the jurisdiction of this Court over the subject matter of this action, filed January 26, 1937.

13. The order of this Court entered on July 26, 1937, sustaining the defense that this Court has no jurisdiction of this action.

14. The order of this Court entered on August 18, 1937, permitting plaintiff to file an amendment and supplement to its bill of complaint.

15. The amendment and supplement to plaintiff's bill of complaint, filed August 18, 1937, with the following exception:

In place of "Exhibit H" attached to the amendment and supplement to plaintiff's bill of complaint, substitute the following:

"(Here is copied as 'Exhibit H' the contract of March 2, 1936, between the Department of Utilities of the City of In-
dianapolis and The Indianapolis Gas Company, which
279 contract is in the form of a letter dated March 2, 1936, from the Department of Utilities of the City of Indianapolis to The Indianapolis Gas Company. In all respects this is the identical contract printed as 'Exhibit E.' to the separate and several answer and counter claim of defendant, The City of Indianapolis and the directors and trustees of its Utility District.)"

16. Waiver of summons and entry of appearance by defendants filed August 18, 1937.

17. The separate answer of defendant, The Indianapolis Gas Company, to plaintiff's bill of complaint, as amended and supplemented, filed September 10, 1937.

18. The separate answer of defendants, the City of Indianapolis and the directors and trustees of its Utility District, to the amendment and supplement to plaintiff's bill of complaint, filed September 10, 1937.

19. The order of this Court entered on September 15, 1937, substituting new parties defendant.

20. The separate answer of defendant, Citizens Gas Company of Indianapolis, to the amendment and supplement to plaintiff's bill of complaint, filed September 21, 1937.

21. The order and final decree of this Court entered on November 15, 1937, sustaining the defense that this Court has no jurisdiction to hear and determine the controversies presented by plaintiff's bill of complaint, as amended and supplemented.

22. Plaintiff's petition for appeal.

280 22. The assignment of errors on behalf of plaintiff.

23. Order of this Court allowing appeal.

24. The bond on plaintiff's appeal.

25. The citation on plaintiff's appeal.

26. This praecipe.

27. The Clerk's certificate authenticating the transcript of record on appeal.

Said transcript of record to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Seventh Circuit and to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, at Chicago, Illinois, on or before the 24 day of December, 1937.

Dated November 27, 1937.

William S. Taylor,
Newton D. Baker,
Howard F. Burns,
Solicitors for the Plaintiff.

281 ACKNOWLEDGMENT OF SERVICE.

Service of the above praecipe is hereby accepted and acknowledged this 27th day of November, 1937.

Citizens Gas Company of Indianapolis,
By Davis, Pantzer, Baltzell & Sparks,
Its Solicitors.

The Indianapolis Gas Company,
By Louis B. Ewbank,
William R. Higgins,
Its Solicitors.

The City of Indianapolis,
William J. Mooney, Sr.,
A. Dallas Hitz,
Alfred M. Glossbrenner,
Edward W. Harris and
Charles S. Rauh,
as members of the Board of Trustees for Utilities of the City of Indianapolis,
Henry L. Dithmer,
Broadhurst Elsey,
Joseph H. McDuffee,
Roy Sahm,
Donald J. Angus,
Isaac E. Woodard, and
Leroy J. Keach,
as members of the Board of Directors for Utilities of the City of Indianapolis,
By Floyd J. Mattice,
Corporation Counsel.
W. H. Thompson,
Albert Rabb,
Solicitors.

282 United States of America,
Southern District of Indiana, } ss:
Indianapolis Division.

I, Albert C. Sogemeier, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that the above and foregoing is a true and full transcript of the record and proceedings in the cause of The Chase National Bank of the City of New York, Trustee, *vs.* Citizens

Gas Company of Indianapolis, *et al.*, No. 1844 in Equity, according to the praecipe filed November 27, 1937, now remaining among the records of said Court in my office.

I further certify that the original Citation has been incorporated into said transcript.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court of Indianapolis this 3rd day of December, 1937.

Albert C. Sogemeier,
(Seal) *Clerk, United States District Court,*
Southern District of Indiana.

271 (Entry for November 27, 1937, Continued)

And the plaintiff also files citation on appeal, duly acknowledged, which citation is as follows:

272 In the District Court of the United States.
* * (Caption—1844) * *

CITATION ON APPEAL.

To Citizens Gas Company of Indianapolis, The City of Indianapolis, The Indianapolis Gas Company, William J. Mooney, Sr., A. Dallas Hitz, Alfred M. Glossbrenner, Edward W. Harris, and Charles S. Rauh, as members of the Board of Trustees for Utilities of the City of Indianapolis, Henry L. Dithmer, Broadhurst Elsey, Joseph H. McDuffee, Roy Sahm, Donald J. Angus, Isaac E. Woodard, and Leroy J. Keach, as members of the Board of Directors for Utilities of the City of Indianapolis, defendants, Greeting:

You and each of you are hereby cited and admonished to be and appear at a session of the United States Circuit
273 Court of Appeals for the Seventh Circuit to be held in the City of Chicago, State of Illinois, in said Circuit, on the 24 day of December, 1937, pursuant to an order allowing an appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division, wherein The Chase National Bank of the City of New York, Trustee, is appellant and you are appellees, to show cause, if any there be, why the order and final decree made and entered against said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Robert C. Baltzell, Judge of the District Court of the United States for the Southern District of Indiana, Indianapolis Division, this 27 day of November, in the year of our Lord One Thousand Nine Hundred and Thirty-seven and of the Independence of the United States of America the One Hundred Sixty-second.

Robert C. Baltzell,
Judge of the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

Service of the above citation is hereby acknowledged and the appearance of the appellees and each of them is hereby entered.

Citizens Gas Company of Indianapolis,
By Davis, Pantzer, Baltzell & Sparks,
Its Solicitors.

The Indianapolis Gas Company,
By Louis B. Ewbank,
William R. Higgins,
Its Solicitors.

The City of Indianapolis,
William J. Mooney, Sr.,
A. Dallas Hitz,
Alfred M. Glossbrenner,
Edward W. Harris and
Charles S. Rauh,
274 *as members of the Board of Trustees for Utilities of the City of Indianapolis,*
Henry L. Dithmer,
Broadhurst Elsey,
Joseph H. McDuffee,
Roy Sahm,
Donald J. Angus,
Isaac E. Woodard, and
Leroy J. Keach,
as members of the Board of Directors for Utilities of the City of Indianapolis,
By Floyd J. Mattice,
Corporation Counsel,
W. H. Thompson,
Albert Rabb,
Solicitors.

Dated 27 November, 1937.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 283, inclusive, contain a true copy of Volume I of the printed record, printed under my supervision and filed on the twentieth day of December, 1939, which together with Volumes II and III of the printed record, constitutes the record, upon which the following entitled causes were heard and determined:

The Chase National Bank of the City of New York, Trustee, etc.,
Plaintiff-appellant,

7143 *vs.*

Citizens Gas Company of Indianapolis, et al.,
Defendants-Appellees.

The Chase National Bank of the City of New York, Trustee, etc.,
Plaintiff-appellee,

7144 *vs.*

The Indianapolis Gas Company,
Defendant-appellant.

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 28th day of August, A. D. 1940.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

CLERK'S COPY.

Vol. II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1940~~ 1941

No. ~~421~~ 10

CITY OF INDIANAPOLIS, ET AL., PETITIONERS,

vs.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., ET AL.

No. ~~422~~ 11

CITY OF INDIANAPOLIS, ET AL., PETITIONERS,

vs.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., ET AL.

No. ~~423~~ 12

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., PETITIONER,

vs.

CITIZENS GAS COMPANY OF INDIANAPOLIS, ET AL.

No. ~~424~~ 13

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., PETITIONER,

vs.

THE INDIANAPOLIS GAS COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

United States Circuit Court of Appeals
For the Seventh Circuit

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC.,

Plaintiff-Appellant,

7143 *vs.*

CITIZENS GAS COMPANY OF INDIANAPOLIS, ET AL.,

Defendants-Appellees.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC.,

Plaintiff-Appellee,

7144 *vs.*

THE INDIANAPOLIS GAS COMPANY,

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284 In accordance with Item 2 of the stipulation as to the parts of the record to be included in the record on appeal, a copy of the opinion of the United States Circuit Court of Appeals for the Seventh Circuit is included in this transcript and is as follows:

285 IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 6472. October Term 1937—January Session, 1938.

Chase National Bank of the City of New York, Trustee, *Plaintiff-Appellant*, *vs.* Citizens Gas Company of Indianapolis, *et al.*, *Defendants-Appellees.*	Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

April 8, 1938.

Before Evans, Major and Treanor, *Circuit Judges.*

Major, *Circuit Judge.* Appellant is the trustee under a deed of trust executed by appellee, Indianapolis Gas Company, on October 1, 1902, to secure a total authorized issue of $7,500,000 of its first mortgage bonds due October 1, 1952, of which bonds aggregating $6,881,000 are outstanding. The deed of trust conveyed to the trustee all the properties of the Indianapolis Gas Company, including:

"* * * all corporate and other franchises, rights, easements, privileges and immunities, contracts and property, of whatever name or description, now belonging to or held, or which may hereafter be acquired or held by said Gas Company, together with the rents, issues, income, tolls and profits arising therefrom; * * *

"To Have and to Hold all and singular the above mentioned and described property, acquired, and to be hereafter acquired, * * * and the tolls, incomes, revenues, rents, issues and profits thereof, * * *."

On September 30, 1913, the Indianapolis Gas Company leased its property to appellee, Citizens Gas Company of Indianapolis, for a term of 99 years, including in the lease all the mortgaged property. The lessee, among other things, agreed to perform all the obligations of the lessor under its mortgage, except its obligation to pay the principal of the

bonds, which included, First, the interest on the lessor's bonded indebtedness, and second, the sum of $120,000 per year to be distributed by the lessee direct to the lessor's stockholders, as dividends upon their stock and the expenses of maintaining the lessor's corporate organization not to exceed $300 a year. The Indianapolis Gas Company withdrew from active business and the Citizens Gas Company assumed the active management of tis business and the mortgaged property. The Citizens Gas Company was a quasi public corporation whose purposes and objects were controlled by a franchise and contract entered into on August 25, 1905, between the city of Indianapolis and three individual citizens who assigned the franchise and contract to the Citizens Company. The franchise and articles of corporation of the latter company provide that all the capital stock of the Citizens Company should be held by trustees with complete and irrevocable power to hold and vote the stock as fully as if they were the owners thereof and to select the members of the Board of Directors; that upon the performance of certain named conditions, and after the expiration of 25 years, it was provided that the trustees and directors should convey to the city all the property of the Citizens Company, subject to the legal obligations of that company, to be held by the city for the use and benefit of its inhabitants.

In *Todd* v. *Citizens Gas Company of Indianapolis, et al.*, 46 F. (2d) 855, this court held the property of the Citizens Gas to be a public charitable trust and that the property might be conveyed to the city in continuance of the trust, the city being the successor to said Citizens Company as trustee.

For a period of 22 years after the execution of the aforesaid lease, the mortgage property was operated by the Citizens Gas during which period it paid the interest on the bonds either direct to the trustee or to the bondholders themselves. During the same interval, Citizens Gas made extensive improvements on the mortgage property and procured the issuance of some $2,000,000 additional bonds under the deed of trust of October 1, 1902, to provide for the payment thereof. On two occasions the validity of the
286 lease was questioned and its binding effect upon the Citizens Company was sustained by the Supreme Court of Indiana. (*Fishback* v. *Public Service Commission of Indiana, et al.*, 193 Ind. 282; *Williams* v. *Citizens Gas Company*, 206 Ind. 448).

On September 9, 1935, in pursuance of a prior demand by

the city, the Citizens Company conveyed all its property to the City of Indianapolis, as successor trustee, and executed and delivered to the city an instrument of transfer and assignment. This assignment was made subject to all legal obligations of the Citizens Company including its obligations under the lease. The Citizens Company also tendered to the city an assignment of the lease which the city refused to adopt or recognize as binding upon it. The city took actual possession of the property covered by the lease as well as the mortgage and advised the Indianapolis Company that it was ready to negotiate a new lease, and negotiations were instituted which looked toward the modification or the cancellation of the same.

On March 2, 1936, the Indianapolis Company and the city entered into an agreement providing that until the controversy between them as to the binding effect of the lease upon the city had been either adjudicated or settled, the city would pay a sum equal to the interest on the bonds and the dividends on the stock of the Indianapolis Company to the Indiana National Bank of Indianapolis, and that when such controversy was settled or adjudicated, the sum so paid should be disbursed as follows:

"(a) If an agreement of settlement is made, the fund shall be disbursed in accordance with that agreement.

"(b) If it is determined in a litigated case that the lease is binding upon the City or the property acquired by it from the lessee, the entire fund shall be paid to The Indianapolis Gas Company.

"(c) If it is determined in a litigated case that the lease is not binding upon the City or the property acquired by it, reasonable compensation for the use of the mortgaged property (fixed by agreement or by the court) shall be paid to The Indianapolis Gas Company and the balance, if any, to the City."

Appellant, concerning such agreement, alleges:

"the purpose and intent of said agreement was to bring about a default in the payment of interest, to depreciate the value of the outstanding bonds, to place the income derived from the operation of the mortgaged property beyond the reach of the bondholders, and by these means to coerce the plaintiff and the bondholders for whom plaintiff is Trustee to surrender the rights secured to them under the mortgage and under the lease of September 30, 1913, and thereby make possible a settlement agreement acceptable to the stockholders of The Indianapolis Gas Company and to the City of Indianapolis."

It is claimed that the agreement of March 2, 1936, is tantamount to an agreement that no interest shall be paid upon the outstanding bonds by any of the defendants unless and until the city and the Indianapolis Company shall so agree, and that as a result of this agreement default was made in the interest payments due October 1, 1936, and April 1, 1937, aggregating more than $350,000.

Appellant's suit is brought for the purpose of protecting its interest, as Trustee, in the security for its bonds, substantially all of which is in the possession of the city, and its right to be paid the interest on such bonds. The court was asked to declare the lease binding upon the city, so that it would be bound to pay the interest on the bonds and to perform and observe all the covenants and agreements of the mortgagor contained in its deed of trust. It was also prayed that the lease be declared binding upon the Indianapolis Company; that it be restrained from interfering with the lease in any way and that past due interest be paid from the fund being accumulated in the Indiana National Bank.

In the court below, upon the request of the city for a separate determination of the question of that court's jurisdiction, it was decided that appellee, the Indianapolis Company, was an indispensable party to the suit and that it should be realigned as a party plaintiff, thus destroying the diversity of citizenship upon which Federal jurisdiction rested. Appellant's bill of complaint was thus dismissed. Federal jurisdiction of this suit is based solely upon diversity of citizenship, appellant being a citizen of New York and each of the appellees, citizens of Indiana.

The contested issues are:

First: Is the Indianapolis Gas Company an indispensable party to the relief sought by plaintiff in its Bill of Complaint as amended and supplemented?

Second: Should The Indianapolis Gas Company be
287 realigned with the plaintiff as a party plaintiff for the purpose of testing the jurisdiction of the Federal Court?

Third: Should the District Court have dismissed plaintiff's Bill as amended and supplemented for want of jurisdiction?

We conclude that the first contested issue must be answered in the affirmative. While it seems apparent that the essential question involved is whether the lease in question is enforcible against the city, and that both appellant and The Indianapolis Company are so contend-

ing, yet there are other important questions which give rise to controversies between appellant and the Indianapolis Company. There is one thing certain, however, and that is that if the Indianapolis Company be omitted as a party to this litigation, it would be free to relitigate in another court the question of the validity of the lease against the city, irrespective of a final decree in this litigation, which it seems to us would permit an intolerable situation and one "wholly inconsistent with equity and good conscience." To say that the Indianapolis Company is not an indispensable party is the equivalent of granting it permission, either during or subsequent to the present action, to institute suit against the city in the state court and virtually relitigate the same questions, so far as the city is concerned, as are here involved. There are some authorities which apparently sustain appellant's contention, but if so, we find ourselves in disagreement with the application of a theory which is calculated to prolong legal controversies, especially where all the parties are before the court. To view the matter otherwise is to encourage protracted litigation with the rights of innocent parties, such as the bondholders, undetermined for an indefinite time.

Appellant places great stress upon the case of *Old Colony Trust Co.* v. *City of Omaha,* 230 U. S. 100. The plaintiff in that case was the trustee of a mortgage executed by the Omaha Electric Light and Power Company. In a controversy with the city concerning the Electric Company's franchise, that Company (mortgagor) sought to enforce its franchise rights against the city, and the court decided in favor of the latter. Afterwards, a suit was brought by the trustee of the mortgage, which action it succeeded in maintaining. The city defended this second action, claiming that the first suit was *res judicata,* but the court held the trust company free to maintain its suit unembarrassed by the decree in the former case. So far as appears from the opinion, no question was raised in either suit as to who were indispensable parties, and in neither were all the parties before the court as here. We do not regard it as controlling.

That the Indianapolis Company is at least a proper party is recognized by appellant from the fact that it was named as a party to the suit. (*Lee* v. *Lehigh Valley Coal Co.,* 267 U. S. 542.) In *Mahon, et al.* v. *Guaranty Trust and Safe Deposit Co.,* 239 F. 266, this court gave consideration to the question as to whether a mortgagor is a

necessary party in a suit brought by its mortgagee to enforce rights created by virtue of a contract between the mortgagor and third parties. On page 269 is found a citation of many cases in support of each contention. While the facts in that case are different from those here, we think what was said is pertinent. Thus said the court on page 270:

"That such company is an indispensable party is clearly shown when we consider the possible, and in fact probable, embarrassment which the courts will meet, if separate actions in respect to this contract can be maintained in different jurisdictions. If this case were to proceed to trial without the traction company and the court upheld the contract and enforced its terms against the defendant employes, its decision would not be binding upon the mortgagor in a subsequent action. If the traction company were not a party to the action it would have a perfect right to test out the same question in the state court. Such a situation should not be tolerated. The mere statement of the possibilities shows the absolute necessity of making the traction company a party to this action."

Another opinion by this court cited by appellant as supporting its contention is that of *Equitable Trust Co. of New York* v. *Denney, et al.*, 24 F. (2d) 169. It is true, in this case the conclusion was reached that the mortgagor, under the situation presented, was not an indispensable party. It seems that we there relied strongly on the fact that a decree in favor of the mortgagee would likewise be favorable to the mortgagor, and that the latter could not be injured or affected by the decree sought. To what extent, if any, the mortgagor here would be benefited by a decree in favor of appellant is conjectural, but we are not dealing with the merits of the controversy, but upon the facts as contained in the bill of complaint. Whatever merit may be involved, there is a controversy
288 between appellant and the Indianapolis Gas Company which is calculated to affect the interest of the latter. We are convinced that the City of Indianapolis is entitled to have both the appellant and the Indianapolis Gas as parties to this litigation for the important reason that it should not be required to relitigate, in the instant forum, or any other, the matters which can be properly determined and forever settled in the present suit.

As to the second controverted issue, we conclude it must be answered in the negative. This answer, of course, is

predicated upon the basis that there is a collision of interest between appellant and the Indianapolis Company. The argument of the city to the contrary rests entirely upon the premise that the only matter in controversy is whether or not the lease is enforcible against the city, and that in seeking to maintain the affirmative of that position, the Indianapolis Company is just as much interested as is appellant. Whether they are interested on equal terms is difficult for us to determine from the record. True, Indianapolis Company admits the validity of the lease and at least makes some pretense of claiming it is binding upon the city, but it is rather significant that no effort has been made, and so far as the record discloses, none contemplated, looking toward a favorable determination of its position. In its answer to appellant's bill, it admits most of the material allegations, but some it denies, and concludes by requesting that the bill be dismissed as to it. The city cites a number of cases in support of its contention that the Indianapolis Company must be realigned as a party plaintiff. (*Lee* v. *Lehigh Valley Coal Company, supra; Dawson* v. *Columbia Trust Company*, 197 U. S. 178; *Niles-Bement-Pond Co.* v. *Iron Moulders Union*, 254 U. S. 77; *Mahon* v. *Guaranty Trust and Safe Deposit Company, supra.*) A perusal of these authorities discloses that such realignment has been required when there is no actual controversy between plaintiff and defendant, or no bona fide prayer for relief against it. If it be conceded, however, that appellant and the Indianapolis Company occupy a similar position with respect to the validity and enforcement of the lease against the city, yet we think there are sufficient matters in controversy between them to prevent the latter from being realigned with appellant as plaintiff. The rule seems to be that before such realignment may be required, the parties must be in substantial accord upon all issues presented. (*Boston Safe-Deposit & Trust Co.* v. *City of Racine*, 97 Fed. 817.) It is not sufficient that they merely be in accord upon one issue or some of the issues. (*Sutton* v. *English*, 246 U. S. 199; *Mahon* v. *Guaranty Trust and Safe Deposit Company, supra; Franz* v. *Franz*, 15 Fed. (2d) 797.)

As was said by this court in *Mahon* v. *Guaranty Trust and Safe Deposit Company, supra*, page 269:

"One of the tests by which the court may determine whether a defendant should be aligned with the plaintiff is the prayer for relief. If no relief is sought against a defendant, such defendant should ordinarily be treated

as a plaintiff. *Dawson* v. *Columbia Avenue Trust Co.*, 197 U. S. 178, 180, 25 Sup. Ct. 420, 49 L. Ed. 713; *Steele* v. *Culver*, 211 U. S. 26, 29, 29 Sup. Ct. 9, 53 L. Ed. 74. Whether we examine the entire bill or merely the prayer for relief, we must reach the same conclusion, viz., that the traction company and the plaintiff are on the same side of this controversy. We fail to find any collision of interest between them. Both are interested in obtaining the same relief."

Appellant, among other things, is seeking to have the lease declared as part of the security for its bonds, while the Indianapolis Company is adverse to such a declaration; appellant requests that the city be ordered to pay the interest on the bonds direct to appellant, as the Citizens Company had done throughout the term of the lease, but the Indianapolis Company, by entering into an agreement with the city under date of March 2, 1936, seems to assert that the interest should be paid direct to it; appellant also requests that its expenses and attorney fees be paid out of the funds being accumulated in the Indiana National Bank of Indianapolis under the contract of March 2, 1936. Inasmuch as both appellant and Indianapolis Company have an interest in the accumulated funds, and the greater the amount of the recovery by the former, the less there will be for the latter, a controversy of some proportions is calculated to develop.

Appellant also seeks to enjoin the Indianapolis Company from interfering with the lease in any way and to have the lease declared binding upon that company as well as upon the city. While it is true appellant has not seen fit to press its request for such relief, yet it has prayed for the same and who can say, in view of the situation presented, that it may not be required so to do. We are of the opinion that the relation existing
289 between appellant and the Indianapolis Company is such that the latter should not be realigned with the appellant.

Having decided the second controverted issue in the negative, it necessarily follows that the third must be given a like answer.

The cause is reversed with directions to proceed in accordance with the views herein expressed.

A true Copy:

Teste:

.....

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

290 **Dissenting Opinion.**

Treanor, Circuit Judge, Dissenting. I agree that the Indianapolis Gas Company is a necessary party to the full determination of the controversy; but I cannot agree that there is any "collision of interest" between the Indianapolis Gas Company and the plaintiff. In my opinion the only substantial, and the dominating question, presented in this suit is whether the lease is a valid and enforcible obligation against the City of Indianapolis. And as respects that question the interests of the plaintiff, as trustees of owners of bonds of the Indianapolis Gas Company, and the Indianapolis Gas Company are identical. I find nothing in the agreement of March 2, 1936, between the city and the Indianapolis Gas Company to create an adversity of interest between the plaintiff and the Indianapolis Gas Company. The terms of that agreement provided for payments by the city pending a determination of the controversy between the city and the Indianapolis Gas Company as to the enforcibility of the lease against the city, and expressly provides against prejudice to the rights of the Indianapolis Gas Company respecting the lease; and in general had as its objective to safeguard against any interruption in the gas utility service and to insure the ultimate payment to the Indianapolis Gas Company of all amounts due under the lease in case the lease finally should be determined to be valid and enforcible against the city.

I think that the District Court's conclusion that the Indianapolis Gas Company was an indispensable party to the controversy but that it should be aligned in interest with the plaintiff was correct. Consequently, diversity of citizenship did not exist as a ground of jurisdiction. And in my opinion the District Court's order of dismissal for want of jurisdiction should be affirmed.

Endorsed: Filed April 8, 1938. Frederick G. Campbell, Clerk.

291 And afterwards, towit, at the May Term of said Court, on the 24th day of October, 1938, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit:

Comes now Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals, and files mandate reversing decree with costs, plaintiff to recover $477.13 costs from the defendants, which mandate is as follows:

292 United States of America, } ss.

The President of the United States of America, to the Honorable the Judges of the District Court of the United States for the Southern District of Indiana, Indianapolis Division. (Seal)

Greeting:

Whereas, lately in the District Court of the United States for the Southern District of Indiana, Indianapolis Division before you, or some of you, in a cause between The Chase National Bank of the City of New York, Trustee, Plaintiff, and Citizens Gas Company of Indianapolis, a corporation, The City of Indianapolis, a municipal corporation, The Indianapolis Gas Company, a corporation, William J. Mooney, Sr., A. Dallas Hitz, Alfred M. Glossbrenner, Edward W. Harris, and Charles S. Rauh, as Members of the Board of Trustees for Utilities of the City of Indianapolis, Henry L. Dithmer, Broadhurst Elsey, Fred W. Jungclaus, Rpy Sahm, David J. Angus, Isaac E. Woodward and Russell J. Ryan, as Members of the Board of Directors for Utilities of the City of Indianapolis, Defendants, Number 1844, a Decree was entered on the fifteenth day of November, 1937.

As by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Seventh Circuit by virtue of an Appeal by The Chase National Bank of the City of New York agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And Whereas, in the term of October, in the year of our Lord one thousand nine hundred and thirty-sever, the said cause came on to be heard before the said United
293 States Circuit Court of Appeals for the Seventh Circuit, on the said transcript of record, and was argued by counsel:

On Consideration Whereof, It is ordered, adjudged and decreed by this Court that the Order or Decree of the said District Court in this cause appealed from be, and it is hereby reversed with costs; and that this cause be, and it is hereby remanded to the said District Court with directions to proceed in accordance with the views expressed in the Opinion of this Court.

Friday, April 8, 1938.

And afterwards, to-wit: On the twenty-fifth day of

April, 1938, there was filed in the office of the Clerk of this Court, a Petition for a Rehearing, which said Petition for a Rehearing was denied on the twenty-fourth day of May, 1938.

And further that the Appellant, The Chase National Bank of the City of New York recover against the Appellees, Citizens Gas Company of Indianapolis, et al., the sum of Four Hundred Seventy-seven and 13/100 Dollars ($477.13) for their costs herein expended with direction to award execution therefor.

You, therefore, are hereby commanded that such further proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said Decree notwithstanding.

Witness the Honorable Charles Evans Hughes, Chief Justice of the United States, the twenty-second day of October in the year of our Lord one thousand nine hundred and thirty-eight.

(Signed) Frederick G. Campbell,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Here follows the detailed statement of costs.)

294 And afterwards, to-wit, at the May Term of said Court, on the 28th day of October, 1938, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to-wit: Entered Oct. 28, 1938.

Come now the parties by their respective solicitors, and there having been filed herein a mandate of the United States Circuit Court of Appeals directing this Court to proceed in accordance with the views expressed in the opinion of that Court;

It is now, thereupon, ordered that the order entered herein on the fifteenth day of November, 1937, dismissing the bill of complaint as amended and supplemented, and the counter-claim of the defendants herein for want of jurisdiction is now hereby set aside, and the Court now finds that this Court does have jurisdiction.

It is further ordered that this case be assigned for trial at the United States Court House at Indianapolis, Indiana, on Thursday, January 5, 1939, at 10:00 A. M., and is assigned for pre-trial conference on Saturday, December 3, 1938, at 9:30 A. M. to each of which rulings the City of Indianapolis and the individual defendants, who are members of the Board of Trustees and Directors of the Department of Utilities of the City of Indianapolis, except.

Filed Dec. 22, 1938.

295 And afterwards, to-wit, at the November Term of said Court, on the 22nd day of December, 1938, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to-wit:

Comes now the plaintiff by its attorneys and files motion for leave to file second amendment and supplement to bill, which motion is granted and is as follows: (H. I.)

And the plaintiff now files second amendment and supplement to plaintiff's bill of complaint, which is as follows:

296 IN THE DISTRICT COURT OF THE UNITED STATES.

For the Southern District of Indiana,

Indianapolis Division.

The Chase National Bank of the City of New York, Trustee,
Plaintiff,
vs.
Citizens Gas Company of Indianapolis, *et al.*,
Defendants.
} In Equity No. 1844.

SECOND AMENDMENT AND SUPPLEMENT TO PLAINTIFF'S BILL OF COMPLAINT.

William L. Taylor,
State Life Building,
Indianapolis, Indiana,
Howard F. Burns,
Union Commerce Building,
Cleveland, Ohio,
Solicitors for Plaintiff.

Baker, Hostetler & Patterson,
Of Counsel.

297 The plaintiff, The Chase National Bank of the City of New York, Trustee, by leave of Court first had and obtained, files this its Second Amendment and Supplement to the bill of complaint heretofore filed herein. (For the convenience of Court and counsel the paragraphs herein are numbered beginning with Paragraph 26 to follow the last numbered paragraph of the original bill of complaint.)

26. On or about September 9, 1935, the Board of Trustees of the Citizens Gas Company and the Board of Directors of the Citizens Gas Company, each of said boards acting separately, authorized the conveyance, transfer, and assignment of all property of the Citizens Gas Company, including the leasehold estate created by the lease of September 30, 1913, (Exhibit B to the bill of complaint), to the City of Indianapolis, in order to carry out and execute the public charitable trust established and provided for by the Articles of Incorporation of said Citizens Gas Company and the Franchise Contract of August 25, 1905, between said City and the assignors of said company (which Franchise Contract and Articles of Incorporation are attached to the bill of complaint as Exhibit C). The Board of Trustees and the Board of Directors of said Citizens Gas Company each authorized such conveyance, transfer, and assignment to the City upon the express condition that the City of Indianapolis should execute and deliver to said Citizens Gas Company an Indemnity Agreement in the form set forth in the separate minutes of said Trustees and said Directors. In pursuance of this requirement the City of Indianapolis, acting by the Board of Directors for Utilities of the City of Indianapolis, executed and delivered to Citizens Gas Company on or about September 9, 1935, an Indemnity Agreement in the form required by the Board of Directors and by the Board of Trustees of said Citizens Gas Company. A true copy of said Indemnity Agreement is attached hereto, marked "Exhibit J," and made a part hereof.

27. Since the filing of this suit the City of Indianapolis has deposited with The Indiana National Bank the sum of $1,157,875 in pursuance of the agreement of March 2, 1936 (Exhibit H), which sum is now on deposit with said The Indiana National Bank. All of said fund has been derived from and is the proceeds of the operation of the property transferred, conveyed, and assigned by Citizens Gas Company to the City of Indianapolis, including the leased property, and said fund is therefore subject to the claims and liens asserted in this cause upon all property

transferred to the City by the Citizens Gas Company
298 (including the leased property), and the proceeds,

rents, issues, and profits therefrom. Neither The Indianapolis Gas Company nor the Citizens Gas Company of Indianapolis nor the City of Indianapolis has paid any part of the semi-annual interest on the First Consolidated Mortgage Five Per Cent. Gold Bonds of The Indian-

apolis Gas Company (hereinafter sometimes called the "Bonds") due on October 1, 1936, April 1, 1937, October 1, 1937, April 1, 1938, and October 1, 1938, in the sum of $172,025 due on each of said dates, and there is now overdue and unpaid as interest on said Bonds the sum of $860,125. The City of Indianapolis has, however, paid all the State, County, and Municipal taxes on the leased property becoming due after September 9, 1935, all the insurance premiums for insurance on the leased property becoming due since said date, all instalments of Federal income taxes of The Indianapolis Gas Company falling due between September 9, 1935, and December 31, 1936, on account of any money paid by the Citizens Gas Company or the Department of Utilities of the City of Indianapolis to The Indianapolis Gas Company during the years 1934 and 1935, and has paid all instalments of the Indiana gross income tax of The Indianapolis Gas Company falling due after September 9, 1935, to and including the payment of said tax due on April 15, 1936, all in accordance with the terms and provisions of said lease (Exhibit B) by which the lessee agreed for itself and its assigns to pay said taxes and insurance premiums.

28. By reason of the facts that

(a) The Indianapolis Gas Company, the Citizens Gas Company, and the City of Indianapolis are in default in the payment of interest on the Bonds in an amount exceeding $860,000, as above set forth,

(b) neither The Indianapolis Gas Company nor Citizens Gas Company, nor both of them, have property sufficient to pay the interest in default on the Bonds, other than the property now in the possession and under the control of the City of Indianapolis,

(c) the Citizens Gas Company made certain agreements in the lease of September 30, 1913 (Exhibit B), for the benefit of the bondholders for whom and as a protection to the security of which plaintiff is Trustee, and

(d) the Citizens Gas Company on or about September 9, 1935, disabled itself from carrying out any of its agreements in said lease by transferring all its property to the City,

the transfer of the property of the Citizens Gas Company and each and every part thereof to the City of Indianapolis on or about September 9, 1935, was fraudulent as to the plaintiff and the bondholders for whom it is Trustee, unless the City of Indianapolis became bound and all of the property conveyed, transferred, and assigned by Citizens

Gas Company to the City of Indianapolis remained bound for all obligations of the Citizens Gas Company under said lease of September 30, 1913 (Exhibit B). The City of Indianapolis received the transfer and conveyance of all the property of Citizens Gas Company on or about September 9, 1935, with full knowledge of the facts that Citizens Gas Company had obligated itself under the lease of September 30, 1913 (Exhibit B), to the plaintiff and the bondholders for whom plaintiff is Trustee, that the transfer and conveyance of the property of the Citizens Gas Com-
299 pany to the City would disable the Citizens Gas Company from performing its obligations under said lease, and that Citizens Gas Company was transferring and conveying all its property to the City and was retaining no property to enable it to perform its obligations under said lease. If the fact be (which plaintiff denies) that the lease of September 30, 1913 (Exhibit B), is not binding on the City of Indianapolis and all the property formerly owned by the Citizens Gas Company and now owned and operated by the City, then the transfer and conveyance of all the property of the Citizens Gas Company to the City was made by the Citizens Gas Company and received by the City with the intent to hinder, delay, and defraud the plaintiff and the bondholders for whom it is Trustee, as creditors of Citizens Gas Company. By reason of these facts plaintiff is entitled (in the event the lease of September 30, 1913 (Exhibit B), shall be held not binding on the City of Indianapolis and all the property formerly owned by the Citizens Gas Company of Indianapolis and now owned and operated by the City) to have the conveyance of all its property by Citizens Gas Company to the City of Indianapolis set aside and declared fraudulent as to it and the bondholders whom it represents and to have said property, all improvements and additions thereto, and all proceeds, rents, issues, and profits therefrom, subjected to the judgments prayed for in this cause.

29. The Indianapolis Gas Company is the owner and holder of Bonds in the principal amount of $120,000, with all coupons maturing October 1, 1936, and thereafter attached. The City of Indianapolis is now the owner and holder of Bonds in the principal amount of $18,000, with all coupons maturing October 1, 1936, and thereafter attached. Said Bonds in the principal amount of $18,000 now held by the City of Indianapolis were transferred to it by the Citizens Gas Company on or about September 9, 1935, at the time when all other property of the Citizens Gas

Company was conveyed, transferred, and assigned to the City. By reason of the facts hereinbefore set forth said Bonds in the amount of $120,000 held by The Indianapolis Gas Company and said Bonds in the amount of $18,000 held by the City of Indianapolis and any and all other Bonds now held or hereafter acquired by The Indianapolis Gas Company, the Citizens Gas Company, or the City of Indianapolis should not be allowed to participate in the distribution of any funds recovered herein until all other bondholders have been paid in full and all claims of the plaintiff have been paid, satisfied, and discharged.

30. Under the provisions of the lease of September 30, 1913 (Exhibit B), the lessee, Citizens Gas Company, agreed to accept the leased premises of the lessor (The Indianapolis Gas Company) as the same actually were at the date of said lease and to renew, repair, replace, and extend said plants and system so as to maintain and keep the demised premises in as good order, repair, and condition as the same were at the time of making said lease. In violation of said provisions of the lease, and of plaintiff's rights as Trustee under the Mortgage of the leased propperty, The Indianapolis Gas Company, the Citizens Gas Company, the City of Indianapolis, and the Trustees and Directors for Utilities of said City have refused and neglected to make or cause to be made the renewals, repairs, replacements, and extensions necessary to maintain and keep the leased premises in as good order, repair, and condition as the same were at the making of said lease and to keep the same in their then state of efficiency. By
300 reason of these facts the gas plants and the distribution system of the lessor, The Indianapolis Gas Company, have been greatly damaged in an amount unknown to this plaintiff, and The Indianapolis Gas Company, the Citizens Gas Company, the City of Indianapolis, and the Trustees and Directors for Utilities of said City, and each of them, are liable to the plaintiff as Trustee under the Mortgage of the property covered by said lease for all losses, damages, costs, charges, and expenses resulting from the failure of said defendants to make or cause to be made the renewals, repairs, replacements, and extensions necessary to maintain and keep the leased premises in as good order, repair, and condition as the same were at the making of said lease and to keep the same in their then state of efficiency.

31. Under the provisions of said lease the lessee, Citizens Gas Company, was permitted to use as its own all

coal, coke, oil, gas meters, pipe, fittings, tools, horses, wagons, automobiles, and all supplies and merchandise of any kind on hand belonging to the lessor at the time of making said lease, and said lessee agreed that at the termination of said lease it would deliver to the lessor usable and salable supplies and merchandise of a like value or pay to the lessor in money the difference between the value of the property so delivered to the lessor and the total value of the inventory at the time of making said lease. By agreement between The Indianapolis Gas Company and Citizens Gas Company the value of the inventory so turned over to the Citizens Gas Company at the time of making said lease was fixed at $112,950.43. In the event said lease of September 30, 1913 (Exhibit B), has terminated (which plaintiff denies) the Citizens Gas Company and the City of Indianapolis, and each of them, has been obligated to pay to The Indianapolis Gas Company the sum of $112,-950.43 since the termination of said lease, and they are, and each of them now is, obligated to pay said sum with interest thereon at the rate of six per cent. per annum from the date of the termination of said lease.

Wherefore, plaintiff prays (in addition to the prayers set out in the original bill of complaint as amended and supplemented by the Amendment and Supplement to Plaintiff's Bill of Complaint):

10. That this Court in its final decree enter judgment in favor of the plaintiff against defendants The Indianapolis Gas Company, the Citizens Gas Company of Indianapolis, the City of Indianapolis, and the Trustees and Directors for Utilities of said City, and each of them, in the amount of all unpaid interest on said Bonds, together with interest on such unpaid interest from the several dates upon which such interest payments shall have accrued, at the rate of six per cent. per annum, until paid, and for all losses, damages, costs, charges, and expenses resulting from the failure of defendants to make or cause to be made the renewals, repairs, replacements, and extensions necessary to maintain and keep the leased premises in as good order, repair, and condition as the same were at the making of said lease, and to keep the same in their then state of efficiency.

11. That (in the event said lease of September 30, 1913, (Exhibit B) has terminated, which plaintiff denies), this Court in its final decree enter judgment in favor of the plaintiff against defendants the Citizens Gas Company of Indianapolis, the City of Indianapolis, and the Trustees

and Directors for Utilities of said City, and each of them, in the sum of $112,950.43 with interest thereon at the rate of six per cent. per annum from the date of the termination of said lease, and further for all the rents, issues, and profits of said leased property held by the City for the period from September 9, 1935, to the date of judgment, including the sums deposited with The Indiana National Bank as aforesaid, or for the reasonable value of the use of said property, whichever amount may be greater.

12. That this Court in its final decree adjudge, determine and declare that defendant The Indianapolis Gas Company apply to the payment of any and all judgments entered against it in this cause all property, debts, choses in action, and equitable interests belonging to it, or held in trust for it, or in which it is in any way or manner beneficially interested, including (but not intending by the following enumeration to limit the generality of the foregoing description):

(a) Said Bonds held by The Indianapolis Gas Company in the principal amount of $120,000 and any and all other Bonds now held or hereafter acquired by said Company.

(b) Any and all rights of The Indianapolis Gas Company growing out of the lease of September 30, 1913 (Exhibit B), or out of the transfer by Citizens Gas Company to the City of Indianapolis of the leased property, or both, against either the Citizens Gas Company, or the City of Indianapolis, or the Trustees and Directors for Utilities of said City, or any one or more of them; or against the property transferred and conveyed to the City by Citizens Gas Company, the improvements and additions thereto, and the proceeds, rents issues, and profits therefrom (including the sums deposited with The Indiana National Bank of Indianapolis pursuant to the agreement of March 2, 1936); or against both said property, the improvements and additions thereto, and the proceeds, rents, issues, and profits therefrom, and any one or more of said defendants.

(c) Any and all rights of The Indianapolis Gas Company growing out of the transfer of all the property of Citizens Gas Company to the City of Indianapolis in fraud of the rights of The Indianapolis Gas Company under the lease of September 30, 1913 (Exhibit B), against either the Citizens Gas Company, or the City of Indianapolis, or the Trustees and Directors for Utilities of said City, or any one or more of them; or against the property transferred and conveyed to the City by Citizens Gas Company,

the improvements and additions thereto, and the proceeds, rents, issues, and profits therefrom (including the sums so deposited with said The Indiana National Bank); or against both said property, the improvements and additions thereto, and the proceeds, rents, issues, and profits therefrom, and any one or more of said defendants.

(d) Any and all rights of The Indianapolis Gas Company growing out of the Indemnity Agreement dated September 9, 1935 (Exhibit J), against either the Citizens Gas Company, or the City of Indianapolis, or the Trustees and Directors for Utilities of said City, or any one or more of them; or against the property transferred and conveyed to the City by Citizens Gas Company, the improvements and additions thereto, and the proceeds, rents, issues, and profits therefrom (including the sums so deposited with said The Indiana National Bank); or against both said property, the improvements and additions thereto, and the proceeds, rents, issues, and profits therefrom, and any one or more of said defendants.

302 (e) Any and all rights of The Indianapolis Gas Company growing out of the use of the property of The Indianapolis Gas Company by said City from about September 9, 1935, until the date of judgment, against the City of Indianapolis, or the Trustees and Directors for Utilities of said City, or any one or more of them; or against the property transferred and conveyed to the City by Citizens Gas Company, the improvements and additions thereto, and the proceeds, rents, issues, and profits therefrom (including the sums so deposited with said The Indiana National Bank); or against both said property, the improvements and additions thereto, and the proceeds, rents, issues, and profits therefrom, and any one or more of said defendants.

(f) Any and all rights of The Indianapolis Gas Company to the proceeds, rents, issues, and profits from the leased property since on or about September 9, 1935, including the sums so deposited with said The Indiana National Bank.

and further that this Court in its final decree adjudge, determine, and declare the amount of all claims which The Indianapolis Gas Company has against the Citizens Gas Company, the City of Indianapolis, or the Trustees and Directors for Utilities of said City, or any one or more of them, and render judgment therefor, and that this Court adjudge, determine, and declare that all property of said The Indianapolis Gas Company, including all that above

described and including the said judgments or the proceeds thereof, be sequestered and set aside for the following purposes: First, to pay, satisfy, and discharge any and all judgments entered against The Indianapolis Gas Company in this cause and, Second, to hold any surplus of the amount so sequestered (over and above the amounts necessary to satisfy any and all judgments against it entered herein) as additional security for the obligations of The Indianapolis Gas Company under the Mortgage (Exhibit A) or the Bonds secured thereby; and further that no distribution of any of said sequestered property be made to The Indianapolis Gas Company or its stockholders until all obligations of said The Indianapolis Gas Company under the Mortgage or the Bonds issued thereunder have been fully satisfied and discharged or full and adequate security has been furnished by said The Indianapolis Gas Company for the ultimate payment and discharge of all its obligations under said Mortgage.

13. That this Court in its final decree adjudge, determine and declare that defendant Citizens Gas Company of Indianapolis apply to the payment of any and all judgments entered against it in this cause all property, debts, choses in action, and equitable interests belonging to it, or held in trust for it, or in which it is in any way or manner beneficially interested, including (but not intending by the following enumeration to limit the generality of the foregoing description):

(a) All the property transferred, conveyed and assigned to the City of Indianapolis by said Citizens Gas Company on or about September 9, 1935 (including said Bonds in the principal amount of $18,000 so transferred), all the improvements and additions thereto, and all proceeds, rents, issues, and profits therefrom, including the sums deposited with The Indiana National Bank of Indianapolis pursuant to the agreement of March 2, 1936.

(b) Any and all rights of the Citizens Gas Com-
303 pany growing out of the lease of September 30, 1913 (Exhibit B), and the transfer by Citizens Gas Company to the City of Indianapolis of the leased property, against either the City of Indianapolis, or the Trustees and Directors for Utilities of said City, or any one or more of them; or against the property transferred and conveyed to the City by Citizens Gas Company, the improvements and additions thereto, and the proceeds, rents, issues, and profits therefrom (including the sums so deposited with said The Indiana National Bank); or against

both said property, the improvements and additions thereto, and the proceeds, rents, issues, and profits therefrom, and any one or more of said defendants.

(c) Any and all rights of the Citizens Gas Company growing out of the Indemnity Agreement dated September 9, 1935 (Exhibit J), against either the City of Indianapolis, or the Trustees and Directors for Utilities of said City, or any one or more of them; or against the property transferred and conveyed to the City by Citizens Gas Company, the improvements and additions thereto, and the proceeds, rents, issues, and profits therefrom (including the sums so deposited with said The Indiana National Bank); or against both said property, the improvements and additions thereto, and the proceeds, rents, issues, and profits therefrom, and any one or more of said defendants.

(d) Any and all rights of the Citizens Gas Company growing out of the use of the leased property by the City since on or about September 9, 1935, against either the City of Indianapolis, or the Trustees and Directors for Utilities of said City, or any one or more of them; or against the property transferred and conveyed to the City by Citizens Gas Company, the improvements and additions thereto, and the proceeds, rents, issues, and profits therefrom (including the sums so deposited with said The Indiana National Bank), or against both said property, the improvements and additions thereto, and the proceeds, rents, issues, and profits therefrom, and any one or more of said defendants.

(e) Any and all rights of Citizens Gas Company to the proceeds, rents, issues, and profits from the leased property since on or about September 9, 1935, including the sums so deposited with said The Indiana National Bank.

and further that this Court in its final decree adjudge, determine, and declare the amount of all claims which Citizens Gas Company of Indianapolis has against the City of Indianapolis or the Trustees and Directors for Utilities of said City, or any one or more of them, and render judgment therefor, and that this Court adjudge, determine, and declare that all property of said Citizens Gas Company, including all that above described and including the said judgments or the proceeds thereof, be sequestered and set aside for the following purposes: First, to pay, satisfy, and discharge any and all judgments entered against the Citizens Gas Company in this cause, and, Second, to hold any surplus of the amount so sequestered (over and above the amounts necessary to satisfy any and all judgments

against it entered herein) as additional security for the obligations of Citizens Gas Company under the lease (Exhibit B).

14. That this Court in its final decree adjudge, determine and declare the order in which the defendants herein are liable for the amounts found due and the order in which the various assets of the defendants herein, 304 including the properties and assets hereinbefore specifically mentioned, shall be applied to the satisfaction of the judgments entered herein.

15. That pending final determination of this cause the defendants The Indianapolis Gas Company and the City of Indianapolis be enjoined from selling, transferring, in any way disposing of, or in any way encumbering the Bonds held by them in the principal amount of $120,000 and $18,000, respectively.

16. That all such other and further relief as may be proper and equitable in the premises be awarded the plaintiff.

William L. Taylor,
Howard F. Burns,
Solicitors for Plaintiff.

Baker, Hostetler & Patterson,
Of Counsel.

EXHIBIT J.

Indemnity Agreement of September 9th, 1935, Given by City of Indianapolis to Citizens Gas Company.

INDEMNITY AGREEMENT.

Whereas, the Citizens Gas Company of Indianapolis is, by separate instruments, conveying, transferring and assigning to the City of Indianapolis all of its property in order to carry out and execute the public charitable trust established and provided for by the articles of incorporation of said Company and the franchise agreement entered into on the 25th day of August, 1925, by and between the said City and the assignors of said Company; and,

Whereas, said conveyance, transfer and assignment is being made pursuant to, and subject to all the restrictions, stipulations and agreements contained therein, the articles of incorporation of said Company, the franchise agreement entered into between said Company's assignors and the said City of Indianapolis under date of August 25th, 1905,

as aforesaid, and Chapter 78 of the Acts of 1929 of the General Assembly of the State of Indiana.

Now, Therefore, in consideration of the premises and the conveyance, transfer and assignment as aforesaid, it is agreed by the City of Indianapolis, a municipal corporation organized and existing under the laws of the State of Indiana, by and through the Board of Directors for Utilities of the City of Indianapolis, that it shall hereafter well and sufficiently save, defend, keep harmless and indemnify the said Citizens Gas Company of Indianapolis, its officers,
Directors and Trustees, from any and all loss, damage,
305 cost, charges, liability or expense on account of any
actions at law or in equity, or any other proceedings of any nature brought in or before any court, board or other tribunal, on account of the conveyance, transfer and assignment of any or all of the property of the said Company to the said City for the purpose as aforesaid. The City of Indianapolis further agrees that it will hereafter well and sufficiently save, defend, keep harmless and indemnify the said Citizens Gas Company of Indianapolis, its officers, Directors and Trustees, from any and all loss, damage, costs, charges, liability or expense on account of any pending actions or suits which have heretofore been instituted against said Company and on account of any actions or suits which may hereafter be brought against said Company, arising from any and all acts or actions or omissions to act on the part of said company of any nature whatsoever.

Executed this 9th day of September, 1935.

Board of Directors for Utilities
of the City of Indianapolis,
By (Signed) Henry L. Dithmer,
President.

305 And afterwards, towit, at the November Term of
said Court, on the 10th day of January, 1936, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit:

Comes now the defendant Citizens Gas Company of Indianapolis by its solicitors, and files separate answer to second amendment and supplement to plaintiff's bill of complaint, which answer is as follows:

Filed Jan. 10, 1939. 307 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—1844) * *

SEPARATE ANSWER OF CITIZENS GAS COMPANY OF INDIANAPOLIS TO SECOND AMENDMENT AND SUPPLEMENT TO PLAINTIFF'S BILL OF COMPLAINT.

Citizens Gas Company of Indianapolis, a defendant in the above entitled cause, for separate answer to the Second Amendment and Supplement to the Plaintiff's Bill of Complaint, says (the paragraphs herein are numbered to correspond with the paragraph numbers of the amendment and supplement):

XXVI.

This defendant admits the averments contained in Subdivision 26 of said second amendment and supplement.

XXVII.

This defendant has no knowledge of the averments contained in Subdivision 27 of the said second amendment and supplement, and neither admits nor denies said averments but requests that plaintiff be required to make strict proof thereof; except that this defendant admits that it has not paid any part of the semi-annual inter-
308 est upon the bonds and due on the dates mentioned therein.

This defendant avers that it was and is under no obligation or legal liability to pay the said interest for the reasons and because of the facts specifically set forth in Subdivision XX of this defendant's answer to the original bill of complaint herein, and Subdivision XXVIII of this separate answer to the second amendment and supplement thereto.

XXVIII.

This defendant denies that the conveyance and transfer of all of its property to the City of Indianapolis on September 9, 1935, was fraudulent as to the plaintiff or any other person or persons, that the said conveyance and transfer was made by this defendant and received by the City of Indianapolis with an attempt to hinder,

delay and defraud the plaintiff or any other person or persons whatsoever, and that the plaintiff herein is entitled to have said conveyance set aside and declared fraudulent, by reason of the following facts:

(a) Said conveyance was made in the manner and form, and pursuant to this defendant's legal duty and right so to do, as specifically set forth in Subdivision XX of this defendant's answer to the original bill of complaint herein; and,

(b) Whether or not the City of Indianapolis and the said property are bound and subject to the obligations of said lease from and after September 9, 1935, the said ninety-nine year lease is not a valid and legal obligation of this defendant, but that it was entirely and com-
309 pletely released and discharged from any such obligation at the time said conveyance was made to the City of Indianapolis, on September 9, 1935; and,

(c) At the time said conveyance was made, this defendant had completely performed and satisfied all of its obligations and liabilities under the said lease, and that it was not indebted to the Indianapolis Gas Company or the plaintiff or the bondholders for whom the plaintiff is Trustee in any manner; and,

(d) As specifically set forth in Subdivision XX of this defendant's answer to the original bill of complaint herein, this defendant, on and prior to September 9, 1935, was the trustee of a public charitable trust for the benefit of the present and prospective gas consumers of the City of Indianapolis, and all the rights, property and assets acquired and possessed by it, including the said lease, were possessed and owned by it as such trustee, and for the purposes set forth in the instrument creating said public charitable trust, and the conveyance of the said trust property, as aforesaid, was made to the City of Indianapolis as the successor-trustee of the said public charitable trust, and not otherwise. Accordingly, said conveyance, which was made subject to all legal obligations of this defendant, including the obligation of the said lease, if any there be, amounted in law to no more than a substitution of the City of Indianapolis for this defendant as the trustee of the said public charitable trust and the complete execution by this defendant
310 of its duties as the original trustee as aforesaid. By reason of the foregoing, this defendant was on September 9, 1935, entirely and completely released and discharged from any and all obligations under said lease.

XXIX.

This defendant has no knowledge of the averments contained in Subdivision 29 of said second amendment and supplement, and neither admits nor denies said averments, but requests that plaintiff be required to make strict proof thereof; except that defendant admits that at the time of the said conveyance, it transferred bonds in the principal amount of $18,000 to the City of Indianapolis.

XXX.

As to the averments of Subdivision 30 of said second amendment and supplement, this defendant admits that under the provisions of the said lease, it agreed to accept the leased premises of the lessor as the same actually were at the date of said lease, and to renew, replace and expand said plant and system so as to maintain and keep the said demised premises in as good order, repair and condition as the same was at the time of making said lease. This defendant denies the remaining averments of said subdivision.

XXXI.

This defendant admits the averments contained in Subdivision 31 of said second amendment and supplement, except that it denies that it is under any obligation to the Indianapolis Gas Company, this plaintiff or the bondholders for whom this plaintiff was Trustee, by reason of the facts specifically set forth in Subdivision XX and
311 Subdivision XXVIII of defendant's answer to the original bill of complaint and the amendments and supplements thereto.

Wherefore, this defendant, having fully answered the said second amendment and supplement to plaintiff's bill of complaint, prays that it may go hence without day.

(Acknowledgment of Service.)

312 (Entry for January 10, 1939, continued.)

Comes now the defendant The Indianapolis Gas Company by its solicitors, and files separate answer to the second amendment and supplement to plaintiff's bill of complaint, which is as follows:

313 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Jan. 1 1939.
• • (Caption—1844) • •

SEPARATE ANSWER OF THE INDIANAPOLIS GAS COMPANY TO THE SECOND AMENDMENT AND SUPPLEMENT TO PLAINTIFF'S BILL OF COMPLAINT.

The Indianapolis Gas Company, defendant herein, by way of its separate answer to the "Second Amendment and Supplement to Plaintiff's Bill of Complaint" filed December 23d, 1938 says:

26. For answer to Paragraph 26 thereof, The Indianapolis Gas Company admits upon information and belief that at or about the 9th day of September, 1935 the Board of Trustees of the Citizens Gas Company of Indianapolis and the Board of Directors of that Company, each acting separately, took some action, the exact nature and form of which is to this defendant unknown, and pursuant thereto, under date of the 9th day of September, 1935 the Citizens Gas Company of Indianapolis, by its Vice President, attested by its secretary, made the transfer and assignment of its property which is set out as Exhibit E with the Bill of Complaint; and also by its said officers signed and acknowledged and tendered to the City of Indianapolis the instrument denominated "Assignment of Lease" set out as Exhibit F with said Bill of Complaint;

and that the leasehold therein referred to was the
314 estate created by the instrument set out as Exhibit D with said Bill of Complaint; and admits that in so doing the said Citizens Gas Company purported and intended to carry out and execute the public charitable trust established and provided for by its Articles of Incorporation and its Franchise Contract set out as Exhibit C with the Bill of Complaint. But as to the same having been or not having been authorized upon any express conditions, or as to what is stated in the minutes of proceedings of said Trustees or of said Directors, this defendant has no knowledge unless only by hearsay, and cannot admit or deny the same. And whether or not the city of Indianapolis, by its Board of Directors for Utilities executed and delivered to said Citizens Gas Company the instrument called an Indemnity Agreement attached to and filed with said Second Amendment and Supplement to Plaintiff's Bill of Complaint, marked "Exhibit J," and

whether or not the same was done in pursuance of said requirement by the said Trustees and Directors of said Citizens Gas Company, this defendant does not know except by hearsay, and cannot either admit or deny the same.

27. For answer to Paragraph 27 thereof this defendant, The Indianapolis Gas Company, admits as true all of the independent facts therein stated. But as to the matters the alleged conclusion of fact concerning what the funds deposited in the Indiana National Bank was derived from, and the alleged conclusions of law as to what said fund is subject to, and whether all that has been done by the City of Indianapolis is in accordance with the provisions of the lease filed with the Bill of Complaint as "Exhibit B," this defendant is not sufficiently informed to answer positively and therefore does not admit nor deny.

28. For answer to Paragraph 28 thereof, this answering defendant admits that there is default in the
315 payment of interest on its bonds in an amount exceeding $860,000.00 and that it does not now possess sufficient property, other than that now operated by the said City to pay such defaulted interest. It neither denies nor admits the alleged conclusions resulting from the facts so averred and states that the same are conclusions of law now before this court for determination.

29. For answer to Paragraph 29, this answering defendant admits that it is the owner and holder of bonds in the principal amount of $120,000 with coupons maturing October 1, 1936 and thereafter attached, but it denies that by reason thereof said bonds should not be permitted to participate in the distribution of any funds recovered by this plaintiff for all bond holders until all other bond holders have been paid in full, together with all claims of this plaintiff. It further states that it does not know, except by hearsay, whether or not the City of Indianapolis is the owner and holder of any of its bonds nor whether or when any of said bonds, if at all, were transferred to the said City by the Citizens Gas Company, and therefore, neither admits nor denies said averments of ownership.

30. For answer to Paragraph 30, this answering defendant admits the provisions of the lease as alleged and as embodied in the same as filed with the Bill of Complaint and marked Exhibit "B," but says that it has not operated or been in possession of its said property since the

same was taken over under and pursuant to said lease, since which time its said property has been continuously under the operation and control of the Citizens Gas Company of Indianapolis and of the City of Indianapolis through its Department of Utilities, and is now under the operation and control of said city. This defendant says that in executing said lease and transferring the operation and control of its property to the lessee thereunder,
316 it violated no right, duty or obligation to these plaintiffs or to the owners and holders of its bonds.

This defendant is not now informed as to how far and in what particulars the provisions of the lease relative to the maintenance and upkeep of said property have been violated, nor to what extent, if at all, any of its now mortgaged property has been damaged; but this defendant says that, if damage has accrued to its said property through failure of the said Citizens Gas Company of Indianapolis or the City of Indianapolis to maintain the same in accordance with the terms and provisions of said lease, all rights and claims arising from any such failure is vested alone in this answering defendant and not in the plaintiff as averred in the said bill of complaint.

31. For answer to paragraph 31 thereof, defendant The Indianapolis Gas Company admits that subdivision 11 of said lease set out as Exhibit B with the Bill of Complaint contained and contains provisions substantially as averred in the Second Amendment and Supplement to said complaint, and that it and subdivision 12 thereof provide for making an inventory and appraisement of the property of the lessor taken over by the lessee, and that pursuant to an inventory and appraisement so made it was agreed that the value of such items of supplies and merchandise owned by the lessor and at that time turned over to the lessee to use as its own under said provisions of the lease was $112,950.43. But it is informed that the matters of law as to the legal rights, obligations and liabilities of the parties hereunder upon the hypothetical state of facts suggested in said amendment would be for the court to decide, and therefore neither admits nor denies the same.

317 Wherefore, this defendant prays:

1. That the relief prayed for against this defendant in each and all of the said paragraphs of prayer of this second amendment and supplement to the Bill of Complaint be denied, and that plaintiff's bill of complaint be dismissed as to it.

2. That in the decree and judgment entered in this case it be allowed its costs in this action and all other proper relief agreeable to equity and good conscience.

(Acknowledgment of Service.)

Filed Jan. 11, 1939.

318 And afterwards, towit, at the November Term of said Court, on the 11th day of January, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit:

Come now the defendants City of Indianapolis, et al., by their attorneys, and file separate answer to second amendment and supplement to plaintiff's bill of complaint, which answer is as follows:

319 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—1844) * *

SEPARATE ANSWER OF CITY OF INDIANAPOLIS ET AL. TO SECOND AMENDMENT AND SUPPLEMENT TO PLAINTIFF'S BILL OF COMPLAINT.

City of Indianapolis, a municipal corporation, and the named members of its Board of Directors and of its Board of Trustees for Utilities (hereinafter for convenience sometimes referred to collectively as defendant City), for separate answer to the Second Amendment and Supplement to Plaintiff's Bill of Complaint, and referring to the numbered paragraphs thereof, say:

26. They admit the averments contained in Subdivision 26 thereof, but allege that defendant City did not accept the tendered transfer and assignment of the leasehold estate created by the lease of September 30, 1913; that said lease has never been binding and is not now binding upon defendant City or its property; and that the execution of the indemnifying agreement to Citizens Gas Company (Exhibit J to said Bill) in no sense was or is a recognition of liability under said lease, nor an acceptance of it; nor did or could the benefits of such agreement validly extend to said plaintiff, nor can plaintiff enforce the same, directly or indirectly.

320 27. They admit the deposit of $1,157,785 with The Indiana National Bank of Indianapolis in pursuance of the agreement dated March 2, 1936 (Exhibit H to the Bill); admit the payment of insurance premiums on prop-

erty of The Indianapolis Gas Company and the payment of Indiana gross income taxes and Federal income taxes assessed against The Indianapolis Gas Company, all since September 9, 1935, and all under and by virtue of said agreement dated March 2, 1936, and not otherwise. They deny that such payments were made under or by reason of said lease of September 30, 1913. They deny that the sums so paid were paid from proceeds of the operation of the property covered by said lease exclusively. They admit that defendant City has not paid, and allege that defendant City is not under any circumstances liable for, all or any part of interest on bonds issued by The Indianapolis Gas Company; and leave plaintiff to its proof as to who, if anyone, has paid interest upon such bonds. They allege defendant City is not liable for payment of such interest for the reasons and by reason of facts heretofore pleaded by defendant.

28. They deny that defendant City is in default in the payment of interest on bonds of The Indianapolis Gas Company and allege that for reasons and upon facts heretofore pleaded, defendant City is not and could not be liable for such interest by reason of such bonds or said lease. They deny that the transfer of i ~ property by Citizens Gas Company to said City on September 9, 1935, was fraudulent as to plaintiff or as to plaintiff's bondholders or to any person; and they deny that such transfer was made or received with intent to hinder, delay or defraud plaintiff or its bondholders or any person; and they deny that plaintiff is entitled to have such transfer set aside or declared fraudulent and deny that property so transferred may be subjected to judgments as
321 prayed. They deny that any obligations of said lease were or are enforceable or valid against defendant City; deny that any obligations of said lease were or are enforceable or valid since September 9, 1935; and deny that defendant City received said property with knowledge that such lease obligations were valid or enforceable against it or its property or against any one subsequent to September 9, 1935. They allege that the said transfer and conveyance were made pursuant to a legal duty imposed upon said Citizens Gas Company, and by virtue of a legal right vested in said City. They allege that said transfer and conveyance were made in the performance of a public charitable trust, whereby defendant City was substituted in possession as a successor trustee to defend-

ant Citizens Gas Company; all consistently with the terms of such public charitable trust.

29. They admit defendant City is now the owner and holder, as a part of said public charitable trust, of bonds of The Indianapolis Gas Company in the aggregate principal amount of $18,000, transferred to defendant City by Citizens Gas Company; and they deny that there are any reasons why such bonds should not participate in any distribution of funds payable by way of principal or interest on such bonds, equally and ratably with all other bondholders excepting only as to bonds issued and now held by said The Indianapolis Gas Company in the aggregate principal amount of $120,000; as to which defendant City is informed and believes and upon information and belief alleges the fact to be that such bonds are subject to extinguishment and should be cancelled and not allowed to participate equally and ratably with other bonds.

30. They deny that defendant City has refused or neglected or has ever been or is now under any obligation to make or cause to be made, renewals, repairs,
322 replacements, or extensions of property owned by The Indianapolis Gas Company and covered by said lease, excepting only to the extent if any that some obligation is imposed by said agreement of March 2, 1936. They deny that defendant City is liable to plaintiff as Trustee under a mortgage of property covered by said lease to any extent and for any sum, whether for losses, damages, costs, charges, or expenses, resulting from alleged failure of defendants or any of them to make or cause to be made any such renewals, repairs, replacements, or extensions. With respect to the obligations and performance or non-performance thereof imposed by said lease or by said mortgage, on The Indianapolis Gas Company or Citizens Gas Company, these defendants leave plaintiff to strict proof, as not having sufficient knowledge with respect thereto. They allege that no such claimed liability is assertable that has accrued more than ten years prior to the date of plaintiff's said Second Amendment and Supplement. They allege that any controversy with respect to claimed under-maintenance, viz., alleged failure to make or cause to be made renewals, repairs, replacements or extensions by reason of said lease, is a separable controversy to which The Indianapolis Gas Company is an indispensable party and is opposed in interest to defendant City; that as to this

controversy, the parties should be realigned, and when realigned, there is no jurisdiction over such separable controversy because of lack of diversity of citizenship; jurisdiction being collusively invoked.

31. They deny any obligation under or by virtue of the said lease of September 30, 1913. They have no knowledge and leave plaintiff to strict proof of the facts alleged in said subdivision 31 of said Second Amendment and Supplement to its Bill of Complaint.

323 Wherefore, these defendants specifically deny that plaintiff is entitled to any and all of the relief prayed; and they renew the prayer of their counterclaim.

Edward H. Knight,
Corporation Counsel of Indianapolis.
M. B. Reddington,
City Attorney of Indianapolis.
W. H. Thompson,
Albert L. Rabb,
Solicitors for said Defendants.

324 And afterwards to wit at the November Term of said Court, on the 14th day of January, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit: Filed Jan. 14, 1939.

On oral application of plaintiff, The Chase National Bank of the City of New York, Trustee, it is hereby given leave to withdraw its answer to the counterclaim of defendants, City of Indianapolis, et al., and to file its motion to strike immaterial matter from the answer and counterclaim of defendants, the City of Indianapolis, et al. Said motion is now filed and reads as follows:

325 In the District Court of the United States.

* * (Caption—1844) * *

MOTION TO STRIKE IMMATERIAL MATTER FROM THE ANSWER AND COUNTERCLAIM OF DEFENDANTS, THE CITY OF INDIANAPOLIS, ET AL.

Now comes the plaintiff, The Chase National Bank of the City of New York, Trustee, by its attorneys, and respectfully petitions the Court for leave to withdraw its

answer to the counterclaim of defendants, the City of Indianapolis, the members of the Board of Trustees for Utilities of said City, and the members of the Board of Directors for Utilities of said City, and moves the Court for an order striking out the following portions of the separate and several answer and counterclaim of said defendants, making this motion separately as to each of said portions, on the ground that each and every such portion of said answer and counterclaim, whether such portions are taken separately or collectively, is immaterial to the determination of any issue in this cause:

1. That portion of the last grammatical paragraph of part 5 of said answer which reads:

"also contains many other conditions burdensome in character"

(which language appears in the 14th, 15th and 16th lines of page 8).

326 2. That portion of sub-paragraph "Second" of part 8 of said answer which reads:

"which lease contained onerous and burdensome conditions,"

(which language appears in the 31st and 32nd lines of page 15).

3. That portion of part 11 of said answer which reads:

"These answering defendants further aver that The Indianapolis Gas Company has during all of said time received the rentals due it under the terms of said lease; that the Citizens Gas Company of Indianapolis has paid all taxes in connection therewith and all other burdens imposed upon it by the terms of said lease, and that the payments so made to or in behalf of The Indianapolis Gas Company during the period from 1913 to 1935, inclusive, were as follows:"

(which language appears on page 24).

4. The table of payments included in part 11 of said answer, which table appears on page 25 of said answer.

5. That portion of the last grammatical paragraph of part 11 of said answer which reads:

"deny that over the period of the lease any profits have been produced thereby and"

(which language appears in the 4th and 5th lines of page 26).

6. That portion of the last grammatical paragraph of part 11 of said answer which reads:

"On the contrary, these answering defendants aver:

"(a) That the payments made to The Indianapolis

Gas Company during the period of years above referred to, viz.: from 1913 to 1935 were largely in excess of the fair value of the use of said property during said time.

"(b) That during many of the years referred to Citizens Gas Company was operated at a loss and one of the factors contributing materially to the existence of such loss was the excessive rental and other considerations required to be paid to and on behalf of said The Indianapolis Gas Company under the terms of said lease.

"(c) That said lease is presently burdensome and not advantageous to said trust property, all as herein-
327 after in subdivision 27 hereof more specifically alleged.

"(d) That the bondholders and stockholders of The Indianapolis Gas Company have benefited to an inequitable, unfair and unreasonable extent because of payments made to them or on their behalf under the terms of said lease."

(which language appears on page 26).

7. That portion of part 21 of said answer which reads:

"and that the benefits of The Indianapolis Gas Company largely exceeded the benefits to the City of Indianapolis;"

(which language appears in the 7th, 8th and 9th lines of page 51).

8. All of paragraph "Fourth", including sub-paragraphs (a), (b) and (c) of said paragraph "Fourth," and all of paragraph "Fifth" of part 27 of said answer, (which paragraphs and subparagraphs appear on pages 61-62).

9. All of paragraph "Fourth," including sub-paragraphs (a), (b) and (c) of said paragraph "Fourth", and all of paragraph "Fifth" of said counterclaim, (which paragraphs and subparagraphs appear on pages 69-70).

Dated: January 13th, 1939.

Howard F. Burns,
1956 Union Commerce Building,
Cleveland, Ohio.
William L. Taylor,
State Life Building,
Indianapolis, Indiana.
Solicitors for Plaintiff.

Baker, Hostetler & Patterson,
Taylor & Carter,
Of Counsel.

Entered Jan. 14, 1939.

328 (Further Entry for January 14, 1939.)

Said motion to strike having been filed and having been submitted for the consideration of the Court, and the Court being fully advised, it is hereby ordered that said motion be and the same is hereby overruled, to which ruling the plaintiff excepts.

Upon the overruling of said motion, plaintiff, The Chase National Bank of the City of New York, Trustee, is hereby given leave to refile its answer to the counterclaim of defendants, the City of Indianapolis, et al., which answer was previously filed on November 14, 1936, and said answer is refiled and reads as follows: (H. I.)

Filed Jan. 18, 1939.

329 And afterwards towit at the November Term of said Court, on the 18th day of January, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit:

Come now the answering defendants by their attorneys, and file motion for leave to amend one paragraph of defendants' answer, which motion is granted by the Court and is as follows: (H. I.)

And said answering defendants now file amendment and supplement to their answer and counterclaim, which is as follows:

330 In the District Court of the United States.

* * (Caption—1844.) * *

AMENDMENT AND SUPPLEMENT TO ANSWERING DEFENDANTS' ANSWER AND COUNTERCLAIM.

The answering defendants by leave of court first had and obtained file this their amendment and supplement to their answer and counterclaim heretofore filed in this cause. (This amendment will follow the averments of answering defendants subdivision numbered 9 on page 20 of their answer.)

These answering defendants aver that at no time has the City of Indianapolis through the Board of Public Works or otherwise formally, or in any other manner, accepted the lease by requiring extensions in the lines and mains of The Indianapolis Gas Company to be made, nor

has said City through said Board of Public Works or otherwise ever in any manner recognized or ratified said lease by requiring extensions in lines and mains of The Indianapolis Gas Company to be made, although the answering defendants admit that the City of Indianapolis through the Board of Public Works thereof did require extensions
331 to be made in the lines and mains of The Indianapolis Gas Company.

Edward Knight,
Corporation Counsel.
Michael B. Reddington,
City Attorney of Indianapolis.
William H. Thompson,
Albert L. Rabb,
Patrick J. Smith,
Solicitors for Answering Defendants.

332 (Further Entry for January 18, 1939.)

Entered Jan. 18, 1939.

This matter came on to be heard upon this day upon the question of the advisability of hearing and determining the issue presented as to whether or not the obligations contained in the lease between the Indianapolis Gas Company and Citizens Gas Company of Indianapolis, dated September 30, 1913, are binding upon and enforceable against the City of Indianapolis or any of the property acquired by it from Citizens Gas Company of Indianapolis on September 9, 1935, or against the Indianapolis Gas Company or the Citizens Gas Company of Indianapolis.

And the Court being duly advised in the premises:

It is ordered that evidence shall be heard upon the issues as to whether the lease dated September 30, 1913, from the Indianapolis Gas Company to the Citizens Gas Company of Indianapolis is binding upon and enforceable against the City of Indianapolis, or any of the property acquired by it from the Citizens Gas Company of Indianapolis, on September 9, 1935, or against the Indianapolis Gas Company or against Citizens Gas Company of Indianapolis and whether plaintiff is entitled to judgment for the rental under said lease or for the interest on the First Consolidated Mortgage Five Per Cent Gold Bonds of the Indianapolis Gas Company which has accrued since April 1, 1936, against any of said defendants or said property, with the one exception that evidence shall not be heard therewith

but shall be deferred on one certain reason assigned by the City of Indianapolis in its answer, for claimed unenforceability of such lease against it or its said property viz., that the City as successor trustee of a certain public charitable trust in property of the Citizens Gas Company of Indianapolis had the right as such successor trustee to refuse and reject an assignment of such lease on the
333 ground that such lease was burdensome and not advantageous to such trust; reserving the right to make such order or decree as may seem just and appropriate to the Court at any stage of this proceeding.

The trial of all other issues in this case is deferred until the further order of the Court with the right reserved to refer any of all issues to a Master.

It is further ordered that the assignment of this cause for trial upon the above stated issues for Monday, February 20, 1939, at 10:00 A. M. be, and the same is, hereby vacated and this cause is ordered reassigned for trial of such issues on Thursday, March 2, 1939, at 10:00 A. M.

Entered Mar. 2, 1939.

334 And afterwards towit at the November Term of said Court, on the 2nd day of March, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit:

It appearing to the Court that Alfred M. Glossbrenner, who was made a defendant to plaintiff's bill of complaint as a member of the Board of Trustees for Utilities of the City of Indianapolis has died, that Thomas D. Sheerin has succeeded said Alfred M. Glossbrenner as such member of said Board of Trustees, that Joseph H. McDuffee, who was made a defendant in this cause as a member of the Board of Directors for Utilities of the City of Indianapolis, is no longer a member of said Board of Directors, and that John E. Ohleyer has succeeded said Joseph H. McDuffee as such member of said Board of Directors;

It is ordered that said Thomas D. Sheerin, as a member of the Board of Trustees for Utilities of the City of Indianapolis, and said John E. Ohleyer, as a member of the Board of Directors for Utilities of the City of Indianapolis, be, and they hereby are made parties defendant in this suit and this suit shall proceed.

And now Thomas D. Sheerin and John E. Ohleyer through their solicitors, William H. Thompson and Albert L. Rabb, enter their appearance in this cause and adopt

the pleadings heretofore filed in this cause by their respective predecessors in office as and for their own, with the same force and effect as though they had originally joined in filing the same.

526 And afterwards towit at the May Term of said Court, on the 30th day of October, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit: Filed Oct. 30, 1939.

Comes now the plaintiff by its attorneys, and files official reporter's transcript of proceedings upon trial, which is as follows:

528 IN THE DISTRICT COURT OF THE UNITED STATES,

for the Southern District of Indiana,

Indianapolis Division.

The Chase National Bank of the City of New York, Trustee, *Plaintiff*, *vs.* Citizens Gas Company of Indianapolis, a Corporation, et al., *Defendants.*	In Equity, No. 1844.
Massachusetts Mutual Life Insurance Company, et al., *Plaintiffs*, *vs.* Citizens Gas Company of Indianapolis, et al., *Defendants.*	In Equity, No. 1950.

OFFICIAL REPORTER'S TRANSCRIPT OF PROCEEDINGS UPON THE TRIAL.

Indianapolis, March 2, 1939.

529 Be It Remembered, That, in the District Court of the United States, for the Southern District of Indiana, Indianapolis Division, at the United States Court House, in the City of Indianapolis, Indiana, on Thursday, March 2, 1939, commencing at ten o'clock in the forenoon, the above-entitled causes, being at issue, came on for trial before the Honorable Robert C. Baltzell, sole Judge of

said Court, and the proceedings upon the trial were in the words and figures following, to-wit:

Appearances:

The Plaintiff, The Chase National Bank of the City of New York, Trustee, appeared by Howard F. Burns, Esq., and John Adams, Esq., representing Messrs. Baker, Hostetler & Patterson, by William L. Taylor, Esq., and Thompson Kurrie, Esq., representing Messrs. Taylor & Carter, and by Hugh L. M. Cole, Esq., representing Messrs. Milbank, Tweed & Hope, its attorneys.

The Plaintiffs, Massachusetts Mutual Life Insurance Company, New England Mutual Life Insurance Company and The Savings Bank of Baltimore, appeared by Howard F. Burns, Esq., and John
530 Adams, Esq., representing Messrs. Baker, Hostetler & Patterson, and by Harvey J. Elam, Esq., representing Messrs. Fesler, Elam, Young & Fauvre, their attorneys.

The Defendant, Citizens Gas Company of Indianapolis, appeared by William G. Sparks, Esq., representing Messrs. Davis, Pantzer, Baltzell & Sparks, its attorneys.

The Defendant, The Indianapolis Gas Company, appeared by Louis B. Ewbank, Esq., representing Messrs. Ewbank, Dowden & Adams, and by William R. Higgins, Esq., representing Messrs. McTurnan & Higgins, its attorneys.

The Defendant, The Indiana National Bank of Indianapolis, appeared by Louis B. Ewbank, Esq., representing Messrs. Ewbank, Dowden & Adams, its attorneys.

The Defendants, City of Indianapolis, a municipal corporation, the individual defendants who are members of the Board of Trustees for Utilities of the City of Indianapolis, and the individual defendants who are members of the Board of Directors for Utilities of the City of Indianapolis, appeared by William H. Thompson, Esq., Albert L. Rabb, Esq., and Patrick J. Smith, Esq., representing Messrs. Thompson & Rabb, their attorneys.

531 The Court: Call the case.

The Clerk: The Chase National Bank against Citizens Gas Company of Indianapolis and others.

The Court: Is the plaintiff ready?

Mr. Burns: Yes.

The Court: Is the defendant ready?

Mr. Thompson: Yes, your Honor, but before we commence the actual trial of this case, I have two motions to suppress subpoenas duces tecum that were issued, one on Tuesday at four o'clock and one on yesterday at three-twenty o'clock.

I would be glad to present that matter briefly to your Honor, if I may.

* * * * *

Mr. Burns: If the Court please, the Clerk called only the case of The Chase National Bank against Citizens Gas Company, No. 1844. It was our understanding that the Court made an order that both cases—that is, both 1844 and 1950—were to be tried at this time. Am I correct?

The Court: I understand that the evidence will be
532 heard which would be applied to both cases and, then, we would apply it to the case to which it belongs.

Mr. Burns: Yes.

The Court: There was no order of consolidation.

Mr. Burns: No, I think they were simply to be heard together.

Mr. Thompson: That is our understanding.

* * * * *

The plaintiffs, to maintain the issues on their behalf, offered and introduced the following evidence, to-wit:

533 Mr. Burns: If I may stand over here by the court reporter, it will help in identifying some of these exhibits.

The parties have, with much labor and some difference of opinion, though I guess perhaps no difference of opinion on the final results, agreed on a stipulation covering a substantial part of the facts in this case. The bills in the two cases are in a large measure identical, and the stipulation has been drawn so that Paragraph 1 of the stipulation is referable to the facts stated in Paragraphs 1 of the two bills and Paragraph 2 of the stipulation is referable to the facts stated in Paragraphs 2 of the two bills; and that scheme is followed down through the first seventeen paragraphs of the stipulation. Beyond the seventeenth paragraph of the bills, the allegations perhaps got to be more argumentative than matters of fact, so beginning with Paragraph 18 of the stipulation it does not follow in accordance with the paragraphs of the bills.

The Court: Suppose you have that identified as an exhibit, and shown read in evidence.

Mr. Burns: Yes. Since evidence is being intro-
534 duced here in both cases, in the Trustee's case, 1844, and in the Bondholders' case, 1950, may we have a general understanding that in the absence of some express statement to the contrary all of the evidence offered is being introduced in both cases, and as counsel for plaintiff in both cases we will refer to the evidence and the exhibits offered as the plaintiffs' evidence or the plaintiffs' exhibits, as the term being intended to include both the Trustee and the Bondholders.

The Court: There is no objection to that, as I understand. My recollection is that we stated we would make a finding in the Trustee case first. I do not know that the record shows that, but that is what I had in mind, that I would decide that case, and that would perhaps not necessitate deciding the question of whether or not the Bondholders had a right to bring a suit. That was my understanding of it.

Mr. Burns: Plaintiffs wish to have marked for identification three documents:

First, as Plaintiffs' Exhibit 1, a stipulation signed by counsel for all parties to these cases.

Second, as Plaintiffs' Exhibit 2, the printed record
535 in the United States Circuit Court of Appeals, in the case of Newton Todd, appellant, against Citizens Gas Company of Indianapolis, et al., appellees, Cause No. 4394.

And, third, as Plaintiffs' Exhibit 3, the appellants' brief in the Supreme Court of Indiana in case No. 26,163, entitled Anna G. Williams, as etc., appellants, versus Citizens Gas Company of Indianapolis, et al., appellees.

The three exhibits mentioned are merely marked for identification at this time.

Mr. Thompson: Is your offer in respect of Exhibit No. 3 limited to the pleadings?

Mr. Burns: At the present time I am simply asking to have it marked for identification, and not offering any of the three exhibits.

(Plaintiffs' Exhibits 1, 2 and 3 were marked for identification by the reporter.)

Mr. Burns: Plaintiffs offer in evidence the following parts of the stipulation heretofore identified as Plaintiffs' Exhibit No. 1:

536 The five grammatical paragraphs which are introductory thereto.

Numbered sections 1 to 17, both inclusive, of said stipulation.

Numbered sections 19, 20 and 21 of said stipulation.

Numbered sections 23, 24 and 25 of said stipulation.

The Court: That omits 22?

Mr. Burns: That omits 22, and we are offering just a part of 18, which I will come to in a minute.

Also subparagraphs I, II, IX, X, XIII and XIV of numbered section 18 of said stipulation.

We are offering all of the paragraphs of the stipulation except Paragraph 22 and except parts of Paragraph 18.

The Court: That is, all of the stipulation with these exceptions, is that right?

Mr. Burns: Yes. There are only 25.

Mr. Thompson: I want to make an objection to the offer of Plaintiffs' Exhibit 1, your Honor, but I would like
537 to make it in connection with Exhibits 1, 2, and 3, if they are to be offered now.

Mr. Burns: I am going to offer a whole lot of things, and if it is agreeable to the court, I will finish the offer with regard to this stipulation, and then let Mr. Thompson make what objections he cares to, if that is agreeable to counsel and the court.

The Court: All right, go ahead.

Mr. Burns: Plaintiffs offer as evidence in both cases the following exhibits attached to the bill as amended and supplemented in the Trustee's case and identified in the stipulation:

EXHIBITS A TO F, both inclusive, and EXHIBITS H AND J.

Plaintiffs offer in evidence in both cases EXHIBITS A AND B attached to the City's answer in the Trustee's case and identified in the stipulation.

The Court: That is attached to—

Mr. Burns: (Interposing.) The City's answer in the Trustee's case. Perhaps I got that wrong. Exhibits A and B attached to the City's answer in the Trustee's case.

Plaintiffs offer EXHIBITS 5 TO 9, both inclusive,
538 20, 22, 23, 24, 47 TO 50, both inclusive, 55, 56, 86 AND 87, identified in the stipulation.

(The reporter marked for identification Plaintiffs' Exhibits 5 to 9, both inclusive, 20, 22, 23, 24, 47 to 50, both inclusive, 55, 56, 86 and 87, identified in the stipulation.)

Mr. Burns: I might say parenthetically, if the court please, that the last paragraph of the stipulation indicates a large number of the exhibit numbers were not used. We

began with 1, and we found that we were taking out these exhibits and putting in others, so there are a large number of exhibit numbers not used, and those are enumerated in the last paragraph of the stipulation.

Plaintiffs offer the following exhibits identified in the stipulation, each of which is a pleading in the Fishback, Todd, or Williams case. Said exhibits are offered for the purpose of showing the questions raised and issues presented in those suits and the positions taken by the various parties in said suits, but said pleadings are not offered as any independent evidence of the facts stated in the several pleadings:

539 The exhibits so offered are as follows:

EXHIBITS 13 AND 14, being certain pleadings in the Fishback case.

EXHIBITS 30, 31, AND 32, being certain pleadings in the Todd case.

EXHIBITS 35 TO 40, both inclusive, being certain pleadings in the Williams case.

EXHIBITS 13, 14, 37, 39, AND 40, just referred to, have been separately typewritten and appear among the typewritten exhibits tendered with the stipulation.

EXHIBIT 30, the bill of complaint in the Todd case, appears on pages 2 to 72, both inclusive, of the printed record in the Todd case, previously identified as Exhibit 2.

Mr. Thompson: Are you offering that?

Mr. Burns: Yes.

The Court: Can you furnish Mr. Thompson a copy of what you have just handed to the court, showing these offers?

Mr. Burns: Yes. Exhibit 31, the answer of the City of Indianapolis and others in the Todd case, appears on pages 115 to 152, both inclusive, of said record in the

540 Todd case, (Exhibit 2) and Exhibit 32, an amended motion to strike out portions of answers, appears on pages 154 to 161, both inclusive, of said record in the Todd case (Exhibit 2).

Mr. Thompson: In the interest of time, this might be handed to the reporter.

Mr. Burns: I have handed it to him, but I have to have these exhibits marked as we go along.

Exhibit 35, the complaint in the Williams case, appears on pages 110 to 228, both inclusive, of the appellants' brief in said cause, previously identified as Plaintiffs' Exhibit 3.

Exhibit 36, the supplemental complaint in said Wil-

liams case, appears on pages 228 to 230, both inclusive, of said appellants' brief (Exhibit 3).

Exhibit 38, the demurrer of the Citizens Gas Company and others in said Williams case, appears on pages 232 to 235, both inclusive, of said appellants' brief (Exhibit 3).

The Court: Unless you are going to use this immediately, why couldn't the reporter take this and mark the exhibits during recess?

Mr. Burns: That will be satisfactory.

The Court: And you may look it over, Mr. Thompson, and if you have any objections to any part of it, that can be taken up later.

(The reporter marked for identification Plaintiffs' Exhibits 13, 14, 30, 31, 32, 35 to 40, both inclusive.)

541 Mr. Burns: I now offer EXHIBITS 13, 14, 30, 31, 32, AND 35 TO 40, inclusive, which I have just referred to, being the pleadings in those various causes. I mention that again so as to give Mr. Thompson a chance if he wants at this time to make an objection to those various pleadings,—or, would you prefer to wait?

Mr. Thompson: I would prefer to wait until you have made this complete offer, and then I will state my objections, if that is satisfactory to your Honor.

The Court: Yes.

Mr. Burns: Plaintiffs also offer certain letters identified in the stipulation as EXHIBITS 58, 59, 66, 67, 75 AND 76, but said letters are offered only for the purpose of showing the positions taken by the various parties in writing said letters, and that said positions were called to the attention of the recipient of such letters, but not as being any independent evidence of the facts stated therein.

Copies of these Exhibits 58, 59, 66, 67, 75 and 76 have been prepared by Mr. Thompson's office, but they do not show the signatures on the letters, and I would like

542 some way to have them appear. That is, many of them were made from carbon copies of letters, and if we could have some arrangement to have those signatures filled in, so that we might know who had written the letters, it would make it complete. Could you do that, Mr. Rabb?

Mr. Rabb: I do not have custody of the Indianapolis Gas Company files.

Mr. Burns: I understood we were going to have complete exhibits here.

Mr. Rabb: We gave you our complete files and photo-

stats. We do not have the originals. They were, in the main, in the Indianapolis Gas Company's custody.

Mr. Burns: I think the letters should be complete, and we will undertake to complete these six we are offering, but we will not endeavor to complete the others somebody else may offer, but will call a witness to prove whose the signatures were.

The Court: If any of the parties have the originals, I am certain they will furnish them.

Mr. Higgins: We will furnish the ones that were submitted to us.

Mr. Burns: I have here in my hand certified copies
543 from the Recorder of Marion County, Indiana, of the transfer and assignment of personal property identified as Exhibit E, attached to the bill, and already introduced in evidence in connection with the stipulation; the assignment of the 99-year lease, Exhibit F, attached to the bill, and already identified in connection with the stipulation; and the deed of the real estate, Exhibit 55, previously identified and offered in connection with the stipulation. It does not seem to me there is any necessity of offering these certified copies. They show—

The Court: (Interposing.) Have you offered the copies?

Mr. Burns: I have offered the copies, but I wanted to show the fact about the recording. I thought perhaps rather than calling the Recorder we could have a stipulation here. We were unable to stipulate on it between the parties when we tried to stipulate on it in advance. These certified copies show each of them recorded at 3:45 p. m., September 9, 1935. I am advised by the Recorder and by counsel learned in the law in this vicinity that that
544 means the time the documents were received for record by the Recorder. If it can be so stipulated, I think it will be unnecessary to offer these certified copies.

The Court: I think you can stipulate that.

Mr. Thompson: For the City of Indianapolis, we will agree the instruments to which Mr. Burns has just referred were presented to the Recorder of Marion County, Indiana for recordation at 3:45 p. m., on the 9th day of September, 1935.

The Court: And that they were recorded in certain volumes.

Mr. Thompson: And that they were thereafter properly recorded.

Mr. Burns: Is that agreeable to the Citizens Gas Company?

Mr. Sparks: Yes.

Mr. Burns: And the Indianapolis Gas Company?

Mr. Higgins: Yes.

Mr. Burns: It seems to me that saves encumbering the record with these certified copies.

Plaintiffs offer as Exhibit 88 a statement of the Secretary of the Public Service Commission of Indiana,
545 duly certified by the Secretary of State, showing that the Secretary of the Public Service Commission, after diligent search, has been unable to find the pleadings before the Public Service Commission referred to in sections 7 and 8 of the bill. In view of the loss of those original pleadings, plaintiffs offer Exhibit 13, the first paragraph of the complaint of Frank S. Fishback case, as independent evidence of the three following matters:

1. Petition of Citizens Gas Company of Indianapolis and Indianapolis Gas Company before the Public Service Commission asking for an order authorizing the making of a lease between Indianapolis Gas Company and Citizens Gas Company.

2. The intervening petition of Frank S. Fishback before the Public Service Commission opposing the approval of the lease.

3. The petition of Frank S. Fishback before the Public Service Commission for rehearing.

Mr. Thompson: The defendant, City of Indianapolis, and the individual defendants who are members of the Board of Directors for Utilities of the City of Indian-
546 apolis, object at this time to the offer of Exhibit No. 13 for the reason that there is no showing at all that the petition of the Citizens Gas Company of Indianapolis and the Indianapolis Gas Company before the Public Service Commission, the intervening petition of Frank S. Fishback, and the alleged petition of Fishback for a rehearing, set out in the first paragraph of plaintiffs' complaint are correct, accurate and true copies of the pleadings that are actually filed before the Public Service Commission. Note, your Honor, these are offered as evidence of the things that were actually filed before the Public Service Commission.

Secondly, on the ground that these are hearsay as to the objecting defendants.

Third, on the ground they cannot be received as original evidence of the papers that were actually filed, without some proof that they are correct copies of such papers.

Mr. Burns: As I understand it, under the stipulation,

Exhibit 13 is here before the court with just as much effect as though we had subpoenaed the transcript from the Supreme Court of Indiana and proved Exhibit 13 from
547 the transcript. That is where we got the information, and what it was compared with.

The Court: I understand Mr. Thompson's position that he is not objecting to that, but the fact that the things stated in there constitute the things that were filed before the Public Service Commission,—which, of course, would be elementary.

Mr. Burns: The petition of Fishback in the Circuit Court, removed to the Superior Court, was verified, and was then certified by the Clerk of the Superior Court to the Supreme Court, and it is that on which we rely as our evidence.

The Court: You do not contend that would be evidence because it was filed before the Commission?

Mr. Burns: The petition purports to set forth in detail and quote exactly what those petitions are. There is a well settled exception to the hearsay rule that a declaration as to matters of great public interest is admissible where the original source of information is no longer available. I think this court knows from his previous contact with this situation that there wasn't anything in and about Indianapolis in 1913 about which there was so much public
548 interest as about this gas situation. It was a topic of constant discussion in the newspapers, and Fishback comes into the Circuit Court and files what purports to be a statement of what his pleadings were before the Public Service Commission. Now, we contend that that comes within the well accepted exception to the hearsay rule, that if the primary sources of evidence are unavailable, hearsay declarations are admissible to prove the fact which otherwise cannot be proved.

This question, I ought to say, is typical of several questions that are necessarily involved here, and they are inherent in the situation because the City of Indianapolis delayed twenty-two years before it raised any question whatever about the validity of the lease.

The Court: Let us not go into that. We are just trying a law suit, and I don't care to be harassed by things that are personal in this. I am interested in the facts and the law. They filed it within the required time. You don't have to file anything the next day; you can file it within limits. It was all right, and the Circuit Court of Appeals said so; so I don't see any point to that.

549 I am doubtful very much whether or not that document should be received as evidence of documents that were filed with the Public Service Commission. I will reserve my ruling on that, however, until I have an opportunity to examine it further. It would be evidence, of course, of what was in the petition filed by Fishback, but to say that would be evidence of the things that were in the statements, allegations that are in the pleadings or papers filed with the Public Service Commission, I am just doubtful if I could go that far, but I will reserve my ruling on that.

Mr. Burns: Plaintiffs also offer Paragraph 13 of the bill of complaint in the Todd case appearing upon pages 40 and 41 of Exhibit 2, and Paragraph 10 of the answer of the City of Indianapolis and others appearing on page 126 of Exhibit 2, to establish the admission made by the City of Indianapolis in its answer as to the circumstances under which Chapter 78 of the Indiana Laws of 1929 was prepared and passed. We are offering an allegation in the bill and an admission in the City's answer as an admission of the facts there stated.

Mr. Thomspon: To which evidence the City of Indianapolis and the Member of the Board of Directors for
550 Utilities object, because it is perfectly clear an averment in the bill of complaint in the Todd case or an admission contained in the answer of the City of Indianapolis are limited, so far as any legal questions are concerned, to that case. Here is an issue made between the City of Indianapolis and Newton Todd, the plaintiff, as to whether Newton Todd as representing the stockholders of the Citizens Gas Company is entitled to take this property over or whether a public charitable trust had been created by which title to that property was vested in the City of Indianapolis at the date of the creation of the trust, which was 1905. Certain averments are made in that bill of complaint, and certain answers in respect thereto by the City of Indianapolis. That is not offered now on the question of res adjudicata, but is offered as an independent admission in this case, and I think it is well settled any admission made by any party in a pleading in a case is limited to that case.

The Court: I do not know what the allegations are.

Mr. Burns: These allegations are allegations of fact that the law was prepared by counsel for the City of
551 Indianapolis who was acting for it in connection with this, that it was introduced in the Legislature at the

request of the City of Indianapolis, that it was passed exactly as it was introduced.

The Court: Is that with reference to that special enabling statute?

Mr. Burns: Yes.

Mr. Thompson: I will add the objection, which Mr. Burns brings to my mind, that all of this could not make any difference whatever. If an act is passed the court is not to examine the circumstances and conditions under which it was passed; it is either a valid statute or it isn't. What possible difference could it make in the determination of this case whether the enabling act, Chapter 78 of the Laws of 1929 was passed by the General Assembly in the exact form it was prepared, or whether the Legislature made a change in it?

Mr. Burns: It certainly cannot make any difference in the law, but it is material in considering the intention of the City of Indianapolis. Within about a week or ten days after the law was passed, the City, by its Board of Works, exercised its option to take over the Citizens Gas, and
552 I think that is material and has a bearing on—

The Court: (Interposing.) I realize this goes back a long ways, and the evidence necessarily covers various ramifications, and I am going to be very liberal in my rulings as to the admission of evidence. I think the Court wants everything before it that will shed any light on the questions to be determined, and I would rather err on having a little more in the record than not having enough. I am making that as a general statement that will apply to all. I will not pass on that question now.

Mr. Burns: If the Court would like for us to do so, we can cite decisions of the Supreme Court and other courts, holding that admission by a party is admissible as to that same party in entirely independent litigation. It is a very well settled rule.

The Court: I would like to take up these exhibits all at the same time and go right down through them. I can't do it very well piecemeal. Perhaps we can get along better if we make all of these offers and then begin at the beginning and make your objections, and we can rule
553 on them as we go along, or take them under advisement, and I think that would be a little more practical.

Mr. Burns: Plaintiffs offer as Exhibit 89 the second, third, and fourth grammatical paragraphs from Section 18 of the answer of City of Indianapolis and others in the case of Cotter, et al, versus Citizens Gas Company, et al., being Case No. 1192 on the equity docket of this court, as evi-

dence that the City of Indianapolis and the Board of Public Works in said case admitted, among other things, that the Citizens Gas Company leased all the plant and property of Indianapolis Gas Company for a period of 99 years with the full consent and approval of the City of Indianapolis.

The Court: I wonder if we might just let these stand on their offer at the present time, and unless it is necessary to have them passed upon, until we go ahead with the other evidence of the plaintiff, and take this all up at the conclusion of the evidence, if we can, unless some particular part of it would be necessary; and I would say we can pass on all of it before the defendant proceeds with its evidence.

554 Mr. Thompson: I have reduced my objections to print on the major portion of these. If the Court would rather, I will take it up later.

The Court: Yes, if there is no objection to that procedure.

Mr. Burns: I would like to say in regard to Exhibit 89, which I have just referred to, I asked Mr. Sogemeier to produce the original files of the Court in the Cotter case so if objection arises from the fact it is merely a copy, we would be glad to take it from the record.

The Court: No. We are not in the habit of having lawyers misrepresent anything in making copies.

Mr. Burns: I think I missed one in there in reading this offer.

Plaintiffs offer Paragraph 4 of the stipulation of facts in the Todd case appearing on pages 192 and 193 of Exhibit 2, as evidence that the parties to said cause, including the Citizens Gas Company and the City of Indianapolis, stipulated that the Citizens Gas Company of Indianapolis was then the owner of a 99-year lease created by the lease of September 30, 1913 here in question.

555 Mr. Thompson: I haven't been furnished copies of these last two.

The Court: Pages 4 and 5, you mean, Mr. Thompson?

Mr. Thompson: The last one, on page 5. You see, your Honor, he comes here with an offer of isolated portions of a stipulation of facts and three grammatical paragraphs from Section 18 of an answer. I think it is perfectly obvious I cannot tell from looking at these just what these are, and I don't know whether the context is given so it is understandable, and I won't until—

The Court: (Interposing.) We will give you an opportunity to examine them. I haven't seen a copy yet of the

stipulation that was offered. Do you have that stipulation, Exhibit 1?

(Exhibit No. 1 was handed to the Court.)

(At this point the witnesses in the cause were sworn.)

Mr. Burns: I will call Mr. Vonnegut.

556 FRANKLIN VONNEGUT, a witness called on behalf of the Plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Burns.

Q. Mr. Vonnegut, will you state your name?

A. Franklin Vonnegut.

Q. And your address?

A. 120 East Washington Street, for business.

Q. And your occupation?

A. President of the Vonnegut Hardware Company.

Q. Are you now a member of the Board of Directors of the Citizens Gas Company?

A. I am.

Q. During what time have you been a director of the Citizens Gas Company?

A. From the inception.

Q. That is, from about 1905 to the present time?

A. Correct.

Q. And have you been active in other respects? Have you been an officer of the Citizens Gas Company as well as a director?

A. I was the President for a number of years.

Q. Can you tell me during what years you were President?

A. I cannot.

Q. Have you held some other office than President?

A. Not in the Citizens Gas Company.

Q. Not in the Citizens Gas Company?

A. Director, only.

Q. Director and President?

557 A. Director and President.

Q. You don't recall during what years you were President?

A. I only know that I was requested not to ask for the office when I was not in harmony with Mr. J. D. Forrest, our manager.

Q. During what period of time was Mr. J. D. Forrest with the Citizens Gas Company?

A. All the time.
Q. Well, do you mean he came in 1905?
A. Yes, sir.
Q. And stayed with the Citizens Gas Company until what time?
A. Until it was turned over to the City of Indianapolis.
Q. Well, now, wasn't there a time, shortly before the property was turned over to the City of Indianapolis, that the Citizens Gas Company had some other manager?
Mr. Burns: Mr. Kemp was his name?
A. I don't recall it.
A Voice: Mr. Kirk.
Mr. Thompson: Mr. Forrest retired and Mr. Kirk went in long before the time that the City took over the
558 property.
A. (Continued.) Oh, sure—Mr. Kirk. I knew that he was the manager, but I didn't catch the connection suddenly.
Q. You have a little difficulty with your hearing?
A. A little—a lot of it.
Q. Do you recall, now, when Mr. Kirk succeeded Mr. Forrest?
A. I didn't prepare myself to be a witness. I didn't look up anything and my memory isn't such that I can give any dates.
Q. During the time when Mr. Forrest was with the company, what was his title, the office that he held?
A. As I recall it, it was Secretary and General Manager.
Q. Did he have charge of the operation of the business of the Citizens Gas Company?
Mr. Thompson: To which question the Defendant City objects. The extent of Mr. Forrest's authority has to be established by the record, not by the oral statement of some witness.
Mr. Sparks: May the record show the same objection on the part of the Citizens Gas Company?
559 The Court: I think he can tell what he did, if that is what you want.
Mr. Burns: That is exactly what I want.
The Court: He could not express his opinion as to what his authority was.
Mr. Burns: No.
Will you read the question, please, Mr. Reporter?
(The Reporter read the preceding question as follows: "Did he have charge of the operation of the business of the Citizens Gas Company?")

A. He did.

The Court: I think the objection is sustained as to that.

Q. What did Mr. Forrest do in connection with the Citizens Gas Company?

A. He had no other connections that I know of. He devoted his entire time to the Citizens Gas Company and its business.

Q. And what did he do for the Citizens Gas Com-
560 pany? What functions did he perform? What work did he do?

A. Just everything.

Q. Did he take care of the sale and marketing of securities of the Citizens Gas Company?

A. He did, indeed.

Q. And did he have the contacts with the bankers and brokers through whom those securities were sold?

A. Entirely.

Q. And would he report to the Board the result of those negotiations?

A. Yes, sir,

Q. And did the Board object or raise any question about his dealing with the bankers and brokers?

Mr. Thompson: I don't like to object, your Honor, but it seems to me that the scope of Mr. Forrest's authority must be shown by the By-Laws and the appropriate resolutions or minutes of the Citizens Gas Company.

The Court: I will let him answer the question. Go ahead. Overruled.

Read the question, please.

561 (The Reporter read the preceding question as follows: "And did the Board object or raise any question about his dealing with the bankers and brokers?")

A. I think the Board was generally in full accord with his actions and approved them.

The Court: As I understand, he was an employe of the Citizens Gas Company. Is that right?

The Witness: How is that?

The Court: He was an employe, was he, of the Citizens Gas Company?

The Witness: Yes, and he was so proficient in his work that there was very little difficulty—very little objection found to his proceedings—to his actions.

Mr. Burns: That is all.

The Court: Any questions?

Mr. Thompson: No, your Honor.

Witness excused.

562 ALFRED F. GAUDING, a witness called on behalf of the Plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Burns.

Q. Will you state your name, your address and your occupation, Mr. Gauding?

A. Alfred F. Gauding; 120 East Market Street; Vice President of The Union Trust Company.

Q. Do you have under your general supervision and control the files of The Union Trust Company of Indianapolis?

A. Yes, we do have.

Q. Did you state what office you hold at the Union Trust?

A. Vice President.

Q. Did you come here in pursuance of a subpoena to produce some documents?

A. Yes, I did.

Q. Have you produced from the files of The Union Trust Company the circular requested by the subpoena?

A. Yes, I have.

Q. May I see it? (The witness handed to counsel the
563 document subsequently marked Plaintiff's Exhibit No. 90).

Calling your attention to a document marked Plaintiffs' Exhibit 90, have you produced that from the files of the Bond Department of The Union Trust Company?

A. Yes, I have.

Q. And was that a circular that was used by The Union Trust Company in the sale of the Citizens Gas stock?

Mr. Thompson: May I see it, please? (Counsel for plaintiffs handed to counsel for defendants Plaintiffs' Exhibit No. 90.)

Do I understand that your Honor has indicated that we are to reserve all objections to all offers?

The Court: No, just the ones that were in this.

Mr. Thompson: I see. As I understand, the question at this point, now, is whether this was a circular that was used in the sale of Citizens Gas Company stock.

I want to object to the question—I think perhaps it may be in the way of a preliminary question—on the general ground that the Citizens Gas Company was the initial trustee of the public charitable trust; that no statement
564 made by the Citizens Gas Company of Indianapolis—this statement, by the way, purports to be made when? 1913?

The Witness: June 1st, 1919.

Mr Thompson: 1919. (continued)—could operate and create an estoppel against the City of Indianapolis or be evidence which would result in the enforcement against the City of Indianapolis of this Indianapolis Gas Company lease.

It seems to me, your Honor, that this is going vary far afield.

The Court: I will let him answer the question he is asked. That is a preliminary question, I think.

Mr. Thompson: It is, I think.

Mr. Burns: Will you read the question to the witness?

(The Reporter read the preceding question as follows: "And was that a circular that was used by The Union Trust Company in the sale of the Citizens Gas Stock?")

A. It was a circular in our files, but whether or
565 not it was used, I would not definitely say.

Q. You don't know that?

A. No, I don't know that.

Q. Have you been with The Union Trust Company since 1919?

A. Yes, I have, but not in the Bond Department.

Q. Not in the Bond Department. Were you also subpoenaed to bring the original letter from Mr. Forrest to The Union Trust Company, which is quoted on Pages 2 and 3 of the circular, Exhibit 90?

A. Yes.

Q. Did you make a search for that letter?

A. We did.

Q. Could you find it?

A. We were unable to find it.

Mr. Burns: You were unable to find it. I think that is all.

The Court: That is all.

Cross-Examination by Mr. Thompson.

Q. Of course, you were unable to find the original of what purports to be a letter from Mr. Forrest, in
566 your files?

A. That is right.

Q. And you have no knowledge of your own whatever that this letter, which is set out on Pages 2 and 3 of the Plaintiffs' Exhibit 90, is, in fact, a copy, or correct copy, of the actual letter that Mr. Forrest wrote?

A. I could not say definitely as to that.
Witness Excused.

GAVIN L. PAYNE, a witness called on behalf of the Plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Burns.

Q. Will you state your name, your address and your occupation, Mr. Payne?

A. Payne — P-a-y-n-e — Gavin L. Payne; investment banking business; Insurance Building, Indianapolis.

Q. Insurance Building, Indianapolis?

A. Indianapolis, yes, sir.

567 Q. How long have you been engaged in the investment banking business?

A. Well, I have been engaged under the name "Gavin L. Payne & Company" for thirty-two years, about—thirty-two or thirty-three years.

Q. And before that were you engaged in the investment banking business with someone else?

A. I was President of the Security Trust Company.

Q. Of Indianapolis?

A. Of Indianapolis.

Q. Mr. Payne, did you from time to time have something to do with the marketing of the securities of the Citizens Gas Company, both bonds and stock?

A. Yes, we were active in it.

Q. And during what period of time were you active in that?

A. Well, on the Citizens Gas Company, we were active in it from the beginning.

Q. Practically from the beginning down to the time when it was taken over by the City?

A. Up to the time it was taken over by the City.

Q. With whom did you deal in connection with 568 the security with the Citizens Gas Company?

A. With the Citizens Gas Company, chiefly—well, with the Citizens Gas Company on the issues put out by the Citizens Gas Company.

Q. Who represented the Citizens Gas Company in your dealings with it?

A. Well, Mr. Forrest, the General Manager and Secretary, and, then, we dealt also with the Board of Directors.

Q. In connection with your dealing in the issues of the Citizens Gas Company, did you receive from it the reports which it issued from time to time to its stockholders?

A. Yes, sir.

Q. Have you some of those reports with you?

A. I have.

Q. Calling your attention, Mr. Payne, to the four documents, which are marked Plaintiffs' Exhibits 91, 92, 93 and 94, are these original copies of the reports of the Citizens Gas Company to its stockholders, which were received by you from the Citizens Gas Company on or about their date?

A. Yes, sir, those were originals.

569 Mr. Burns: We offer those in evidence. (Plaintiffs' Exhibits Nos. 91, 92, 93 and 94.)

Mr. Thompson: May I have them? (Counsel for Plaintiffs handed to counsel for Defendants Plaintiffs' Exhibits Nos. 91, 92, 93 and 94.)

The City of Indianapolis and the individual defendants, who are members of its Board of Directors and its Board of Trustees for Utilities, object to the introduction in evidence of each of these Exhibits 91, 92, 93 and 94, for each of the following reasons.

I am going to state my objection, if I may, very carefully, your Honor, so that when similar papers arise, I may refer back to this objection.

First: The Citizens Gas Company was the initial trustee of a public charitable trust and had no power or authority to accept a lease on property which did not form a part of the trust res and bind the City of Indianapolis as successor trustee to the terms of said lease. Having no authority to bind the City by express contract, the Citizens Gas Company could not, by any act or admission of any of its officers or agents or by the issuance of any report, create any estoppel against

570 the City of Indianapolis in respect of such lease.

Second: A City cannot be estopped expressly and it follows that it cannot be estopped impliedly or in a quasi manner.

Third: As to the City of Indianapolis, this evidence is purely hearsay, as these reports were not prepared by any officer or agent of the City of Indianapolis, but it already clearly appears in this case that these reports were prepared by the Citizens Gas Company of

Indianapolis, which had no power or authority to speak for or bind the City.

Fourth: There is no showing that the person who made this statement had any power or authority to act for or on behalf of the City of Indianapolis, and I might add that there is no showing that these reports were used by the authority even of the Citizens Gas Company.

Fifth: In no event could any such admission have any probative effect unless there is a showing that some present holder of the bonds of The Indianapolis Gas Company relied upon such a statement.

571 Sixth: There is no showing that the lease of September 30, 1913, between Indianapolis Gas Company and the Citizens Gas Company, is binding or enforcible against the City, no showing that the City was a party to the lease, an assignee of the lease or obligated to accept an assignment thereof, or that the City ever recognized the binding effect of such lease upon it and, under such circumstances, a contract for a period of seventy-five years in the future against a municipal corporation cannot be created by estoppel.

Seventh: Under the Indiana statute, no lease of the character here involved can be valid unless approved by the Common Council and the Board of Public Works of the City, and no such lease is valid if for a term of more than twenty-five years. Any lease, made in violation of the provisions of the statute, is void and cannot be ratified. No such contract can be foisted on the City by estoppel.

(See Page 46.)

Mr. Burns: I would like to say just this.

The Court: That was all?

572 Mr. Thompson: That was all, your Honor.

The Court: May I see the exhibits, please? Counsel for defendants handed to the Court Plaintiffs' Exhibits Nos. 91, 92, 93 and 94.)

Let me ask Mr. Payne: Did you purchase some of the bonds yourself, or stock?

The Witness: Beg pardon?

The Court: I say, did you purchase some of the stock yourself, or some bonds?

The Witness: I purchased a great deal of stock as it was offered by the company—

The Court: After you received—

The Witness: (continued.) —from the beginning; also as it was offered at auction.

The Court: After you received these statements that are offered in evidence?

The Witness: Well, yes. We handled it so generally during that period that I—

The Court: I am going to overrule the objection, and permit the exhibits to be admitted and read in evidence for whatever they may be worth.

This is purely on the theory that the City of In-
573 dianapolis, as successor trustee, would not be bound, of course, under the law, but, as the same time, I think I would be justified in permitting the admission of these documents in evidence for consideration in determining that question.

Mr. Thompson: I should like to add these two objections, your Honor: that so far as the stock or bonds of the Citizens Gas Company are concerned, even if the witness or other people relied upon these circulars in purchasing such stock and bonds, they have already been paid off and, therefore, evidence of that character, including these circulars, could have no probative weight.

My next statement is that, if these circulars have any effect at all, it is because a claim will be asserted by the plaintiff that they are an admission of a legal proposition; that is, of validity and enforcibility of this ninety-nine year lease against the City of Indianapolis, and the admission of a legal proposition can never create an estoppel.

The Court: Let the record show that these additional specifications of the objection are made before the ruling of the Court.

574 The said documents, so offered, respectively marked for identification PLAINTIFFS' EXHIBITS NOS. 91, 92, 93 AND 94, were admitted and read in evidence.

Mr. Burns: I would like to make this comment, if I may, because I think it is applicable to a great deal of the evidence that is here and is particularly applicable to the objections which Mr. Thompson has made.

The City of Indianapolis accepted the conveyance of this property, subject to all of the obligations of the Citizens Gas Company, so that the question is, or at least, one of the very important questions is, what were the obligations of the Citizens Gas Company? Now, in determining what the obligations of the Citizens Gas Company are which the City has assumed or, in effect

has assumed, at least, in that the property is in the hands of the City, it is competent to consider every admission that the Citizens Gas made that bears on the problem.

The Court: Well, I have admitted them in evidence.

575 Mr. Burns: Yes. I thought it perhaps would be helpful if I just stated our position on that matter.

The Court: Any other questions?

Q. Mr. Payne, subsequent to the receipt of these reports in 1913 and 1914, did you buy from the Citizens Gas Company stock and bonds, at various times, of the Citizens Gas Company?

A. I bought stock and bonds and also—my recollection is that we bought Indianapolis Gas bonds. I think it is stated in one of those circulars that the company had sold quite a block of bonds.

Mr. Thompson: Your Honor, without repeating my objection, may it be understood that the City is objecting not only to these questions and these exhibits, but to all testimony along this line, without the necessity of repeating?

The Court: Yes, you may have your objection.

They have been read in evidence.

Q. Mr. Payne, was there, during the period from 1915 to 1935, in one or in one or two well accepted manuals, a source of information upon which bankers and
576 brokers and business men and the investing public relied in making investments?

A. Well, the Poor's Manual, I think, was the one—Moody's came a little later, but Poor's originally.

Q. After a while the two ran along concurrently and then Poor's and Moody's were consolidated? Is that the fact?

A. Well, I don't recall as to the—Poor's was the first manual and, then, Mr. Moody started in the business, a few years after Poor, in competition and a good many people took both manuals and accepted either one of them.

Q. Now, calling your atention to a book, which I will mark Exhibit 95 for identification, I will ask you if that is Poor's Manual of Public Utilities for 1915,—

A. Yes, sir.

Q. (continued.) —which you have had in your office since about that time?

A. Yes, sir, 1915.

Q. And calling your attention to a book, marked Plaintiffs' Exhibit 96 for identification, is that Poor's Manual for Public Utilities for the year 1922?

A. Yes.

577 Q. And calling your attention to a book marked Plaintiffs' Exhibit 97, is that Poor's Public Utility Manual for the year 1935?

A. Yes, sir.

Q. Which you have had in your office?

A. Yes, sir.

Q. Calling your attention to a book marked Plaintiffs' Exhibit 98 for identification, is that a copy of Moody's Manual for 1923?

A. Yes, sir.

Q. Which you have had since about that time?

A. Well, I don't recall that that was ours.

Q. You can identify it as Moody's Manual?

A. As Moody's Manual, yes.

Q. Are those manuals, Moody's Manual and Poor's Manual, generally relied upon by the investing public in the making of investments and buying of securities?

A. They are relied on by the dealers and investment bankers and also, to a more limited extent, probably, by the purchaser of securities.

Q. From your experience in the field of investment banking and particularly in the field of public utility

578 securities, do you know how those manuals are made up?

Mr. Thompson: If this question, your Honor, calls for —if that is an attempt to prove, now, in a back-handed sort of way, that, because there is certain information set forth in Moody's Manual, the Citizens Gas Company was responsible for it, I object to it because that has got to be approved affirmatively.

The Court: The objection is sustained as to how it was made up.

Mr. Burns: Note an exception.

The Court: I wonder if we could adjourn at this time. Were you about through with this witness?

Mr. Burns: I was about through, your Honor.

The Court: Let's finish with the witness, then.

Offer to Prove.

Mr. Burns: We offer to prove by the witness that the practice in making up these manuals is for the publishers of the manuals to send questionnaires to the various

companies to receive that information from the companies and that the information, contained in the
579 manuals, is made up from the information received from the various companies upon which the reports are made.

The Court: Any other questions?

Mr. Burns: You may inquire.

Mr. Thompson: I have no cross-examination.

The Court: That is all.

Witness Excused.

Mr. Thompson: Now, your Honor, before adjournment, I want to move to strike out the testimony of Mr. Payne for the reasons assigned in the objections to the exhibits and the additional reason that no showing has been made and no offer has been made that any present owner of the bonds of The Indianapolis Gas Company purchased them from Mr. Payne or relied upon any circulars or any of the other information to which he has testified, and that that is a condition precedent to this testimony being admissible.

The Court: The motion is overruled. Let us adjourn, Mr. Marshal, until two o'clock.

Whereupon, the trial was adjourned until two o'clock this afternoon.

580 Indianapolis, Indiana,
Thursday, March 2, 1939,
Two o'Clock P. M.

The Court met pursuant to adjournment and the trial was resumed as follows:

Mr. Thompson: If your Honor please: Mr. Burns, you have offered Paragraph 4 of the Stipulation of Facts in the Todd case, appearing on Pages 192 and 193 of Exhibit 2. I want to know whether all of the parties will agree that that is taken from the Stipulation of Facts, the opening sentence of which reads as follows: "The parties hereto agree that for the purpose of the trial and final hearing of this case, the following facts, in addition to those admitted in the answer, are true."

Mr. Burns: I will admit it.

Mr. Thompson: Will other counsel make the same admission?

Mr. Ewbank: Yes.

(No dissenting expression.)

Mr. Thompson: You have also offered in evidence as

Exhibit 89 the second and third and fourth gram-
581 matical paragraphs from Section 18 of the Answer of the City of Indianapolis and others in the case of Cotter and others versus The Citizens Gas Company, being Cause 1192 in the Equity Docket of this Court. Will you admit that the Answer, from which the expressions referred to are taken, is signed in the following manner, and not otherwise: John W. Holtzman; Oren S. Hack; Edward H. Knight; Smiley N. Chambers; Pickens, Gause, Gilliom & Pickens, Attorneys for said Answering Defendants. John W. Holtzman, Fred C. Gause, of Counsel. And that the Answer is not verified by anyone.

Mr. Burns: We will admit that.

Mr. Thompson: And will the other counsel admit it?

Mr. Ewbank: On your statement that it is so, yes.

(No dissenting expression.)

Mr. Thompson: May the record show those admissions, your Honor?

The Court: Yes.

582 PAUL E. CROSIER, a witness called on behalf of the Plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Burns.

Q. Mr. Crosier, will you state your name, your age and your occupation?

A. Paul E. Crosier; fifty-three years old; I am in the recreational business.

Q. Where do you live?

A. 421 Poplar Road, of this city.

Q. Were you at one time connected with the Citizens Gas Company of Indianapolis?

A. I was.

Q. During what period of time?

A. For eighteen years.

Q. Beginning when?

A. 1918.

Q. Until—

A. January 6, 1936.

Q. Well, during the last three or four months of
583 your connection, you were with the Citizens Gas & Coke Utility?

A. Yes, that is right.

Q. Now, what offices or positions did you hold with the Citizens Gas Company?

A. Assistant Superintendent of the Prospect Plant, Assistant General Manager.

Q. Were you for a while General Manager?

A. Acting General Manager.

Q. That was after Mr.—

A. Mr. Kirk—

Q. (Continued.) —after Mr. Kirk died?

A. That is right.

Q. And you were Acting General Manager at the time the City took over the Citizens Gas property?

A. Yes, that time I was changed to Acting Assistant General Manager.

Q. And you were Acting Assistant General Manager from September 9th, 1935 to January 6th, 1936?

A. That is correct.

Q. Now, in the various capacities in which you served the Citizens Gas Company, did you become familiar
584 with the plant and facilities of the Citizens Gas Company and The Indianapolis Gas Company?

A. Yes.

Q. The plant of The Indianapolis Gas Company was made up of three units, was it not—the distribution system, the Langsdale Plant and the Pratt Avenue part of the property were the distribution system?

A. The Langsdale Plant, of the Plant Department, handled about sixty-five per cent of the mains of Indianapolis, that is right.

Q. Was that percentage, that sixty-five per cent—

A. Approximately.

Q. (Continued.) —constant during the time you were with the company?

A. Yes, sir, it was held constant.

Q. Now, were those two plants of The Indianapolis Gas Company and the Citizens Gas Company operated as a single unit, together?

A. Yes, that is correct.

Q. The gas from the Langsdale Plant might be used in supplying the Citizens Gas customers?

A. It was.

585 Q. And the gas from the Prospect Plant—

A. Yes, the mains were interconnected.

Q. And the mains of the Indianapolis Gas would be necessary to be used in order to go to some of the Citizens Gas distribution system?

A. That is right.

Q. And the mains of the Citizens Gas Company would be necessary to be used in order to get to some of the Indianapolis Gas distribution facilities, is that correct?

A. Yes, that is correct.

Q. The operation of those two properties together had certain financial advantages, because it saved a duplication of facilities, I suppose.

Mr. Thompson: Defendant objects to that, your Honor.

The Court: I did not know that there was any question but that they did use the property of The Indianapolis Gas Company. I don't know the purpose of this. Isn't that true?

Mr. Thompson: Yes, sir.

The Court: The Citizens Gas Company used In-
586 dianapolis Gas Company equipment and mains, and if we are not going into the question of the value of maintenance in this case—

Mr. Burns: The City, as a matter of fact, took possession of the plant of The Indianapolis Gas Company after September 9th, 1935, and we could not get a stipulation out of them on that subject. That is the reason I am going into it.

Mr. Thompson: I am sorry. I don't like to interrupt. We never made denial of that.

The Court: Do you admit it now?

Mr. Thompson: Yes, sir, we do. Of course, the whole point is, we did it pursuant to certain agreements.

The Court: That seems to be the bone of contention.

Q. After the City took over the property, on September 9, 1935, did the City continue to operate the two plants, of the Indianapolis Gas and the Citizens Gas, as a unit?

A. As far as I know, up to January 6th, when I was retired, that is right.

587 Q. And during that part of the time and for some time before January 9, 1935—I should say some time before September 9, 1935, the Citizens Gas Company and the City did not use the coke ovens of the Langsdale Plant of the Indianapolis Gas?

A. As I remember, they were shut down in 1931, on account of economical conditions.

Q. And were not opened up after that?

A. That is right.

Cross-Examination by Mr. Thompson.

Q. Are you familiar with the records that were kept by the Citizens Gas Company, and the records that were kept by the Department of Utilities, in respect to the property of The Indianapolis Gas Company?

A. No, I am not.

Q. Don't know anything about them?

A. Didn't come under my jurisdiction at all.

Q. Were you familiar with the agreements that were made between the City of Indianapolis and The Indianapolis Gas Company?

588 A. No, sir.

Q. In respect to the use of the property?

A. No, sir.

Redirect Examination by Mr. Burns.

Q. After the City took over the property in September, 1935, it did operate the water gas plant out there at the Langsdale Plant, didn't it?

A. As far as I know, up to January 6, 1936.

Q. You did know about that?

A. Yes, sir.

Q. And it did operate it, then?

A. Yes, sir.

Witness excused.

CHESTER A. JEWETT, a witness called on behalf of the Plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Burns.

Q. Mr. Jewett, will you state your name, your age 589 and your address and present occupation?

A. Chester A Jewett; fifty-three; Broadview Farm, Shelbyville, Indiana.

Q. Were you for some time connected with the Union Trust Company of Indianapolis?

A. I was.

Q. During what period of time?

A. From October 2nd, 1916 to March 1st, 1920, I was Manager of the Bond Department.

Q. And had you had experience in the security business and the sales and purchases of securities prior to that time?

A. Yes, sir, from 1912.

Q. And here in Indianapolis?

A. Yes, sir.

Q. With what company were you connected during that time?

A. I was with Miller & Company for about two and one-half years of that time; and Manager of the Bond Department of the American Mortgage Guarantee Company prior to my going with the Union Trust Company.

Q. And did you say you left the Union Trust Company in 1920?

590 A. Yes, sir, March 1st.

Q. Where did you go after that?

A. I went in partnership with Otto F. Haueisen, under the firm name of Haueisen & Jewett.

Q. How long were you associated with him?

A. We were associated together one year, at which time I bought his interest and then operated as Jewett & Company.

Q. Until what time?

A. Until 1933.

Q. And during all that period, from 1912 to 1933, you were engaged in the business of investment banking here in the city of Indianapolis?

A. Yes.

Q. During the period that you were with the Union Trust Company and during the period after that did you have anything to do with the marketing of either the stock or the bonds of the Citizens Gas Company, or bonds of The Indianapolis Gas Company?

A. Yes.

Q. Which ones of these did you have to do with in the way of marketing?

591 A. Well, we marketed, as members of a syndicate, with Gavin L. Payne as syndicate manager, I would say in probably 1916, late in the year 1916, a quarter of a million dollars of the voting trust certificates. We sold by syndicate, in which every member of the Indianapolis Stock Exchange participated.

Q. That was the voting trust certificates of the Citizens Gas Company?

A. Yes, sir, and we were—the Union Trust Company Bond Department participated in that offering, and then

in 1918—in 1919, the Union Trust Company underwrote the major portion—all but a few scattered shares—of five hundred thousand dollars worth of Citizens Gas certificates, completing the capitalization of two million, which was under my supervision at the Union Trust.

Q. Calling your attention to an exhibit which previously had been identified as Plaintiffs' Exhibit 90, I will ask you whether that is the circular which was used in connection with the marketing of the common stock of the Citizens Gas Company in 1919.

A. It is, yes.

592 Q. What did you have to do with the preparation of that circular?

A. I prepared the circular.

Q. I call your attention to the letter appearing upon pages 2 and 3 of that circular. Did you, at the time that circular was prepared, have the original letter from Mr. Forrest in your possession?

A. Yes, sir.

Q. And is the letter as set forth in that circular, on pages 2 and 3, from Mr. Forrest to the Union Trust Company, a correct copy of the original letter?

A. Well, I would have to have the original letter and check it word for word; but I would say it is substantially the same, because I remember very vividly using that letter as the basis of our circular, and it was copied as nearly as we could check it at the time, letter for letter, as to the ones received from Mr. Forrest. Of course, it is always customary and has been in investment banking to receive such letters, which are the basis of representations, under which we purchase the stock and under which we sell. As nearly as I could say, it is my memory through

593 the years, I would say this was a true and exact copy of the letter of Mr. J. D. Forrest, prepared in connection with our purchase of the stock.

Q. Your regular practice was to compare the circular with the letter as received?

A. Oh, yes. Yes, indeed.

Q. Who was Mr. J. D. Forrest?

A. Mr. J. D. Forrest was Secretary and General Manager of the Citizens Gas Company.

Q. And did you deal with him in connection with the purchase of securities from the Citizens Gas Company?

A. Yes.

Q. Did you deal with anybody else at the Citizens Gas Company in connection with the purchase of securities?

A. Well, of course, this direct purchase of the issue, of which this circular is an offering, was purchased by the Union Trust Company at public auction, at the office of the Citizens Gas Company, and that sale, of course, was being conducted under the direct supervision of Mr. Forrest. I suppose some of his assistants were there.

594 Q. In dealing with the other security issues of the Citizens Gas Company, with whom did you deal?

A. Well, anyone dealing with the Citizens Gas Company, particularly on the financial end of it, always dealt with Mr. Forrest. The other officers, that is, the President and Vice Presiden' and even the Treasurer, I think were not active.

Q. Mr. Forrest actually operated the company?

A. Yes, Mr. Forrest conducted all the relations with the Union Trust Company, both as to the deposit of money or the borrowing of money, or any other relations that we had with him.

Q. Now, I call your attention to Exhibit 12 attached to the depositions of Chester M. Clark and Joseph Edward Baker, taken in New York. I will ask you if you had anything to do with the purchase or sale of the securities covered by the circular there shown as Exhibit 12.

A. Yes, we participated in the distribution—the local distribution of a million five hundred thousand Citizens Gas Company general mortgage sinking fund 7s, issued May 1st, 1918.

595 Q. Which are shown by circular, Exhibit 12?

A. Yes, sir.

Q. From whom did you buy those bonds?

A. Those bonds were underwritten by a syndicate headed by Blodgett & Company, Boston.

Q. And did you buy those bonds from that syndicate?

A. We were offered participation by Blodgett & Company, after the purchase of the securities, and I imagine our department distributed around six hundred thousand of the million five hundred thousand issued.

Q. In the purchase of those bonds, did you rely upon the circular, Exhibit 12, that has just been shown you?

Mr. Thompson: A preliminary question.

Mr. Jewett, all of these bonds that you talk about—the Citizens Gas seven per cent bonds—were retired by the Citizens Gas Company long ago?

The Witness: Oh, they were retired long before the City was interested. They had a definite maturity, Mr. Thompson. I think they were retired—well, they were re-

tired beginning May 1st, 1920, '21, '22 and '23, and there never was any default on them, and they were all
596 retired or called by 1923—this particular issue, yes.

Mr. Thompson: If the Court please, the defendant, City of Indianapolis, objects to this evidence in connection with this bond issue which was retired long prior to the transfer to the City. Any representation made in connection with it by the Citizens Gas Company could not have any possible binding effect upon the City of Indianapolis, and could not have been relied upon by the present bondholders of the Indianapolis Gas Company.

Mr. Burns: As I said this morning, the City of Indianapolis accepted the property conveyed to it subject to all obligations of the Citizens Gas Company. In considering what the obligations of Citizens Gas Company are, it is material to consider in evidence which were contemplated against the Citizens Gas Company, to establish those obligations. This is clearly an admission in this circular of the existence of the ninety-nine year lease, and the constant publication of that fact is clearly admissible against the City of Indianapolis.

597 The Court: I have admitted those documents—I admitted them this morning for the purpose of throwing any light, if there is any light at all, upon the activity of the former trustee. Now, it is a question of law whether the trustee had any such right. I think I am going to admit this on that theory, that it will get the facts before us; what was done. That is not an obligation that was assumed by the City in any sense at all, but it only goes to show the manner in which the former trustee transacted the business. Whether that sheds any light upon the question of whether that trustee had any right to do that is to be determined. I am frank to say that, in my opinion, any admission made by the former trustee would not bind the City of Indianapolis, as trustee, if there was no legal right to make such warranty or such representations.

Mr. Thompson: I want to make an additional objection here. First, the admission sought to be proved would be an admission to the legal effect of the lease. Now, this is a very important factor; there was no right in the
598 Citizens Gas Company to execute any mortgage whatever. Any mortgage that was executed was an absolute violation of the underwriting trust instrument, and, therefore, any admission made by the Citizens Gas Company in connection with the execution of a mortgage certainly could not bind us.

The Court: I understand your contention on that. Go ahead.

Mr. Burns: Plaintiff offers in evidence Exhibit 90 and Exhibit 12 attached to the deposition before referred to.

Mr. Thompson: The City objects to Exhibit 90 for the same reasons given on obections to Exhibits 91, 92, 93 and 94; and we object to the exhibit attached to the deposition unless the deposition itself is offered.

Mr. Burns: It will be, in time.

The Court: I will withhold the ruling on the deposition exhibit (Exhibit 12), and overrule the objection on the other (Exhibit 90).

The said document, so offered, marked for identification PLAINTIFFS' EXHIBIT NO. 90, was admitted and read in evidence.

599 The Court: You were in the employ of the Union Trust Company during the years '16 to '20?

The Witness: Yes, sir.

The Court: Any other employment?

The Witness: No other employment except in connection with war financing, of course, where I was loaned to the Government.

Mr. Burns: What office did you hold with the Union Trust Company?

The Witness: Manager of the Bond Department.

The Court: You were not connected with the State Auditor's office?

The Witness: Oh, no, I never was connected with the State Auditor's office. That was my brother Russell.

Q. Did you go to Boston in connection with the purchase of these Citizens Gas Bonds from Blodgett & Company?

A. Yes, sir.

Q. While you were there whom did you consult about those bonds?

A. Mr. Blodgett, senior partner of Blodgett & Company.

Q. And did you have occasion, while you were there with Mr. Blodgett, to consult any standard works of 600 reference in regard to securities and security issues, particularly with respect to the financial statements of the Citizens Gas Company?

A. We did, yes.

Q. And do you recall what work you consulted?

Mr. Thompson: I hate, your Honor, to be in the posi-

tion of constantly objecting. Whether this witness consulted some standard statistical work is far afield.

The Court: Objection sustained.

Mr. Burns: An exception.

Offer to Prove.

Mr. Burns: We offer to prove that the witness and Mr. Blodgett consulted Moody's Manual for Investors in connection with this Citizens Gas issue, and relied upon it in determining what they would do in connection with the purchase of the issue.

The Witness: Well, I should like to correct that just a little bit. This issue which we were immediately distributing, there was no reference made to it in Moody's Manual at that time.

601 Q. But you had Moody's Manual for reference for information about the status of the Citizens Gas Company?

A. On just the financial standing. Of course, now, the special reason that came up was because, after this general mortgage financing, it made the financial structure of the Citizens Gas too top-heavy and there was some objection, and it was at that time—that suggestion was made by the eastern bankers that something be done locally to complete the capitalization of the company to two million dollars from a million five hundred thousand, so that the senior securities would be a little bit—be balanced with the junior securities. Of course, that was done just as reasonably as it could be done, which finally culminated in our underwriting the five hundred thousand dollars worth of the common stock the next year, and that is the reason we consulted Moody's Manual, I suppose, as Poor's would offer the information, but it was more available there, to see the relative position and balance between senior and junior securities.

602 Q. And is Moody's Manual customarily relied upon by brokers and bankers and the investing public generally in the purchase of securities and in securing information about securities?

A. Yes, I would say so.

Q. Is it considered a standard work of reference on that subject?

A. Yes.

Q. Is that true of Poor's Manual?

A. Yes. We used to take both, but those are not

the only works on statistics that are relied on. There is Fitch's Bond Manual and the Standard Statistics.

Q. But during the years from 1915 to 1935, would it be accurate to say that Moody's Manual and Poor's Manual were the outstanding works of reference on that subject?

A. Well, I would say they were two of four. I don't think any better than Fitch's; in some respects I don't like it as well as Standard Statistics; but they are all reliable.

Mr. Burns: Rather than offer these volumes, I have had prepared photostatic copies of the pages of the 603 volumes, not only of these volumes, but other volumes of Moody's Manual, and we could present those volumes here if the Court wishes us to do so.

Covering the years 1915 and 1922 and 1935, I offer Poor's Manual; and covering the years 1923 to 1935, inclusive, I offer Moody's Manual; and I should like to have these marked as exhibits, and offer them in evidence.

Mr. Thompson: What are the exhibit numbers, please;

Mr. Burns: I will have them marked.

The Court: That was all with this witness?

Mr. Burns: I should like to keep him until I get this identified, and ask him a question or two, if that is all right.

The Court: I understand you identified the books.

Mr. Burns: I have identified the books. I think I shall give these exhibits a corresponding number.

The Court: As I say, we will not need the witness if it is in the book. The book shows what is true about it.

Mr. Burns: As I say, I have not brought all the books here, and unless there is some objection, upon 604 that ground, I won't bring all of them here.

I ask to have an excerpt from Poor's Manual of 1915 marked Plaintiffs' Exhibit 95-a, which corresponds with the number of the book previously marked. (Excerpt so marked by the Reporter.)

I ask to have an excerpt from Poor's Manual of 1922 marked Plaintiff's Exhibit 96-a, which corresponds with the number given to the volume itself. (Excerpt so marked by the Reporter.)

An excerpt from Poor's Manual of 1935 will be marked Plaintiffs' Exhibit 97-a; and an excerpt from Moody's Manual of 1923, as Plaintiffs' Exhibit 98-a. (Excerpts so marked by the Reporter.)

I also offer and ask to have marked as Plaintiffs' Exhibits 99 to 110, inclusive, excerpts from Moody's Manual with respect to the Citizens Gas Company of Indianapolis, covering the years 1924 to 1935, both inclusive.

Mr. Thompson: The City objects to the introduction in evidence of Exhibit 90 and Exhibits 95-a to 98-a, inclusive, and Exhibits 99 to 110, inclusive, for the reasons stated in the City's objections to Exhibits
605 91 to 94, inclusive, and, in respect of Exhibits 95 to 110, both inclusive, for the additional reason that no proof whatever that the statements, appearing in Poor's or Moody's Manuals, were even authorized by the Citizens Gas Company.

The Court: I assume that was the purpose of this subpoena duces tecum: to bring in the correspondence to see whether or not it was authorized.

In view of the fact that these are standard works, I think they are competent. That is the usual rule, is it not, relative to statistics that are of national standing?

Mr. Thompson: Well, of course, your Honor, I assume that these exhibits which are offered have no other purpose than that of creating some estoppel against the City of Indianapolis in connection with this lease.

Now, my first position—I do not need to elaborate it—is that the acts of the Citizens Gas Company would not be binding on the City, but, here, you have not only the question of what the statistics are, but whether
606 this lease is an enforcible obligation. When counsel offers statistical reports on the issue of the obligation of this lease on the City of Indianapolis, without any proof whatever that any statement in that connection was ever authorized by the initial trustee, it seems to me to be going far afield.

The Court: Are you going to be able to introduce any evidence on that question?

Mr. Burns: Well, of course, that was one of the purposes of our issuing the subpoena.

The Court: Well, I think you waited a long time to issue a subpoena calling for such information, just two days before the trial, where it was known, or should have been known, months ago, because the case has been assigned three times for trial, that that information was necessary. I cannot sustain your position with reference to the subpoena at all, on that question, because, if the

rules mean anything on reasonableness, I would think that would certainly come within the rules.

I will withhold my ruling on these exhibits that have just been offered.

607 My present thought is that, on the showing of the kind of works that these are, they would be admissible, but I am not going to pass on it at this time.

If these were Government publications,—I have in mind some cases we have had here, that Mr. Thompson has been in,—I think there would be no doubt that they would be competent.

Wouldn't you think that the same rule would apply to a private publication of this kind, or not? I think we have had several cases where the Agricultural Department reports have been read in evidence.

Mr. Burns: I call the Court's attention to the fact that when a substantially identical report so far as the matters here in issue was made over a period of twenty years, it is practically inconceivable that they did not come to the attention of the officers and directors of the Citizens Gas Company.

The Court: Well, that, of course, within itself would not be sufficient. It would not show whether they had objected to the publisher or not, or whether they paid any attention to it or not.

608 I am taking the view that these are standard publications and are reputable and entitled to some consideration.

Did you want to ask this witness any further questions?

Mr. Burns: I take it that there is no objection made to these on the ground that we have not produced the original subject matter?

Mr. Thompson: Why, no, Mr. Burns, I make no objection of that kind.

The Court: Do you want to ask this witness any more questions?

Mr. Burns: I think not.

The Court: Any questions, Mr. Thompson?

Mr. Thompson: Yes, I have just a question or two, your Honor.

Cross-Examination by Mr. Thompson.

Q. Mr. Jewett, you have already stated that the mortgage bonds which were sold to the Trust Department of

the Union Trust Company were redeemed and retired by the Citizens Gas Company long prior to the trans-
609 fer of its property to the City?

A. You mean sold through the Trust Department or Bond Department?

Q. Through the Bond Department, if I said "Trust Department".

A. Yes.

Q. Now, also, you know that the stock, which you have talked about, the Citizens Gas Company common stock, was paid and retired at the time of the transfer of the property of the Citizens Gas Company to the City of Indianapolis?

A. I understood that was part of the consummation of the deal, yes.

Q. Now, in this circular, which is identified as Exhibit No. 90, which includes the letter of Mr. Forrest, appears this statement: "On October 1st, 1913, with the approval of the Public Service Commission of Indiana, this company took over, under a ninety-nine year lease, all of the operating property of the Indianapolis Gas Company," and so and so and so.

Before this circular, which is identified as Exhibit
610 90, was issued, did you examine the lease between the Citizens Gas Company and The Indianapolis Gas Company?

A. Do you mean did I, personally?

Q. Yes.

A. No, not I, personally.

Q. Or ever have an examination made?

A. No, not I, personally. The Union Trust Company was in continual knowledge of the affairs of the Citizens Gas Company and The Indianapolis Gas Company throughout the years.

Q. Did you ever learn, before the circulars were issued, that the lease of September 30, 1913, between the Citizens Gas Company and The Indianapolis Gas Company, contained a provision that if, because of the length of the term of the lease, it should be finally held invalid by a court of competent jurisdiction, that the lease should, nevertheless, be valid for the longest term for which the parties could lawfully contract?

A. I have heard that question raised, yes.

Q. So that when this circular was issued and when this statement was made over the signature of The Union

Trust Company that there was a ninety-nine year
611 lease, you knew of the provision to which I have just referred?

A. Well, I couldn't—I just have a hazy knowledge of it. I neve saw the lease—the instrument of the lease—at all.

Q. But you had heard of that provision?

A. No more than I had seen any of the actual—the charter or the franchise under which the Citizens Gas trust had been created. I suppose Mr. Hornbrook, our attorney, did.

Q. Of course, you knew the question of whether this lease was valid for ninety-nine years, or not, was not a question of fact but a question of law?

A. Probably, yes. As a matter of fact, I didn't—I was not in position to take all of the responsibility that attached to the purchase by The Union Trust Company of these large—

Q. I didn't mean to question that, Mr. Jewett.

A. I see.

Q. Now, just one other question. These manuals to which you have referred, the Poor's and Moody's Manuals, are not official or governmental publications in
612 any way?

A. Oh, no.

Q. They are published by private corporations which are engaged in the publication for profit?

A. Well, that is true. That is like any organization, or we have many of them that furnish information such as Dun & Bradstreet, for instances, which is a private corporation, and yet business men rely on it.

Q. Oh, yes, I understand.

A. Rely on the information.

Q. The only point I am asking about, Mr. Jewett, is whether these are private or governmental publications.

A. They are private.

Q. Private?

A. They are private. I imagine the Government uses them, though, in evaluation. I know bank examiners use them in the evaluation of securities that are held by banks. I know Moody's ratings are regarded by bank examiners as reflecting whether or not a bank can properly and prudently purchase certain securities.

Mr. Thompson: The only point I am asking about is whether they are private or public.

613 The Court: All right, Mr. Jewett.
Mr. Thompson: That is all.
Witness excused.

WILLIAM J. YULE, a witness called on behalf of the Plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Burns.

Q. Will you state your name, your address and your occupation, Mr. Yule?
A. William J. Yule. So you want my business address?
Q. Yes.
A. 1004 Majestic Building; and age?
Q. Occupation?
A. Occupation, Secretary of The Indianapolis Gas Company.
Q. How long have you been connected with The Indianapolis Gas Company?
A. Well, continuously since 1915.
Q. And during all of that time have you been Secretary of the company?
614 A. Yes, sir.
Q. As Secretary, do you have charge of the records and files of the company?
A. I do.
Q. And you keep the minute books of the company?
A. I do.
Q. And have during all of that time?
A. I do.
Q. Now, during the year 1936, at the time when the last coupon was paid upon the bonds of The Indianapolis Gas Company, did you make up as nearly a complete list as you could of the bondholders who had sent in their coupons?
A. As the Government revenue reports came in with the coupons, I listed those. We could gather the information from them.
Q. And were you able to make a complete list?
A. Oh, no.
Q. It appears, here, in the stipulation that coupons for the April 1st, 1936 date, in the amount of seven hundred and seventy-five dollars, have not been paid. Do

you know who the bondholders are or the names or
615 addresses of the bondholders who have not—

A. I wouldn't have any idea at all.

The Court: These are bearer bonds, are they?

The Witness: Bearer bonds, yes, sir.

Q. Under their terms, they may be registered as to principal, I think, with the Trustee?

A. Yes, sir.

Q. And you don't know how many of them may be registered with the Trustee as to principal?

A. I don't have any knowledge of any being registered.

Q. I see. Did you bring with you the file of correspondence between yourself and the Chase National Bank?

A. Yes, sir.

Q. Calling your attention, Mr. Yule,—

The Court: Are these the interrogatories that were ordered to be answered?

Mr. Burns: Yes, these are the interrogatories that were answered by The Indianapolis Gas Company.

The Court: That is, the interrogatories propounded by the defendants?

616 Mr. Burns: The City.

The Court: Well, do you want to introduce the interrogatories and answers?

Mr. Burns: I want to introduce just some of the letters that are attached. I thought it would save time to introduce these rather than to have him dig them out of his files.

Q. Calling your attention to two exhibits, both of them marked Exhibit 11, to the answers of The Indianapolis Gas Company to the interrogatories propounded by the City: Did you receive the letter dated July 19 from the Chase National Bank,—

A. I did.

Q. (Continued)—on or about its date, and was there enclosed therewith a letter from Scudder, Stevens & Clark, dated July 17, also shown as Exhibit 11 attached to your answers?

A. Yes, sir.

Mr. Ewbank: What year?

Mr. Burns: 1935.

The Witness: 1935.

617 Q. And showing you a paper marked Plaintiffs' Exhibit 111-C, I will ask you if that is a copy of

the letter that you wrote to Scudder, Stevens & Clark and the copy which you sent to the Chase National Bank?

A. It is.

Mr. Burns: We offer the three letters just referred to as Plaintiffs' Exhibits 111-A, 111-B and 111-C.

Mr. Thompson: The City objects to these exhibits. They are entirely hearsay and exparte as to the City of Indianapolis.

The important part of this, your Honor, is a letter signed by The Indianapolis Gas Company, in which it takes the position that the City of Indianapolis, while it has not a legal title, has an equitable title to the property of the Citizens Gas Company and so forth and so on.

Now, certainly, the Indianapolis Gas Company cannot create an obligation against the City of Indianapolis by writing some letter to—

The Court: Is this on the issue of collusion?

Mr. Burns: No, it is stated in the answer of the City that the trustee and the bondholders were guilty
618 of laches in not taking some action, before September 9th, to except to this transfer of the property. The fact is that the Trustee did not even know that the city was taking any such attitude as it took in repudiating its obligation until sometime after September 9th. This is offered to show that the Trustee wrote and inquired of the Indianapolis Gas as to what the fact was, and was assured by Indianapolis Gas that the City was going to take over the property.

The Court: Let me see the letter. You can go ahead with any other question you have.

Mr. Burns: In connection with my next questio was going to use those same interrogatories.

The Court: Well, I can't pass on that because I d know what is in the letters. Go ahead with your question. I can pass on those later.

Who are Scudder, Stevens & Clark?

Mr. Burns: Well, I understand that they are a firm of investment advisers, so-called, and that they were inquiring about these Indianapolis Gas bonds of the
619 Trustee and whether the City was going to take over the lease, and that inquiry was forwarded by the Trustee to the Indianapolis Gas, in Indianapolis, and Indianapolis Gas wrote back, "Until the City has a legal title, it could not legally assume the lease, and we are advised that this should follow as a matter of course, when the other property is transferred."

Now, this was August 17, 1935.

The Court: I am certain that the letters would not be competent as to the truthfulness or be binding upon the City of Indianapolis as to any statements made in them, unless—

Mr. Burns: I don't contend that they are.

The Court: (Continued.) —excepting they would only be competent, if competent at all. to show that there was some inquiry being made and some action taken.

Mr. Burns: That is the only purpose for which they are offered.

The Court: To answer the position of the City on the question of laches?

Mr. Burns: Yes, that is the only purpose for
620 which they are offered.

The Court: But, of course, they couldn't bind the City upon the statements contained in them.

Mr. Burns: There is no question in my mind that they are not competent for that purpose.

The Court: I do not know what the substance of the letters is, but I can see no reason why the letters should not be competent just the same as on the question of collusion. They would only meet that issue by showing what the parties, charged with collusion, did between and among themselves. Now, why wouldn't that same thing be true with reference to the charge of laches, to show what the parties did?

Mr. Burns: That is what I was trying to do.

The Court: Wouldn't that be true, Mr. Thompson? Wouldn't they be permitted to show what they did, to meet that issue? The statements in the letters, of course, would not be binding.

Mr. Thompson: No, but here is this situation: this does not affect the relation between The Indianapolis Gas Company and the Chase National Bank, as Trustee.
621 I am not sure whether a copy of this letter went to Chase, but assuming that it did, this was a letter which Chase had asked the Indianapolis Gas Company to write to someone else.

The Court: Well, as I say, I have not seen the letters and I don't know what they are about, excepting as the statements were made. You may proceed in your regular way.

Q. A copy of this letter to Scudder, Stevens & Clark, Plaintiffs' Exhibit 111-C, was sent to The Chase National Bank, was it not?

A. It was.

The Court: You may go right ahead with your inquiry, Mr. Burns.

Q. Calling your attention to two other letters, attached to your answers to the interrogatories, Mr. Yule, as Exhibit 12, a letter of September 6th from Paul C. Beardslee and the enclosure from Russell Berg & Company to The Chase National Bank, were those received on or about their date?

A. They were.

622 Q. And did you answer the letter of Russell Berg & Company?

A. I did not.

Q. And made no reply to the Chase Bank?

A. No reply at all.

Mr. Burns: We offer those two letters in evidence as Plaintiffs' Exhibits 112 and 112-A.

Mr. Thompson: The same objection, your Honor.

The Court: I want an opportunity, as I say, to examine those.

Mr. Thompson: Note the same objection, Mr. Reporter.

Q. Did you, on or about September 19th, receive from Mr. Beardslee a letter, a copy of which is attached to your answers as Exhibit 13?

A. The letter was received at my office, yes.

Q. And did you answer that letter?

A. I did not. It is not addressed to me.

Q. But it was received at the office of The Indianapolis Gas Company?

A. It was received at the office of The Indianapolis Gas Company, yes, sir.

623 Q. And so far as you know, The Indianapolis Gas Company never answered it?

A. Not to my knowledge, no.

Mr. Burns: We offer the letter in evidence as Plaintiffs' Exhibit 113.

Mr. Thompson: The same objection, if the Court please.

Your Honor's attention is directed to the fact that this letter is addressed to Mr. William G. Irwin, and there is no proof here as to whether he answered it or not.

The Court: Well, there is no proof.

Did you say it was received at your office?

The Witness: It was received at the office, yes.

Mr. Burns: It is addressed to William G. Irwin,

President, Indianapolis Gas Company, Indianapolis, Indiana, and we will offer additional proof that no answer was received to it.

Q. Did you, about October 1st, 1935, receive the telegram from The Chase National Bank, marked Exhibit 14 and attached to your answers?

624 A. I did.

Q. And did you answer that telegram?

A. Let me get the original telegram. There is a note on it. (Procuring original telegram.)

I have a note on the corner of this telegram, dated 10-1-1935, "A. V. B. phoned Abbott."

Is that a Chase man?

Q. I haven't the slightest idea.

A. I think he phoned The Chase National Bank and phoned Abbott.

Q. Was that about the payment of the interest that was due October 1st?

A. Correct.

Q. But so far as you know, no answer was sent to the inquiry contained in the letter of September 19th, Exhibit 113, which is referred to in the telegram?

Mr. Thompson: I object to this. How can this witness know what Mr. Brown said over the telephone to Mr. Abbott of The Chase National Bank?

The Court: Objection sustained.

Mr. Burns: All I asked was whether, so far as he knew, any answer was sent.

625 The Court: I think he said a moment ago, didn't you, that it had not been answered?

The Witness: I said the letter had not been answered.

The Court: That is right.

Mr. Burns: But I asked him whether the telegram had been answered and asked him whether--

The Court: Well, he said there was a note there that Mr. A. V. B.—I suppose that is Mr. Arthur V. Brown.

The Witness: Mr. Brown.

The Court: But, of course, that doesn't mean anything because we don't know what he is talking about.

Mr. Burns: Well, he said it was his understanding that he talked about the payment of the interest, and what I asked him was whether, so far as he knew, any answer was sent to the inquiry contained in the letter of September 19th.

The Court: Well, the objection is sustained. There

has to be a line drawn some place. I have been, and I am going to be, pretty liberal all the way through
626 in the admission of evidence, but there has to be a line some place.

Q. I call your attention to a letter of October 3rd from Mr. Beardslee to you, attached to your interrogatories—your answers to interrogatories—as Exhibit 15. Did you receive this letter on or about its date?

A. I did.

Q. Did you answer it?

A. It was not answered immediately, I know. I was trying to think—

Q. As a matter of fact, calling your attention to the next letter of November 7th,—

A. That is right.

Q. (continued.) —it was not answered until November 7, 1935, was it?

A. That is right.

Mr. Burns: I will ask to have the letter of November 7th, which is Exhibit 16 to the answers to the interrogatories, marked Plaintiffs' Exhibit 116. (The letter was marked as requested.)

627 Now, we offer in evidence PLAINTIFFS' EXHIBITS 111-A, 111-B AND 111-C, and PLAINTIFFS' EXHIBITS 112 TO 116, inclusive.

Mr. Thompson: These have already been offered.

The Court: Those are the letters where I stated I didn't know what they were.

Mr. Burns: It may have been my error in offering them twice. Mr. Rabb tells me that the ruling was reserved on some of them.

Mr. Thompson: We have no objection to 114, 115 and 116.

The Court: Let them be read.

The said documents, so offered, respectively marked for identification PLAINTIFFS' EXHIBITS NOS. 114, 115 AND 116, were admitted and read in evidence.

The Court: That just leaves the other three? Mr. Rabb, is that right?

Mr. Rabb: 111, 112 and 113.

Mr. Burns: And there are three parts to 111.

The Court: That is right.

628 Mr. Rabb: There are three parts to 111.

Q. Did you, on or about December 2nd, 1935, receive a letter from Mr. Beardslee, identified as Exhibit 17 to your answers to the interrogatories?

A. I did.

Q. And did you, on February 26th, receive another letter from Mr. Beardslee, identified as Exhibit 18 to your answers?

A. I did.

Q. Between the letter of December 2nd and February 26th, did you send any answer to the inquiries made by Mr. Beardslee?

A. I don't recall that I did.

629 Mr. Burns: We offer the letters of December 2, 1935 and February 26, 1936 as Plaintiffs' Exhibits 117 and 118 respectively.

(The said documents, so offered, respectively, marked for identification PLAINTIFFS' EXHIBIT 117 and PLAINTIFFS' EXHIBIT 118, were admitted and read in evidence.)

Q. Calling your attention to Exhibit 19 attached to your answers did you write Mr. Beardslee to that effect, or the Chase National Bank, on March 2nd?

A. I did.

Q. And that was the first reply you had made to the letters of December 2, 1935 and February 26, 1936?

A. Yes, sir.

Mr. Burns: We offer in evidence the letter of March 2, 1936 as Plaintiffs' Exhibit 119.

The Court: Is there any objection?

Mr. Thompson: No, your Honor.

The Court: Let the exhibit be read in evidence.

630 (The said document, so offered, marked for identification "PLAINTIFFS' EXHIBIT 119", was admitted and read in evidence.)

Mr. Burns: Mr. Taylor has called my attention to the fact that there is apparently a rule of practice here with which I am not familiar, that these written exhibits must not only be offered but must be read in evidence. I take it that does not mean I have to actually read them.

The Court: No, the offer is made, and if there is any objection we rule on that, and if it is overruled they may be considered read.

Mr. Burns: They are considered read in evidence?

The Court: Yes, the ones as to which ruling has not been reserved.

Q. The letter of November 7, 1935, Mr. Yule, which you wrote to Mr. Beardslee in response to the previous requests which have here been introduced in evidence, was the first information you had sent the Chase Bank as to the position

taken by City of Indianapolis in regard to the lease, was it not?

631 Mr. Thompson: Is the question directed to what the witness sent or the Indianapolis Gas Company sent?

Mr. Burns: Directed first to what the witness sent.

The Court: You mean as Secretary of the Indianapolis Gas Company?

Mr. Burns: I was going to come later to as far as he knew, having custody of the Indianapolis Gas Company's records, and, as far as he knew, anyone else that had custody of the Indianapolis Gas Company records.

Mr. Thompson: The only reason for sending any notice to the Chase National Bank would be that they did not know about it. It appears affirmatively from Exhibit 13 to the interrogatories that the Chase National Bank knew as early as September 19, 1935 that the City had refused to take over this leased property. What counsel is attempting to do is to say this is the first notice you sent out. It appears affirmatively here that as early as September 19, 1935

632 the Chase National Bank knew about this.

The Court: I think this only is to meet the question of whether or not they used due diligence to show what was done by the Chase National Bank as Trustee, and I think that is competent, not statements made in a letter to show what steps were taken.

Mr. Burns: That is the only purpose for which it is offered.

The Court: Go ahead and answer the question. I think the question should be as an official. I don't think in his personal capacity.

Mr. Burns: I don't think in his personal capacity he had any duty to do it, but I would like to show whether he did it or did not do it as Secretary.

(The question was read by the reporter as follows: "The letter of November 7, 1935, Mr. Yule, which you wrote to Mr. Beardslee in response to previous requests which have here been introduced in evidence, was the first information you had sent the Chase Bank as to the position taken

633 by the City of Indianapolis in regard to the lease, was it not?")

The Witness: It was.

Q. That is the first information you sent to the bank either individually or in your capacity as Secretary?

A. As Secretary. I wouldn't send it individually.

Q. So far as the records of the Indianapolis Gas Company disclose, that was the first information that anybody

connected with the Indianapolis Gas Company had sent the Trustee?

A. Yes, sir.

Q. Did you as Secretary of the Indianapolis Gas Company send the Trustee or any Bondholders any information about the proposed agreement of March 2, 1936 between the Indianapolis Gas and the City?

A. No, sir.

Q. So far as the records of the Indianapolis Gas Company disclose, did anybody connected with the Indianapolis Gas Company send the Trustee or any of the Bondholders such information?

A. Not to my knowledge.

634 Q. Did you as Secretary of the Indianapolis Gas Company write to the Trustee or to any Bondholders advising any of them of the negotiations and arrangements about making extensions to the Indianapolis Gas property?

A. No, sir.

Q. So far as you know, did anybody connected with the Indianapolis Gas Company send any such information to the Trustee or Bondholders?

A. I don't krow of any.

Q. As Secretary of the Company you have charge of the books and records of the Company?

A. I have.

Q. And you are familiar with what property the Indianapolis Gas Company has?

A. In a general way.

Q. You know it is the property that it leased to the Citizens Gas Company, is that correct?

A. Yes, sir.

Q. Aside from the property leased to the Citizens Gas Company, the Indianapolis Gas Company has no property except its office furniture and fixtures, its record books, and the $120,000.00 of Indianapolis Gas bonds. That

635 is true, is it not?

A. Yes, that is true.

Q. The office furniture and fixtures are the office furniture and fixtures you have had there the last 25 years in two little rooms up in the Majestic Building?

A. Yes, sir.

Q. They were carried on your books at how much?

A. Something over a thousand dollars.

Q. That was the cost value twenty-five years ago?

A. Yes.

Q. Would you venture an opinion as to what they are worth today?

A. Not very much.

Q. Something under a thousand dollars?

A. Under $500.00, surely.

Q. The record books of the Indianapolis Gas are kept in that office?

A. Yes.

Q. Are those of any value except as records?

A. No.

Q. It appears in the stipulation that the $120,000.00 of bonds owned by the Indianapolis Gas were all pledged at the Indiana National Bank.

636 A. They are.

Q. For an indebtedness of about $28,000.00

A. Something like that, yes.

(At this point a short recess was taken.)

After recess.

Questions by Mr. Burns: (Resuming.)

Q. Mr. Yule, did you on or about September 30, 1935 receive a check for $171,575.00 from the Citizens Gas and Coke Utility?

A. I did.

Q. The Citizens Gas and Coke Utility, as I understand it, is the name in which the Utility district does business?

A. I so understand, yes.

Q. What did you do with the $171,575.00?

A. I deposited it in the Indiana National Bank.

Q. Did you arrange to send part of that to the Chase Bank to pay the coupons?

A. They immediately telegraphed $168,575.00 to the Chase National Bank, Trustee, to pay the coupons.

Q. The $3,000.00 you kept out was the $3,000.00

637 covering the coupons held by the—

A. (Interposing.) The one hundred and twenty coupons from the bonds we held in our treasury.

Q. That the Indianapolis Gas held in its treasury?

A. Yes.

Q. It will appear subsequently, if it does not now, that the Citizens Gas and Coke Utility sent in to the Trustee the eighteen coupons that it had on its bonds on October 1, 1935, and again on April 1, 1936. Did the Indianapolis Gas Company pay any money to the Citizens Gas and Coke Utility for those coupons?

A. No, they paid no money for those.

Q. Thse coupons were not paid?

A. We simply take the coupons and cancel them.

Mr. Thompson: What was the date of that check?

The Witness: The date of the check—I don't know what the date of the check was. I have it on my books September 30th. It was really deposited in the bank on the 1st, before the bank opened.

Mr. Thompson: 1935?

638 The Witness: Yes.

Q. Did you also on September 30, 1935 receive from the Citizens Gas and Coke Utility a check for $4,780.80 to cover the quarterly income tax payment that was due on or about that time?

A. It was due on the 15th of September. I received it on the 30th of September.

Q. You had previously borrowed money to take care of that tax payment?

A. Yes.

Q. You received the money from the Citizens Gas and Coke Utility on the 30th of September?

A. That is right.

Q. Then on October 14, 1935 did you receive from the Citizens Gas and Coke Utility a check for $1,772.46 to cover Indiana Gross Income Taxes?

A. I did.

Q. That check was used for that purpose, to pay the Indiana Gross Income Taxes?

A. Yes, sir.

Q. On November 2, 1935, or at about that time, did you receive a check from the Citizens Gas and Coke Utility

639 for $47,761.70 to cover a half year's taxes on the property of the Indianapolis Gas Company?

A. I did.

Q. What did you do with that check?

A. I endorsed the check to the Union Trust Company who in turn I think endorsed it to the County Treasurer.

Q. You did not put that through your bank account?

A. I did not.

Q. Did you on September 13, 1935 receive a check for $4,780.79 from the Citizens Gas and Coke Utility?

A. I did.

Q. To pay the Federal Income Tax instalment that was due December 15, 1935?

A. Yes, sir.

* * * * * *

642 Mr. Burns: I will say this, in the form of a stipula-
643 lation, and try to avoid any conclusions:

It may be stipulated that on December 31, 1935 the

Indianapolis Gas Company received from the Citizens Gas and Coke Utility a check for $60,000.00, which it, in turn, used in paying a dividend of 3 per cent to its stockholders.

Mr. Thompson: Why don't you take a list of these payments and put them in, and if Mr. Hill furnished them to you—here is a complete list.

Mr. Burns: I have the list, but I want the stipulation to show, or have Mr. Yule testify, what the Indianapolis Gas used them for.

The Court: I think that is fair. That, of course, could not bind the City or anyone else as to what the Indianapolis Gas Company did with the money.

Mr. Thompson: So long as it is understood by agreeing to this stipulation I am not consenting that the payment was made in recognition of this lease, I have no objection.

644 Mr. Burns: I think that is perfectly all right. We want it clearly understood that we are not agreeing it was not so made.

The Court: That is where your differences are. If we could agree on that we might not have any law suit. Now, can you go ahead with your stipulation?

Mr. Thompson: As long as it is not construed as an admission we had paid the money for that purpose.

The Court: It will not be so construed.

Mr. Burns: It is further stipulated on January 10, 1936 the Citizens Gas and Coke Utility paid to the Indianapolis Gas $300.00, which was used by Indianapolis Gas as corporate maintenance fee.

It is further stipulated on January 16, 1936 Citizens Gas and Coke Utility paid to Indianapolis Gas $277.10, which Indianapolis Gas used to pay the mortgage Trustee's fees and expenses.

It is further stipulated on January 25, 1936 Citizens Gas and Coke Utility paid to Indianapolis Gas $1,140.66,
645 which Indianapolis Gas used to pay the Indiana Gross Income Tax.

It is further stipulated on March 13, 1936 Citizens Gas and Coke Utility paid to Indianapolis Gas, $4,782.36, which Indianapolis Gas used to pay the current quarterly instalment of Federal Income Tax.

It is further stipulated on March 25, 1936 Citizens Gas and Coke Utility paid to Indianapolis Gas $171,575.00, of which Indianapolis Gas kept $3,000.00 itself, covering its own one hundred and twenty coupons and remitted by its own check to Chase National Bank, Trustee, $168,575.00.

It is further stipulated on April 9, 1936 the Citizens Gas and Coke Utility paid to Indianapolis Gas $421.44, which the Indianapolis Gas in turn used to pay the mortgage Trustee's fee.

It is further stipulated on April 14, 1936 Citizens Gas and Coke Utility paid to Indianapolis Gas, $1,778.25, which Indianapolis Gas in turn used to pay the Indiana Gross Income Tax quarterly instalment.

646 It is further stipulated on June 12, 1936 Citizens Gas and Coke Utility paid to Indianapolis Gas, $4,782.36, which sum Indianapolis Gas in turn used to pay the current quarterly instalment of Federal Income Tax.

It is further stipulated on June 12, 1936 Citizens Gas and Coke Utility paid to Indianapolis Gas, $15.00 which the Indianapolis Gas in turn used to pay the $15.00 Federal Taxes withheld on foreign-held bonds.

It is further stipulated on September 15, 1936 Citizens Gas and Coke Utility paid $4,782.36 to Indianapolis Gas, which Indianapolis Gas in turn used to pay the Federal Income Tax quarterly instalment.

It is further stipulated on December 14, 1936 Citizens Gas and Coke Utility paid to Indianapolis Gas the sum of $4,782.36, which sum Indianapolis Gas in turn used to pay the current quarterly instalment Federal Income Tax.

Questions by Mr. Burns (Resuming).

647 Q. Now, Mr. Yule, in connection with these various payments that were made by Citizens Gas and Coke Utility to Indianapolis Gas, did you send to the Citizens Gas and Coke Utility bills showing the amount due for these various items as they came due from time to time?

A. I usually sent them statements.

Q. In response to those bills you would get back the check from the Citizens Gas and Coke Utility for the amount of the bill?

A. That was customary, yes.

Mr. Burns: I could also cover, although Mr. Hill and not Mr. Yule would have this information,—some other payments which were not made through Mr. Yule.

The Court: If there is no dispute about it—

Mr. Burns: (Interposing.) There is no dispute. I have been over them with Mr. Hill.

The Court: You might read them right into the record at this time.

Mr. Burns: On or about October 30, 1935 Citizens Gas and Coke Utility paid to the Chase National Bank
648 the sum of $421.44, and the check was forwarded in a letter to the Chase National Bank, copy of which is identified as Plaintiff's Exhibit 120, and the invoice No. 33656, referred to in said letter, is identified as Plaintiffs' Exhibit 120-A.

The Court: Any objection?

Mr. Thompson: No.

Mr. Burns: I will read this letter. This is November 1, 1935, to the Chase National Bank and signed Citizens Gas and Coke Utility.

"We enclose herewith Indiana National Bank draft No. 90195 in amount $421.44 drawn to your order. This remittance is in payment of your invoice No. 33656 covering commission for paying Indianapolis Gas Company's Bond Coupons due October 1, 1935, in like amount.

"For your convenience we attach stub of your invoice. We trust same will be found correct."

Mr. Burns: The invoice attached reads: "Com-
649 mission for paying coupons due October 1, 1935 detached from Indianapolis Gas Company 5% First Consolidated Mortgage Bonds."

We offer in evidence Plaintiffs' Exhibits 120 and 120-A.

(The said documents, so offered, respectively marked for identification "PLAINTIFFS' EXHIBITS 120-AND 120-A", were admitted and read in evidence.)

Mr. Burns: It may further be stipulated that on May 4, 1936 the Citizens Gas and Coke Utility paid to the Union Trust Company of Indianapolis, $51,361.54 in payment of the taxes on the Indianapolis Gas property.

Mr. Thompson: Which I suggest you phrase as you did the other,—which the Union Trust Company used in payment.

Mr. Burns: This was paid in taxes, and you have got the receipted bills,—as agent to receive the tax payments.

The Court: Do you have a receipt for that?

Mr. Burns: Mr. Hill has.

The Court: As I understand, the Union Trust Company was a place you would go and pay your taxes instead of going to the Treasurer's office?

650 Mr. Burns: That is right.

Mr. Thompson: Undoubtedly this money was used for paying taxes. The agreement provided for payment of certain sums of money, all under an understanding.

The Court: There would be no objection then to that stipulation?

Mr. Thompson: May I have it read?

(The reporter read as follows: "It may be further stipulated that on May 4, 1936 the Citizens Gas and Coke Utility paid to the Union Trust Company of Indianapolis, $51,361.54 in payment of the taxes on the Indianapolis Gas property.")

Mr. Thompson: As long as it is understood on our part it was paid pursuant to the terms of an express written agreement, I have no objection to it.

Mr. Burns: We don't agree it was paid pursuant to an express written agreement.

The Court: I understand the position of each of you fully, but it was paid, as I understand, and the Union Trust Company turned over to the Utility Company
651 this receipt for the taxes.

Mr. Burns: That is the fact, is it, Mr. Hill?

Mr. Hill: The check was given to the Union Trust Company, and they took the money at the Union Trust and returned to us the receipted tax bills.

Mr. Burns: Covering the Indianapolis Gas property?

Mr. Hill: Yes.

The Court: All right. I think that is a fair statement.

Mr. Burns: It may be further stipulated on November 2, 1936 the Citizens Gas and Coke Utility paid to the Union Trust Company for the County Treasurer $51,361.20 in payment of the state, county and city taxes of the Indianapolis Gas Company; that on May 3, 1937 the Citizens Gas and Coke Utility paid to the Union Trust Company for the County Treasurer, $55,002.94 in payment of the state, county and city taxes of the Indianapolis Gas Company.

The Court: Let me ask, just for my own information, when was the agreement entered into between the Utility or City and the Indianapolis Gas Company
652 whereby these payments were made and other money placed in escrow in the bank?

Mr. Thompson: The first was dated September 30, 1935 and the second March 2, 1936.

The Court: Your position is it was agreed between the City and Indianapolis Gas Company that this Utility District would pay the taxes and deposit certain amounts?

Mr. Thompson: That is right, and I propose to prove in addition, your Honor, that the Chase National Bank

accepted money that was paid under these agreements with full knowledge of the agreements.

Mr. Burns: It is further stipulated on November 1, 1937 Citizens Gas and Coke Utility paid to the Union Trust Company for the County Treasurer $55,002.91 in payment of the state, county and city taxes of the Indianapolis Gas Company; that on May 2, 1938 Citizens Gas and Coke Utility paid to the Union Trust Company for the County Treasurer $59,083.24, in payment of the state, county and city taxes of the Indianapolis Gas Company; that on November 7, 1938 Citizens Gas and Coke Utility paid
653 to the Union Trust Company for the County Treasurer $59,083.20 in payment of the state, county and city taxes of the Indianapolis Gas Company; it is further stipulated that on February 20, 1937 Citizens Gas and Coke Utility paid to various insurance companies for fire and tornado insurance upon the Langsdale Plant of the Indianapolis Gas Company the sum of $11,770.55; that on August 5. 1936 Citizens Gas and Coke Utility paid to a fire insurance company the sum of $575.40 for fire insurance policy that covered the Prospect and Pratt Avenue Plants jointly; and that on February 20, 1937 the Citizens Gas and Coke Utility paid a deposit premium to an insurance company in the sum of $22,500.00 covering the Prospect Plant of the Citizens Gas and Coke Utility and the Pratt Plant of the Indianapolis Gas Company.

Questions by Mr. Burns (Resuming).

Q. Mr. Yule, when the $168,575.00 was telegraphed to the Chase National Bank on October 1, 1935 did you at that time give the Chase National Bank any information as to the source from which that money was derived?

A. I did not.

654 Q. When the $168,575.00 was sent to the Chase National Bank on March 25th or 26th, 1936 did you give the Chase National Bank any information as to the source from which that money was derived?

A. I think not.

Q. Or that it was sent to the Chase Bank subject to any conditions or any qualifications?

A. No.

Q. Have you the letter in which you transmitted the payment of $168,575.00 to the Chase Bank?

Mr. Thompson: It seems to me it is perfectly obvious there are representatives of the Chase National Bank

here. Mr. Yule just knows a part of this story from the standpoint of the Indianapolis Gas Company.

Mr. Burns: Mr. Beardslee is going to be on the stand.

The Court: All right.

Q. I call your attention to a letter dated March 26, 1936. Is this the letter in which you sent the $168,-
655 5 5.00 to the Chase National Bank?

A. It is.

Mr. Burns: We offer this in evidence as Plaintiffs' Exhibit No. 121.

The Court: Any objection?

Mr. Thompson: No.

(The said document, so offered, marked for identification "PLAINTIFFS' EXHIBIT 121", was admitted and read in evidence.)

Q. Have you a record here, Mr. Yule, of the additions and extensions made to the Indianapolis Gas property since September 9, 1935 by the Citizens Gas and Coke Utility as reported to you by the Citizens Gas and Coke Utility?

A. I have.

Q. Will you produce that record, please?

A. Do you want the record or a summary of it? The record is on the desk there wrapped in that package.

Q. Is this it?

A. Yes.

656 Mr. Thompson: I am perfectly willing the summary may be used.

Mr. Burns: I won't open the material if it is agreeable to use the summary.

The Witness: There is the summary of the figures.

Q. Have you another copy of this?

A. I haven't another copy here, but that is all right. I have another copy of it.

Q. Calling your attention to a paper marked Plaintiffs' Exhibit 122, is this a summary prepared by you from the reports submitted to you by the Citizens Gas and Coke Utility of the additions and improvements made to the Indianapolis Gas property since September 9, 1935 to December 31, 1938?

A. It is.

Q. That shows that in the period from September 9, 1935 to December 31, 1938 the Citizens Gas and Coke Utility has expended $95,336.47 in additions and extensions to the Indianapolis Gas property. Is that correct?

A. It does.

Q. And it is subdivided between the Pratt Street Plant, the mains, services, and meters first installation, as
657 shown on this exhibit?

A. It is.

The Court: Is there any objection to the exhibit? I think it will speak for itself.

Mr. Burns: We offer in evidence Plaintiffs' Exhibit 122.

The Court: It may be read in evidence.

The said document, so offered, marked for identification "PLAINTIFFS' EXHIBIT 122", was admitted and read in evidence.

Q. Mr. Yule, did you bring with you the minute book of the Indianapolis Gas Company?

A. I did.

Q. Rather than refer you to that, I would like to identify it at this time, so as to save recalling Mr. Yule—it appears maybe a little out of order—the minutes of the meeting of the Board of Directors of the Indianapolis Gas Company of May 12, 1936, and ask to have this photostatic copy marked "Plaintiffs' Exhibit 123-A", "B", and "C".

658 Calling your attention particularly, Mr. Yule, to a copy of a letter from Baker, Hostetler, Sidlo & Patterson, appearing on the second page of these minutes, dated May 4, 1936, did you receive that letter on or about its date? When I say "you" I mean the Indianapolis Gas Company.

A. Yes, sir.

Q. Did you, following the meeting of May 12, write to Baker, Hostetler, Sidlo & Patterson as shown by the copy of your letter set forth on the third page of these minutes?

A. I did.

Mr. Burns: I take it there will be no objection, because he has here the original letters if anybody cares to see them. I won't offer this at this time, because it is perhaps more properly rebuttal evidence.

The Court: That goes to the question in the answer?

Mr. Burns: The collusion, I think.

The Court: Let the record show these exhibits are
659 identified at this time, and there will be no objection because the original letters—

Mr. Thompson: (Interposing.) I intend to offer them, if he doesn't.

Mr. Burns: That is all, Mr. Yule.

Cross-Examination by William H. Thompson, Esq.

Q. Mr. Yule, the letter of May 4, 1936 from the firm of Baker, Hostetler, Sidlo & Patterson to the Indianapolis Gas Company was sent to you by mail?

A. Are you talking about me or the Indianapolis Gas Company?

Q. I am talking about the Indianapolis Gas Company. Did you receive it through the mail?

A. I didn't receive it.

Q. Who did receive it?

A. I don't know.

Q. Who presented it at the meeting?

A. I don't recall.

Mr. Burns: I simply identified this as out of order.

660 I think it is not proper cross-examination at this time.

I identified this simply to avoid the trouble of calling Mr. Yule back. I don't care particularly, except I think it is out of order at this time.

Mr. Thompson: If he identifies the letter I surely have a right to know how it came. Here is a letter addressed to the Indianapolis Gas Company, Indianapolis, Indiana. Is that right?

The Witness: That is right.

Q. It did not come by mail to the office of the Indianapolis Gas Company, did it?

A. I think not.

Q. Who brought it to the meeting? Mr. Higgins?

A. I don't know.

Q. The letter that you wrote under date of May 12th to the Baker firm, did you mail that or was it given to someone?

A. I mailed that letter. I wrote the letter and mailed it.

Q. Had someone prepared the letter for you to write?

A. Well, it was approved in the meeting of the Board of Directors.

Q. I am trying to find out whether you yourself

661 drafted the letter or whether it was drafted by some other person.

Mr. Higgins: The Indianapolis Gas Company. The minutes show the letter was sent on the order of the motion of the Board of Directors. Now, what officer composed the letter I think is utterly immaterial. The letter was sent by the company at the direction of the directors.

The Court: I understand you are not bound solely by just what is in the record where a charge is made as in this case. You can show under what circumstances and who prepared the letters, and all those things, to show whether there was any collusion or not.

Mr. Ewbank: My recollection would be that I prepared the letter.

Mr. Thompson: If you admit that I am willing to let it stand as the witness's answer.

Mr. Ewbank: Part of it, at least. I remember some pencil notations on the copies of it.

662 Q. Have you the originals of those two letters in your possession there?

A. Yes, I have them right here.

The Court: That was the same day the meeting was?

Mr. Ewbank: Yes, following the meeting. I think the preparation was at the meeting.

Mr. Higgins: There was a full Board present.

Q. You have nothing in connection with these letters, any preliminary drafts of these letters other than the two you have handed me, which were the final drafts?

A. I think not.

Q. Are you sure about it?

A. I suppose there must have been.

Q. I say, do you have them?

A. No.

Q. You—when I say "you" I am talking now about the Indianapolis Gas Company—received a letter from the firm of Thompson, Rabb & Stevenson as attorneys for Department of Utilities on the 24th day of July, 1935,

663 advising the Indianapolis Gas Company that the City of Indianapolis would upon the transfer of the Citizens Gas property to the City of Indianapolis refuse to recognize the validity of the Indianapolis Gas lease?

Mr. Burns: I object.

The Court: Sustained. I think that is part of the defense. As I understand, these minutes were just identified for the purpose of using them perhaps later, so the witness would not have to be recalled.

Mr. Thompson: I was going to these payments now. What I want to show by this witness—and I will produce letters here to show—that he knew continuously from the 23rd day of July, 1935 that the City of Indianapolis was denying any obligation on the lease.

The Court: I think that is competent. I didn't know what you had in mind.

Mr. Burns: Show the objection to his reading things into the letter that we do not think are there.

664 The Court: The Court may have to read it itself.

Q. Did you receive this letter on July 23, 1935 from Thompson, Rabb & Stevenson?

A. I did not.

The Court: He means the company.

The Witness: I did not; the secretary did not.

Q. Have you ever seen the letter of July 23, 1935?

A. I have ilt here.

Q. Will you produce it?

A. Yes.

The Court: When they speak about "you" they mean the company of which you are secretary.

Q. I call your attention now, Mr. Yule, to an instrument identified as Defendant City's Exhibit A, and ask you when that reached the files of the Indianapolis Gas Company?

A. I think it was produced at this meeting of the Board of Directors some time in September, at the first meeting of the Board of Directors.

665 Q. Who produced it?

A. I don't know.

Q. I will ask you if it is a fact, Mr. Yule, that the first checks, being two in number, which were received by the Indianapolis Gas Company from the Board of Directors for Utilities of the City of Indianapolis, which were actually cashed by the Indianapolis Gas Company were those which were received in a letter dated September 30, 1935?

A. That is the checks that we cashed, the $171,575.00 and—

Q. (Interposing.) The first checks that the Indianapolis Gas Company ever received from the Department of Utilities which it actually cashed?

A. That is correct.

Q. I call your attention now to Exhibit 64 to the stipulation, and ask you whether that is the letter in which the checks were enclosed, or a photostatic copy of it, I mean?

A. Yes, I think so.

Mr. Thompson: As a part of the cross-examination of this witness, we offer this letter.

Mr. Burns: We object to it as wholly irrelevant 666 and immaterial as between the City and the Trustee or the Bondholders, that no arrangement made between the mortgagor and City could in any way prejudice

the rights of the Trustee or Bondholders.

The Court: Read the letter and let us see what it says.

(The said document, Exhibit 64 to the stipulation, was read by Mr. Thompson.)

The Court: Objection overruled.

Mr. Burns: May we have an exception?

The Court: Yes. I really don't think you need to ask for it now under the rules. You may have the exception.

Questions by Mr. Thompson (Resuming).

Q. I call your attention now to Exhibit 65 to the stipulation in this case, and ask you whether that is a photostatic copy of a letter you wrote on the same day in reply to the letter identified as Exhibit 64?

A. It is.

667 Mr. Thompson: The defendant offers as part of the cross examination this letter, which is as follows:—

Mr. Burns: (Interposing.) May it be understood we have a continuing objection to this correspondence, on the grounds already stated?

The Court: Yes. As I understand, this is offered to show on what grounds these payments were made.

Mr. Thompson: Yes.

(Exhibit 65 to the stipulation was read by Mr. Thompson.)

Mr. Thompson: Now, in this connection also, your Honor, I offer City's Exhibit A, which is the letter from Thompson, Rabb and Stevenson to the Indianapolis Gas Company under date of July 3, 1935.

Mr. Burns: That has already been put in evidence by the plaintiff as Exhibit 58. It was offered and received this morning.

668 The Court: There is no necessity of having any duplications.

Mr. Thompson: There is an unsigned copy in evidence, as I understand.

669 Q. Are you familiar with an instrument, which I have and hand you?

The Court: I think, Mr. Thompson, that the last exhibit should not be read if the other is an exact copy of it and it had been received. There is no necessity of duplicating the record.

Mr. Thompson: Beg pardon?

The Court: I see no necessity for duplication in the record.

Mr. Thompson: No, I don't want to do that. May it stand this way: If, on checking, this letter is already in, this offer may be withdrawn, and, if not in, it may stand?

The Court: That is right.

Q. I hand you, Mr. Yule, the minute book of the Board of Directors for the Utilities of the City of Indianapolis and call your attention to four pages of this minute book, containing an agreement dated March 2nd, 1936, and ask you whether the signature of The Indianapolis Gas Company, by William G. Irwin, is the signature of the
670 President of The Indianapolis Gas Company.

A. It is.

Q. And whether you signed that as its Secretary and affixed the seal?

A. I did.

Q. And whether you also furnished to the City of Indianapolis a certificate that the Board of Directors had approved the execution of this contract?

A. I did.

Q. I mean the Board of Directors of The Indianapolis Gas Company.

A. Yes.

Mr. Thompson: The City now offers in evidence, as a part of the cross examination of this witness, Pages 358, 359, 360 and 361, and also 362 of this record.

Mr. Burns: The plaintiff objects to this contract of March, 1936 on the ground that no agreement between the City and the Indianapolis Gas can in any way affect the rights of the Trustee and bondholders, and call your attention to the fact that this is one of the exhibits
671 shown in the stipulation and that apparently they are just duplicating a lot of stuff in the stipulation by putting material in in this way. We didn't offer it, but it is attached to the stipulation.

The Court: It hasn't been offered?

Mr. Burns: No.

The Court: I think this would be competent to show the position taken by the City from the start, but what effect it will have on the legal outcome, I am not prepared to say, of course. But I would not duplicate any of these exhibits.

Mr. Thompson: It is not in the stipulation.

Mr. Burns: You mean the March 2nd agreement?

Mr. Thompson: No. The March 2nd agreement was

originally contained in the stipulation, but it was taken out.

Mr. Burns: I beg your pardon. It is my mistake. It was an exhibit to your answers.

Mr. Thompson: Your Honor, the offered item, here not only contains—so counsel will be advised and your Honor, too,—not only contains the agreement of March 2nd,
672 but Page 361 is a certificate entitled, "Resolution of the Board of Directors of The Indianapolis Gas Company, approving the contract," and Page 362 is a resolution of the Board of Directors for Utilities of the City of Indianapolis, ratifying the contract.

The Court: That is the contract under which these deposits were being made and the payments of taxes—

Mr. Thompson: Yes.

The Court: (Continued)—have been made?

Mr. Thompson: That is right.

The Court: Let the record show that the exhibit is read in evidence.

The said Pages Nos. 358, 359, 360, 361 and 362 of said Minute Book, so offered, were marked CITY'S EXHIBIT B and were admitted and read in evidence.

Q. Now, Mr. Yule, when were either Judge Ewbank or Mr. Higgins first employed as attorneys for The Indianapolis Gas Company in connection with the controversy affecting this ninety-nine year lease?

A. I don't know.

673 Q. Well, it was prior to the time when any of these payments were made, wasn't it?

A. Well, I presume the record was the meeting where this was first considered at the first Board meeting, wasn't it?

Q. Well, do you know the date?

A. Well, I can look it up. It is probably about the latter part of September, 1935.

Q. All right. Now, that will be close enough for me. Now, Mr. Newton D. Baker was employed as special counsel for The Indianapolis Gas Company on the 28th day of September, 1935? Is that correct?

A. That is so recorded in the minutes.

Q. Yes. Well, that is right, isn't it?

A. Yes.

Q. Now, Mr. Arthur V. Brown, of whose name some mention has been made, was the Treasurer of The Indianapolis Gas Company?

A. Yes, sir.

Q. When you received the telegram dated October 1st, 1935, from The Chase National Bank in connection with the interest on The Indianapolis Gas Company bonds, you took that telegram to Mr. Arthur V. Brown at The
674 Indiana National Bank?

A. Yes, sir.

Q. That was received on October 1st, '35, was it?

A. Yes, sir.

Q. And Mr. Brown then had a long distance telephone conversation with whom?

A. I only know that I have a note on the corner of the telegram that it was Abbott.

Q. Was Mr. Abbott at that time an officer of The Chase National Bank?

Mr. Burns: I object unless he knows.

Q. (Continued.) Well, if you know.

A. I don't know, no.

Mr. Thompson: Well, will it be admitted that he was an officer of The Chase National Bank?

Mr. Burns: It will be admitted that there was no such officer in The Chase National Bank, if that is a fact.

Q. Mr. Arthur V. Brown is the President of The Indiana National Bank and The Union Trust Company
675 of this city?

A. I so understand, yes.

Q. He resides in Indianapolis?

A. He does.

Q. Is he in Indianapolis at this time?

The Court: He was, at noon. I saw him.

Q. So far as you know?

A. I don't know. I haven't seen him today.

Q. Now, this correspondence, to which your attention has been directed: you said that you, personally, or as Secretary of the company, had not given any notice to The Chase National Bank, prior to this first payment on September 30, 1935, of the fact that the City of Indianapolis had denied liability under this lease? Is that correct?

A. Yes, sir.

Q. You knew from an examination of Exhibit 13 to the answers of The Indianapolis Gas Company to these interrogatories, that The Chase National Bank knew, as early as September 19, 1935, that the City was claiming that this lease was invalid?

676 Mr. Burns: I object. That asks for a conclusion.

The Court: Overruled.

The Witness: What is the question now?

Mr. Thompson: Read it.

(The Reporter read the preceding question as follows: "You knew from an examination of Exhibit 13 to the answers of The Indianapolis Gas Company to these interrogatories, that The Chase National Bank knew, as early as September 19, 1935, that the City was claiming that this lease was invalid?")

A. I had seen this letter, yes.

Q. Well, it is true, in there, that The Chase National Bank calls attention to the fact that the City is attempting to abrogate the lease?

A. Yes.

Mr. Burns: I object to characterizing the letter by saying something that isn't said there.

The Court: Is the letter in evidence?

Mr. Burns: Yes, it is in evidence.

677 Mr. Thompson: I will put it in evidence.

Mr. Burns: I will put it in evidence.

The Court: It may have been one of those that were not admitted. I don't know.

Q. Now, after this controversy arose—that is, after the transfer of this property—you don't mean to say to the Court that you conducted all of the negotiations or correspondence or dealings that were had between The Indianapolis Gas Company and The Chase National Bank, that you, on behalf of The Indianapolis Gas Company, were the only person engaged in dealing with The Chase National Bank?

A. As far as I had knowledge. I didn't know anything about it.

Q. Don't you know that Mr. Brown was in touch with The Chase National Bank?

A. I don't know it, no. I can assume it, I suppose.

Q. Didn't you yourself write a letter to an officer of The Chase National Bank, arranging a conference in New York, which was to be attended by Mr. Brown and Mr. Higgins? You may read it, now. That is Exhibit 19 to your answers. It is addressed to The Chase
678 National Bank, Trust Department, and attention of Mr. P. C. Beardslee, Assistant Trust Officer. "Referring to your letter of February 26th in respect to any recent developments in the negotiation between this company and the City, affecting our lease, we wish to say that the company expects to have a representative in New York early next week, who will advise you fully regarding this

matter. Signed, "Indianapolis Gas Company, By William J. Yule, Secretary".

A. Yes, sir.

Q. Who was that representative that is referred to in this letter?

A. I don't know.

Q. When you wrote this letter, you didn't know who would go to that meeting?

A. No, I don't think I did.

Q. Why, didn't you know that both Mr. Arthur V. Brown and Mr. William Higgins intended to, and did, attend this meeting that was being arranged to take place in New York on March 11th?

A. I didn't know anything about any meeting on
679 March 11th, though.

Q. What does this letter mean, then? I would like to have you explain it to the Court. You may look at it (handing letter to witness).

A. Well, it means just what it says. Mr. Brown told me to write the letter, and that is all I know.

Q. Well, that comes to the point, then, that, so far as your correspondence with The Chase National Bank and your knowledge of this situation were concerned, you merely did what you were told to do?

A. Well, I did whatever the Board of Directors directed me to do, yes.

Q. That is right?

A. Yes.

Q. But you did not have any independent control over any negotiations with The Chase National Bank, or the dealings with it?

A. No, no.

Q. No. And the matters of that kind were handled either by the attorneys for The Indianapolis Gas Company or by Mr. Brown or by Mr. Irvin?

A. So far as I know, yes.

680 Q. And you had no discretion which you were permitted to exercise in the premises?

A. I expect not.

Q. Now, were you asked by either Mr. Brown or any other person to furnish a copy to him of the agreement of March 2nd, which has been introduced in evidence here, between the City of Indianapolis, its Department of Utilities, and The Indianapolis Gas Company, to take with him to this meeting in New York with the representatives of The Chase National Bank?

A. I don't recall anything like that.

Q. Do you know whether Mr. Brown or Mr. Higgins had copies of that agreement?

A. I do not.

Q. Now, the City of Indianapolis paid to The Indianapolis Gas Company the sum of $171,575 on March 25, 1936? Is that correct?

A. That is correct.

Q. And you took out, for The Indianapolis Gas Company,—the check was made payable to The Indianapolis Gas Company?

A. It was.

681 Q. You took out three thousand dollars?

A. Yes, sir.

Q. Which you used to pay the semi-annual installment of interest on one hundred and twenty thousand dollars worth of bonds held by The Indianapolis Gas Company in its treasury?

A. I didn't pay it, no. It wasn't necessary to pay it.

Q. Well, you took it out, anyway?

A. I just didn't pay that much interest on the bonds. They were treasury coupons.

Q. I see, and you forwarded the balance to The Chase National Bank?

A. That is right.

Q. That balance consisting of $168,575?

A. Yes, sir.

Q. Now, was a part of that to pay the fee of The Chase National Bank for distributing the interest on the bonds?

A. No.

Q. Was that forwarded to them at some later time, the fee for distributing that amount?

A. We received a check from the Citizens Gas &
682 Coke Utility for that amount and forwarded it to The Chase National Bank for services in disbursing the coupon interest.

Q. Yes, and you did not attend the meeting of March 11, 1936, in New York City?

A. I did not.

Q. And you have no knowledge as to what occurred there?

A. I do not, no.

Q. And you have no personal knowledge as to whether The Chase National Bank accepted this sum of $168,575 under the terms of the agreement of March 2nd, 1936?

A. I do not, no.
Mr. Thompson: That is all.
The Court: That is all.
Mr. Burns: Just a minute, Mr. Yule.

Redirect Examination by Mr. Burns.

Q. You said that Judge Ewbank, or Judge Ewbank said that he prepared this letter of May 12, 1936, or helped in drafting it at the Directors' meeting?
A. Judge Ewbank was a Director.
Q. Of The Indianapolis Gas Company?
683 A. He was.
Q. And a regular attendant at the meetings?
A. Yes.
Q. And Mr. Higgins also was a Director?
A. He was also.
The Court: Is that all?
Mr. Higgins: I have one question, your Honor.

Cross-Examination by Mr. Higgins.

Q. As to the note on the telegram, Mr. Yule, that you have already testified about, had you any knowledge of what that signified except what you have since learned?
A. Well, may I make a statement as to what that means?
Q. Yes.
A. We received a check, the day before, and we wrote that letter, acknowledging it, and said that, "If that is the understanding, we will use it tomorrow morning," and then I went to the bank, before the bank opened, on the morning of the 1st, and deposited that money and the bank wired it to New York and, then, at eleven
684 o'clock, when I got back to the office, I found this telegram to Mr. Irwin, and I delivered it right to Mr. Brown and he put in a long distance call to The Chase National Bank. I had a note that he was talking to a man named Abbott. I may have been mistaken, if there is no such officer there.
Q. The note was made by you, was it?
A. I made the note on the corner of the telegram. That is the only recollection I have of what I wrote there. That was about eleven o'clock in the morning of the 1st.
Q. After the money—

A. After the money had been telegraphed before nine o'clock in the morning.

Mr. Higgins: That is all.

The Court: That is all.

Witness excused.

The Court: I think we had better adjourn at this time. I think you should take the stipulation and the exhibits that have been offered.

685 Would it be satisfactory to meet at nine-thirty in the morning instead of ten?

Mr. Thompson: That is satisfactory to us, your Honor.

Mr. Burns: It would be a little more convenient for me if it be ten o'clock. The reason is that some people are coming from out of town, in the morning, and I don't know just what time they will get here.

The Court: As you know, I only allotted two days for this trial.

Mr. Burns: Yes. Well, I am very anxious to get through with it.

The Court: Perhaps a half hour would permit us to finish tomorrow. If that isn't satisfactory, we can make it ten.

Mr. Burns: I can be here at nine-thirty.

Mr. Ewbank: Nine-thirty, then?

The Court: Will that be satisfactory to the rest of you? (No audible response.)

Adjourn court until nine-thirty in the morning, Mr. Marshal.

Whereupon, the trial was adjourned until tomorrow, Friday, March 3, 1939, at nine-thirty o'clock A. M.

687

Indianapolis, Indiana,
Friday, March 3, 1939.
Nine-thirty O'clock A. M.

The court met pursuant to adjournment, and the trial was resumed as follows:

Mr. Burns: I would like to recall Mr. Yule for the purpose of correcting a date on one of the exhibits.

WILLIAM J. YULE, a witness on behalf of the Plaintiffs, being recalled, testified as follows:

Redirect Examination by Mr. Burns.

Q. Mr. Yule, calling your attention to Plaintiffs' Exhibit 122, statement of the additions and betterments made by the City to the Indianapolis Gas system, as reported by the Citizens Gas & Coke Utility, from September 9 to June 30, 1938. That figure should correctly be December 31, 1938, should it not?

A. Yes, sir.

Mr. Burns: Would it be all right for Mr. Yule 688 to change it?

Mr. Thompson: Certainly.

Mr. Burns: Mr. Yule has now changed the date of June 30, 1938 to December 31, 1938, and we offer the exhibit as changed.

The said document, changed as aforesaid, so offered, was admitted and read in evidence.

Q. Mr. Yule, just before adjournment, Mr. Higgins had asked you about the telephone conversation which Mr. Brown had with somebody in New York. Did you take that telegram to Mr. Brown's office?

A. I did.

Q. The telegram of October—

The Court: He went over that yesterday and said that he made the note on the telegram.

Q. Yes, and did you stand there while Mr. Brown telephoned?

A. I did.

Q. Could you hear Mr. Brown's end of the conversation?

689 A. I did.

Q. Tell us, if you will, what that conversation was.

Mr. Thompson: To which the defendant City objects.

The Court: Objection sustained. Mr. Brown is available, and this witness doesn't know whom he talked to, but only what he heard.

Q. Was anything said by Mr. Brown about the correspondence which accompanied the check that The Indianapolis Gas Company had received from the City?

Mr. Thompson: To which question the defendant City objects.

The Court: Objection sustained.

Mr. Burns: Note an exception.

The Court: There is no reason why you can't have the witness here. He is within three blocks.

Mr. Burns: I am perfectly willing to have him here.

The Court: That is the way to prove it.

Mr. Burns: This witness heard the conversation.

The Court: He doesn't know whom he talked to or
690 anything about it except what he heard. That, of course, is hearsay. You can have Mr. Brown here, if you want to, and have him testify.

Is that all with this witness?

Mr. Burns: That is all.

Witness excused.

Mr. Higgins: I will have Mr. Brown here any time you say.

GEORGE HILL, a witness called on behalf of the Plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Burns.

Q. What is your name, your age, your address and your occupation, Mr. Hill?

A. George Hill; Room 200 Majestic Building; sixty-one; Auditor of Citizens Gas & Coke Utility.

Q. How long have you been Auditor of the Citizens Gas & Coke Utility?

A. Since December 10, 1929.

691 Q. Well, you were Auditor of the Citizens Gas Company until September 9, 1935?

A. That is right.

Q. And since then you have been Auditor of the Citizens Gas & Coke Utility? Is that correct?

A. Except during the time in which I was acting Auditor.

Q. Yes. Before you became Auditor of the Citizens Gas Company, were you employed there with the company?

A. I was.

Q. And in what capacity?

A. Assistant Auditor.

Q. Assistant Auditor, and during what time were you Assistant Auditor?

A. Well, I began work with the Citizens Gas Company of Indianapolis on July 2nd, 1917 and, about one year after that, I became Assistant Auditor.

Q. And from about 1919, when you became Assistant Auditor, were you Assistant Auditor until 1929?

A. That is right.

Q. And then you were Auditor from then until September 9, 1935?

A. That is right.

692 Q. And then, beginning September 9, 1935, you were Acting Auditor of the Citizens Gas & Coke Utility?

A. Yes, sir.

Q. And when did you become Auditor of the Citizens Gas & Coke Utility?

A. Well, I don't remember that date. It was about a year later.

Q. About a year later. As Auditor of the Citizens Gas Company, did you have charge of the books and records, the accounting books of the company?

A. I did.

Q. And the people who kept the books and accounts of the company were under your general direction and supervision?

A. They were.

Q. Did you from time to time, as Auditor of the company, have charge of the preparation of material to be sent to Poor's Manual or Moody's Manual?

A. That was usually done—that was usually sent by the Secretary.

Q. That was usually sent by the Secretary?

A. Yes, sir.

693 Q. That was by Mr. Forrest when he was there?

A. Or his secretary.

Q. Or his secretary, but did you have charge of the preparation of the accounting data for that purpose?

A. Part of it.

Q. Part of it. Would you prepare those statements annually and send them?

A. I don't remember as to those particular companies—how many we reported to. I know there were some.

Q. You know there were some. Would those companies send back the proof of what they were going to print?

Mr. Thompson: I object to this because this witness says that he didn't have charge of it.

The Court: Well, if he saw it and knows something personally about it.

The Witness: No, so far as I know—

Q. You didn't see the proof?

A. No.

Q. But you did have charge of preparing the accounting data that went into those reports?

A. Yes.

694 Q. And that accounting data, which you prepared, was then given to Mr. Forrest or his assistant and forwarded by him to any of these companies?

Mr. Thompson: Just a moment. I want to ask a question for the purpose of making an objection.

What you did do was to furnish certain accounting data to Mr. Forrest? Is that it?

The Witness: That is right.

Mr. Thompson: And you have no knowledge as to what he did with it?

The Witness: No, sir.

Q. But you do know it was prepared for the purpose of sending to these information services?

A. I know that we had a form with certain statistical companies' names on it.

Q. And those forms you filled out, showing the names of the directors and the earnings and so forth?

A. No, I didn't. No, I didn't fill that part of it out.

Q. You filled out just the accounting data to be sent in? Is that correct?

A. Yes, sir.

695 Q. And the rest of the information, you don't know who filled it out on the reports?

A. No, sir.

Q. Has the Citizens Gas & Coke Utility made similar reports to any of these services?

A. Any of them? I am not prepared to answer on that.

Q. You don't know?

A. No.

Q. You have not had anything to do with preparing any information, during the last three years and a half, for any such—

A. For some, but I don't remember the names of the statistical companies.

Q. You know that the Citizens Gas & Coke Utility has sent such information in to some of these statistical services, but you don't know which ones?

A. I don't know whether they were sent or not. I prepared the same figures and turned them over to someone else.

Q. And to whom did you turn them over?

A. Mr. Seiter or Mr. Burns.

Q. Mr. Seiter or Mr. Burns, but, after that, you
696 don't know what happened to them?

A. That is right.

Q. Mr. Seiter and Mr. Burns, neither of them were with the Citizens Gas Company, were they?

A. No, sir.

Q. They have come with the Citizens Gas & Coke Utility since the City took over the property?

A. Yes, sir.

Q. You were here yesterday and heard Mr. Yule's testimony about the addition and improvements that had been made by the Citizens Gas & Coke Utility to The Indianapolis Gas Company properties since September 9, 1935?

A. Yes, sir.

Q. You were subpoenaed to bring the figures showing the maintenance, the expenditures for maintenance, of the Citizens Gas & Coke Utility on the Indianapolis Gas property. I am not interested particularly in the exact figures, but it is a fact, is it not, Mr. Hill, that during the period from September 9, 1935 to the present time the Citizens Gas & Coke Utility has spent varying amounts for the maintenance of the distribution system of The Indianapolis Gas Company?

697 A. They have.

Q. It has or whatever—

A. Yes, sir.

Q. And has also spent varying amounts for the maintenance of the Pratt Street Station? Is that what you call it?

A. That is right.

Q. The Pratt Street Station is also Indianapolis Gas property?

A. Yes, sir.

Q. And has also spent various amounts for maintenance of the Langsdale property of The Indianapolis Gas Company?

A. Yes, sir.

Q. As a matter of fact, at the present time, the only part of the Langsdale property that has been in use is the large storage tank and the compressor rooms and the steam boilers for using the compressor rooms? Isn't that true?

A. I think so.

Q. So that very little, during the period from 1935, has

been spent on the maintenance of the other equipment at Langsdale?

698 A. That is right.

Q. The answer was "Yes"?

A. Yes, sir.

Q. In your work as Auditor of the Citizens Gas Company, did you from time to time prepare accounting material to be furnished to Blodgett & Company or The Union Trust Company or anyone else or Gavin L. Payne & Company or any other broker or banker who was engaged in marketing securities of the Citizens Gas Company?

A. I did not, after I became Auditor.

Q. You did before you became Auditor?

A. No, sir.

Q. You say you did not?

A. I did not.

Q. You did not, after you became Auditor?

A. No, nor before.

Q. Or before?

A. That is right.

Q. You didn't do it at any time while you were at the Citizens Gas Company?

A. No, sir.

Q. Beg pardon?

699 A. No, sir.

Q. Was any such work done under your direction as Auditor?

A. No, sir.

Q. Who did that work at the Citizens Gas Company?

A. I don't remember of any Blodgett reports being made.

Q. You don't remember of any accounting data being assembled for that purpose,—

A. For Blodgett?

Q. (continued)—while you were at the Citizens Gas Company?

A. No, sir.

Q. Your subpoena called for you to bring in the annual report of the Citizens Gas Company for the year ending December 31, 1913. Did you find that?

A. Yes, sir.

Q. May I see it? (The witness handed document to counsel.)

Calling your attention, Mr. Hill, to this paper that you have brought in, is that the annual report of the Citizens

Gas Company for the year ending December 31, 1913, which you have taken from the old files of the Citizens Gas Company?

700 A. It is so stated on this report, and it was taken from the files of the Citizens Gas Company.

Mr. Burns: May it be stipulated that this is a duplicate original of the report used by Mr. Gavin L. Payne, which has already been introduced in evidence as Plaintiffs' Exhibit 93?

Mr. Thompson: I know nothing about it, Mr. Burns.

Mr. Burns: We will ask to have it marked Plaintiffs' Exhibit 124. I hesitate to mark this because it is an exact duplicate of what we offered yesterday, but Mr. Thompson says he will not stipulate that it is a duplicate.

Mr. Thompson: I don't know anything about it, Mr. Burns.

Mr. Burns: Well, it is right here.

The Court: Where is the other one? Haven't you the original that was put in yesterday? Why don't you use that to examine this witness instead of this one?

Q. Calling your attention, Mr. Hill, to Plaintiffs' Exhibit 93, that was offered in evidence yesterday in

701 connection with the testimony of Mr. Payne, is that an exact copy, a duplicate original, of the report which you have produced here from the files of the Citizens Gas Company?

A. It is so marked and it has the same date and looks as though it were printed from the same plate.

Mr. Thompson: Your Honor will recall I made no objection to this other exhibit on the ground that it was not shown to have been an original.

Mr. Burns: Will you now stipulate that it is?

Mr. Thompson: I see no purpose in making a stipulation in connection with an offering of it, your Honor.

The Court: Why don't you withdraw the other exhibit and insert the original, if you want to?

Mr. Burns: Well, one isn't any more an original than the other. The one that was produced from Mr. Payne's files was one which he had received as the person who was floating the securities, but, in order to save time, I will offer Plaintiffs' Exhibit 124.

Mr. Thompson: I make the same objection to this, your Honor.

702 The Court: That is the other exhibit?

Mr. Burns: That is the copy that Mr. Hill has produced.

The Court: I am not sure whether I ruled on the other one or not.

Mr. Burns: I think there was no objection made to it except that it was not binding on the City.

Mr. Thompson: I make the same objection to this.

The Court: Was the other one read in evidence or was the ruling reserved?

Mr. Thompson: I think it was reserved, your Honor, but I am not sure.

Official Reporter: Exhibit 93 was admitted.

The Court: Let this be read in evidence. The ruling was reserved with respect to several of them.

Mr. Burns: Yes.

The Court: I didn't remember about this.

The said document, so offered, marked for identification PLAINTIFFS' EXHIBIT NO. 124, was admitted and read in evidence.

703 Mr. Burns That is all.

The Court: That is all.

Witness excused.

PAUL C. BEARDSLEE, a witness called on behalf of the Plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Burns.

Q. Mr. Beardslee, will you state your name, your age, your occupation and your address, please?

A. My name is Paul C. Beardslee; age, forty-eight; business address, 11 Broad Street.

Q. New York City?

A. New York City. Occupation, banking.

Q. What is your official connection with The Chase National Bank of the City of New York, the plaintiff in one of the two cases here on hearing?

A. I am Assistant Trust Officer of The Chase National Bank.

Q. And how long have you held that office?

704 A. Since 1931.

Q. And before 1931, had you held similar offices in other banks in New York?

A. That is true, in the Trust Departments.

Q. In the Trust Department?

A. Corporate Trust Departments.

Q. Have you been in general charge of the work of The

Chase National Bank, as Trustee of the Mortgage dated October 1, 1902 from The Indianapolis Gas Company?

A. I have, subject to approval of an executive vice president on matters of policy.

Q. And I suppose, also, the management committee or the board of directors?

A. And the management committee of the Trust Department.

Q. Over what period have you had charge of this trust relating to the mortgage of 1902?

A. It goes back at least to 1934.

Q. Do all matters in connection with that trust come to your attention, other than mere routine matters, in the ordinary course of the operation of the Chase Bank?

A. Yes, other than routine matters.

Q. So that if any information comes into the bank, 705 either in the form of a letter or a telegram or any other way, in the ordinary course of business, it comes to your attention?

A. It would reach my desk, yes.

Q. The stipulation which has been offered here in evidence shows that of the coupons dated April 1st, 1936 $775 principal amount have not been cashed. Do you know or have you any means of finding out who the owners of those coupons are?

A. No, those coupons are payable to bearer.

Q. When the coupons were paid on the last coupon paying date, on April 1st, 1936, did you then make up as complete a list as you could of the corporate holders of the bonds of the Indianapolis Gas?

A. Yes, we did.

Q. And did you also secure a list from the Indianapolis Gas, made up from the ownership certificates showing the individual holders of those bonds?

A. Presumably it came from that list. I don't know because I don't know where they compiled it from.

Q. But they supplied you a list?

A. They supplied us with a list.

706 Q. Now, in the ordinary course of your operation at the bank, when the coupons are cashed for an individual, they come in with an ownership certificate and those—please answer out loud so the Reporter will get your answer.

A. That is true.

Q. And those ownership certificates are sent right to the company issuing the bonds? Is that true?

A. Along with the canceled coupons, in most cases.

Q. Yes.

A. That is the ordinary course.

Q. But as a result of the list which you secured from the Indianapolis Gas and the list of the corporate holders which you secured yourselves in New York, do you have a complete list of the bondholders covering those sixty-eight hundred and eighty-one bonds?

A. No.

Q. The bonds, as I understand it, are all in the denomination of one thousand dollars each?

A. That is correct.

Q. Did you ever have any intimation, prior to September 9, 1935, that the City of Indianapolis was either
707 denying the validity of the lease of September 30, 1913 or the enforcibility of that lease against it or against its properties that it had received from the Citizens Gas Company?

A. No.

Q. If any such information had come to the Chase Bank, would that information, in the ordinary course of business, have come to your attention?

A. It would have reached my desk.

Q. Now, calling your attention to Plaintiffs' Exhibit 111-A and 111-B, identified yesterday by Mr. Yule, did you write Mr. Yule, about July 19th, 1935, enclosing a copy of a letter from Scudder, Stevens & Clark, as shown by those two exhibits?

A. I did.

Q. Did you, on or about August 18th or 19th, receive from The Indianapolis Gas Company a copy of a letter to Scudder, Stevens & Clark, which has been identified as Plaintiffs' Exhibit 111-C?

A. We did. The Trustee did.

Mr. Burns: We offer in evidence Plaintiffs' Exhibits 111-A, B and C.

708 The Court: I think the offer has already been made.

Mr. Burns: I thought perhaps we ought to offer them after this further identification.

The Court: One time is enough, and the ruling was reserved, as I remember, on those. 14, 15 and 16 were admitted. One offer is enough.

Q. Calling your attention to Plaintiffs' Exhibits 112 and 112-A, did you, on or about September 6th, send to Mr. Yule the letter, 112, enclosing a copy of the letter from

Russell Berg & Company, dated September 4th, as shown by these two exhibits?

A. I did.

Q. Did you receive any response from The Indianapolis Gas Company or from Mr. Yule to that letter of September 6th?

A. No.

Q. Or did you receive any copy of any letter sent by Mr. Yule or anybody representing The Indianapolis Gas Company to Russell Berg & Company?

A. No.

709 Q. Did you write to Mr. Irwin, President of The Indianapolis Gas Company, on September 19th, as shown by Plaintiffs' Exhibit 113?

A. I did.

Q. And when did you first receive any response to that letter of September 19th from the Indianapolis Gas—when did you receive any response from The Indianapolis Gas Company to that letter of September 19th?

A. On or about November 7th.

Q. You received a letter dated November 7th, Exhibit 116? Is that true?

A. That is true.

Q. Probably a day or two after its date?

A. Along about that time.

Q. Had you, in the meantime, between September 19th and November 7th, received any response or word from anyone connected with The Indianapolis Gas Company to your letter of September 19th?

A. No.

Q. Did you on October 1st, 1935 telegraph The Indianapolis Gas Company, as shown by Plaintiffs' Exhibit 114?

A. That is correct.

710 Q. And did you then, later, on October 3rd, write Mr. Yule, as shown by Plaintiffs' Exhibit 115?

A. Yes, I did.

Q. Now, calling your attention particularly, Mr. Beardslee, to the last line of the first paragraph of the letter of October 3rd, Exhibit 115, in which you say, "We also wired him on September 1st with respect thereto," was that date, September 1st, a typographical error?

A. It was. It should have been October 1st.

Q. Intended to refer—

A. To the telegram of October 1st.

Q. Exhibit 114?

A. That is correct.

The Court: Just correct that in pencil.

Q. After you received the letter of November 7, 1935, from The Indianapolis Gas Company, did you write the Gas Company or Mr. Yule on December 2nd, as shown by Exhibit 117?

A. I did.

Q. And did you receive a reply to that letter—

A. No, sir.

Q. (Continued.) —from anybody connected with
711 The Indianapolis Gas Company or from Mr. Yule or from the company itself?

Q. Did you again write to The Indianapolis Gas Company on February 26th, 1936, as shown by Plaintiffs' Exhibit 118?

A. I did.

Q. And did you, in response to that letter, receive a letter from The Indianapolis Gas Company, Plaintiffs' Exhibit 119?

A. I did.

Q. Now, Mr. Beardslee, Plaintiffs' Exhibit 119 from Mr. Yule says, "Referring to your letter of February 26th in respect to any recent developments in the negotiations between this company and the City affecting our lease, we wish to say that the company expects to have a representative in New York early next week, who will advise you fully regarding this."

Was there then some correspondence between you and The Indianapolis Gas Company saying that you would be glad to see them, or something of that sort?

A. Yes, sir.

712 Q. And in pursuance of that correspondence, did Mr. Higgins and Mr. Brown, representing the Indianapolis Gas Company, come to New York on March 11th?

A. They did.

Q. And come into the office of the Chase Bank to give the information that you had requested?

A. That is correct.

The Court: That is in '36, isn't it?

Mr. Burns: That is March 11, 1936.

The Witness: That is March 11, 1936.

Q. What occurred at that meeting of March 11, 1936? What information did Mr. Brown and Mr. Higgins give you?

A. Well, at this meeting on March 11th, which was attended by Mr. Higgins and Mr. Brown, of the Indianap-

olis Gas, Mr. Rowe of the Massachusetts Mutual Life Insurance Company, Mr. Kugler of the New England Mutual Life Insurance Company, Mr. Stearns of Estabrook & Company, investment bankers, I was also present, representing the Trustee, and counsel for the Trustee.

Q. That was Mr. Cole?

A. That was Mr. Cole.

713 Q. Of Milbank, Tweed & Hope?

A. Of Milbank, Tweed & Hope. Mr. Higgins and Mr. Brown told us of the situation, the position that the City had taken with respect to the lease and also with respect to the—and told us of the March 2nd, 1936 agreement.

Q. Did they at that time give you or show you a copy of the March 2nd agreement?

A. I didn't see it.

Q. They didn't give you one there at that meeting?

A. No, sir.

Q. Well, what occurred after that?

A. Then a discussion was had as to the best method of protecting the interests and rights of the bondholders. Foreclosure was discussed.

Q. As a possible method of protecting—

A. A possible method of protecting the rights and finally I was asked, on behalf of the Trustee, as to what the Trustee's reaction would be if it were asked to bring a bill--bring a suit, to determine the validity of the lease, against the City.

The Court: I didn't understand that. You were

714 asked what?

The Witness: What the reaction of the Trustee would be to bringing a suit, to determine the validity of the lease, against the City.

The Court: Who asked you that?

The Witness: Well, this is a conversation that happened three years ago and at a round table discussion and I wouldn't—

The Court: That might be very important in this litigation.

The Witness: I couldn't say definitely.

The Court: Well, what is your best judgment?

The Witness: That might have come from either Mr. Brown or Mr. Higgins. I couldn't say definitely. It is three years ago.

Q. You don't remember whether it came from Mr. Brown or from Mr. Higgins or Mr. Rowe or Mr. Kugler or Mr. Stearns?

A. I don't know.

Q. But you do know that it developed during the conversation?

A. That was one of those things that developed,
715 but who originally started it I couldn't say definitely.

Q. Was there some further discussion as to the advisability of a foreclosure and did Mr. Brown or Mr. Higgins have anything to say as to the desirability of foreclosure proceedings?

A. Yes, there was a further discussion of foreclosure and Mr. Brown or Mr. Higgins pointed out that foreclosure would delay the proceedings and possibly cause a lot of additional expense.

Q. Mr. Brown and Mr. Higgins indicated that they didn't want the Trustee to bring foreclosure proceedings?

A. That is true.

Q. And what was the position of the bondholders in regard to that?

A. Well, the bondholders, as I recall it, were leaning toward foreclosure.

Q. And you, representing the Trustee, or Trustee's counsel, expressed what opinion?

A. Well, I told them, in response to that question, as to what the reaction of the Trustee would be. I told those present that was something on which I could not bind the bank, and it would have to be submitted to the man-
716 agement committee of the Trust Department.

Q. Well,—go ahead.

A. But I did intimate that if it was my own choice—my own opinion, that if we were requested to do so, to bring this suit by a substantial amount of the holders of the bonds, and if we were indemnified by the bondholders, that we might do so.

The Court: Which suit do you have reference to, the foreclosure?

The Witness: No, I am speaking now of determining the validity of the lease against the City.

The Court: Declaratory judgment case?

The Witness: That is what you call it, I guess.

Q. Was the possibility of a declaratory judgment suit, as such, discussed at that meeting, do you know?

A. Yes, I think it was.

Q. You know what a declaratory judgment suit is as distinguished from an ordinary suit?

A. I am not a lawyer, but I have an idea; but nothing definite was decided at that meeting, because the bond-

holders seemed to be rather reluctant to put up in-
717 demnity.

Q. They expressed themselves as not wanting to put up the indemnity, is that correct?

A. That is correct.

The Court: The bondholders finally put up indemnity for this Chase National Bank suit?

The Witness: No, sir.

Q. Did you have a later meeting—have you told everything that you can recall at present about the meeting of March 11th?

A. I think that is all.

Q. In any case, no definite decision was reached at that meeting about what action the Trustee would take?

A. That is correct.

Q. And the bondholders did not directly commit themselves as to whether they would or would not give indemnity?

A. That is true.

* * * * * *

723 Q. Did you, sometime after April 13, 1936, receive letters from the Massachusetts Mutual Life Insurance Company, dated April 16th, 1936, marked Plaintiffs' Exhibit 125, and from the New England Mutual Life Insurance Company, dated April 17th, 1936, marked Plaintiffs' Exhibit 126, copies of which I show you—125 and 126?

724 A. We did receive the original of which this is a photostat sometime about April 18th or 19th, 1936.

* * * * * * *

727 Mr. Burns: Exhibits 125 and 126, any objection to them?

Mr. Thompson: None whatever.

The said documents, so offered, respectively marked for identification PLAINTIFFS' EXHIBITS NOS. 125 and 126, were admitted and read in evidence.

* * * * * *

730 Q. Mr. Beardslee, when was the first time you received any information as to the agreement of March 2, 1936 having been made between the City of Indianapolis and the Indianapolis Gas Company?

A. At the conference on March 11, 1936.

Q. Had you, prior to that time, known anything about any such agreement?

A. We had not.

Q. Or anything about the exchange of correspondence

between the City and The Indianapolis Gas Company,
731 of September 30, 1935?

A. No.

Mr. Thompson: I should think the witness would look at the letter he received under date of November 7, 1935 before he lets that answer stand.

(The Reporter read the preceding record as follows: Question: "Had you, prior to that time, known anything about any such agreement?" Answer: "We had not." Question: "Or anything about the exchange of correspondence between the City and The Indianapolis Gas Company, of September 30, 1935?" Answer: "No.")

732 A. Well, that doesn't refer to the March 2nd agreement.

Q. Calling your attention to the third paragraph of that letter of November 7, 1936, Mr. Beardslee, it does refer to the fact that the Company through its Board of Directors entered into a stipulation with the City of Indianapolis providing that the Board of Utilities will continue the operation of the property of this Company for a period of six months pending negotiations, and it will pay a monthly rental for such period equal to the amount of the rental under the lease?

A. That is true.

Q. So you knew that fact, that that agreement had been made?

A. For the six months period.

Q. You did not know or have any copies of the correspondence exchanged on September 30th?

A. No.

Q. And this letter of November 7th was the first information that you had of the terms under which the City and the Indianapolis Gas were allowing the property to be operated?

A. Yes, that is true.

Q. If any information as to the City's position
733 on the lease had come to the attention of the officers or employes of the Chase Bank, would that in the ordinary course of business come to your attention?

A. It would have reached my desk.

Q. When did it first come to your attention that the City of Indianapolis and the Indianapolis Gas Company had entered into any arrangement by which the City of Indianapolis would make additions and extensions to the Indianapolis Gas property pending settlement of the dispute about this lease?

A. I never heard of that.

Q. You heard of—

A. (Interposing.) Until you asked me the question yesterday.

Q. Were you consulted, or the Chase Bank consulted, in any way before that agreement was made?

A. No.

Q. If any one at the Chase Bank had been advised or consulted about that, would that have come to your attention in the ordinary course of business?

A. That would have come to my attention.

734 Q. When the Chase Bank received notice on October 1, 1935 that the Indiana National Bank had credited $168,575.00 to it for the purpose of payment of Indianapolis Gas coupons did you have any information as to the source from which that money had come?

A. None whatsoever.

Q. Or the circumstances under which it was paid?

A. No, sir.

• • • • • •

740 Q. Mr. Beardslee, did you on or about October 21, 1935 receive a letter from the Citizens Gas and Coke Utility, copy of which I show you, marked Plaintiffs' Exhibit 131?

A. We did.

Q. Were there enclosed with that letter eighteen coupons maturing October 1, 1935 of the Indianapolis Gas bonds?

A. There were.

741 Q. Did you on or about May 1, 1936 receive a letter from the Indianapolis Gas Company marked Plaintiffs' Exhibit 132?

A. We did.

Q. Were there enclosed with the letter from the Indianapolis Gas Company one hundred and thirty-eight coupons due April 1, 1936?

A. There were.

Q. Was any money paid by the Chase Bank to the Citizens Gas and Coke Utility for the eighteen coupons received on October 21, 1935 or for the one hundred and thirty-eight coupons received in the letter of May 1, 1936?

A. Not by the Chase Bank.

Mr. Burns: I offer the two letters in evidence, Plaintiffs' Exhibits 131 and 132.

The said documents, so offered, respectively marked for

identification PLAINTIFFS' EXHIBITS 131 and 132, were admitted and read in evidence.

Q. Did you have any information prior to March 2, 1936, Mr. Beardslee, that there were any negotiations between the City and Indianapolis Gas Company looking towards the making of the agreement of March 2, 1936?

A. No, sir.

742 Q. As a matter of fact, the first information you got about that at all was at the meeting of March 11, 1936?

A. That is correct.

Mr. Burns: That is all.

Mr. Thompson: Your Honor, may we have a recess for a few moments?

The Court: Yes, I will take about a ten-minute recess.

After Recess.

Mr. Burns: If the Court please, Mr. Brown is here, and I think we can dispose of him in about one minute, if counsel will agree we may use him at this time.

Mr. Thompson: That is perfectly all right.

The Court: Proceed.

The Court. Proceed.

743 ARTHUR V. BROWN, called as a witness by Plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Burns.

Q. Your name is Arthur V. Brown?

A. Correct.

Q. You are President of the Indiana National Bank?

A. Yes.

Q. And President of the Union Trust Company of Indianapolis?

A. Yes.

Q. And Vice President and Treasurer of the Indianapolis Gas Company?

A. That is right.

Q. And also associated with many other corporations in and around Indianapolis?

A. Yes, some of them.

Q. Do you recall, Mr. Brown, a telephone conversation of October 1, 1935 which you had in regard to some Indianapolis Gas matters with somebody in New York?

A. I do not, because I have a great many long distance calls every day. I don't remember.

744 Q. You don't recall anything about that conversation?

A. No.

Q. Who you talked with?

A. No.

Q. Or what was said during the conversation, or anything about it?

A. No, I do not.

Q. Do you recall whether you had any conversation with somebody in New York at the Chase Bank about the fact that the Indiana National Bank had wired $168,575.00 to the Chase National Bank to pay the Indiana Gas coupons?

A. I don't recall.

Q. You do not remember anything about that?

A. No.

Cross-Examination by W. H. Thompson, Esq.

Q. Mr. Brown, you were present at the meeting of March 11, 1936 at the office of the Chase National Bank in the city of New York?

Mr. Burns: I object. It seems to me this is not cross-examination.

745 The Court: I do not know what it will lead to. Go ahead. We won't have to call Mr. Brown back then.

Mr. Burns: May we understand this is part of the defense's testimony?

The Court: Proceed.

Q. I will ask you, Mr. Brown, if in that conference which has been testified to in some particulars by Mr. Beardslee, you did not tell Mr. Beardslee and Mr. Cole, the attorney for the Chase National Bank, that the City of Indianapolis had executed an agreement dated March 2, 1936 with the Indianapolis Gas Company?

A. I don't recall, no.

Q. Didn't you tell them the payment was to be made under the terms of the agreement of $171,000.00 on the 25th day of March, 1936?

A. I don't know. I may. I can't remember.

Q. Do you remember that that was discussed at that meeting, Mr. Brown?

A. What?

Q. Don't you remember the question of the payment which was to be made by the City to the Indianapolis
746 Gas Company was discussed at that meeting of March 11th?

A. I don't remember. I can't remember the facts.

Q. Do you remember anything that occurred at that meeting?

A. No.

Mr. Thompson: That is all.

The Court: That is all.

(Witness excused.)

747 PAUL C. BEARDSLEE, a witness on behalf of the Plaintiffs, being recalled, testified as follows:

Cross-Examination by W. H. Thompson, Esq.

* * * * * *

760 Q. At the meeting of March 11, 1936 Mr. Higgins or Mr. Brown or both of them told you, as you have already stated, that the City of Indianapolis had entered into an agreement with the Indianapolis Gas Company dated March 2, 1936?

A. Yes, they did tell us about that.

Q. And they told you that under the terms of that agreement the City of Indianapolis was to pay $171,575.00 to the Indianapolis Gas Company, plus the Trustee's charges for disbursing the interest on the bonds, and that that payment was to be made on or before March 25, 1936?

A. I don't recall that at all.

Q. Didn't you discuss at that meeting, Mr. Beardslee, the question of whether the Indianapolis Gas Company ought to accept that money, and whether you, as Trustee, ought to accept it?

A. No, sir.

Q. Was it ever discussed later?

A. No, never was discussed as to whether we should accept it.

761 Q. They told you certain payments were to be made by the City under that agreement?

A. They told us generally of the terms of the agreement.

Q. Then you knew before there had been some delay

or trouble about these interest payments being made by the City of Indianapolis because you had sent a wire on October 1st?

A. You say "before". When do you mean?

Q. I mean before this agreement of March 2nd was executed.

A. Sure. If the funds were not in our hands a few days before the interest payment it is our practice to send out a wire.

Q. You had been told of the agreement of the City. Did you make any investigation or any inquiry then or later as to the sources of the money which you received in a letter from the Indianapolis Gas Company on March 28, 1936?

A. No, we didn't make any further inquiry. The check came.

Q. You knew it had been paid by the City under the terms of some sort of an agreement?

A. I didn't know what the agreement was.

Q. Didn't you have any curiosity about that agreement?

762 A. Those funds were paid to us merely as agents of a company.

The Court: As agent of what company?

The Witness: Of the Indianapolis Gas Company.

Mr. Burns: Not as Trustee of the mortgage.

Q. Not as Trustee of the mortgage?

A. No, I think it was merely an agency arrangement, the payment of those coupon funds.

Q. In other words you say, the coupons being payable at the office of the Chase National Bank when the Indianapolis Gas Company forwarded this money here, you were simply acting as an agent? You did not try to close your eyes to this transaction, did you, Mr. Beardslee?

A. We did not close our eyes, no.

Q. Did not the Chase National Bank, laying aside its banking connections now, but as Trustee under the mortgage, have a vital interest in knowing what was going on in this picture?

A. Yes, I would say that we did have an interest.

Q. When was the first time you knew the City had denied the validity of this lease?

763 A. I think it was November—the first time we really knew it was about November, 1935.

Q. You had written a letter in September in which it

was stated someone had directed your attention to the fact the City had abrogated the lease?

A. Yes.

Q. Did you investigate that?

A. We asked the City to send us a copy of their reply.

Q. Do you read the Wall Street Journal?

A. No.

Q. Do you pay any attention to the market prices of the bonds under the mortgages of which your Company is Trustee?

A. No, sir.

Q. Does anyone in the Chase Bank have any more intimate or direct contact with this matter than you?

A. Not that I know of. We don't follow the prices of bonds.

Q. Don't you follow the general financial news of the country to know what is going on?

A. I read the daily newspapers, the New York papers. I never read the Wall Street Journal.

Q. You knew late in September, 1935 someone had
764 advised you that the City had denied the validity of this lease. The language used in the letter that you wrote is "abrogated the lease."

A. Didn't I say it was newspaper reports?

Q. Had you seen newspaper reports before then?

A. Yes, I think I had seen a newspaper report, but it was nothing constructive about a newspaper report—I mean you couldn't—if we get an inkling from a newspaper report, naturally we would verify it with our principal, and that is the reason that letter of September, I think 19th, 1935, was written.

Q. Your first position as Trustee for this mortgage was you would not bring this suit unless you were indemnified?

A. That is correct.

Q. And then later when you submitted the question to the Baker firm as to whether the expenses of maintaining this litigation would be a charge ahead of the mortgage debt on the mortgaged property, you agreed to bring the suit without indemnification. Is that correct?

A. That is correct.

Q. And you were not indemnified by anyone?

A. That is true.

765 Q. Who has paid the costs of this litigation, if you know?

A. Well, I guess that Chase Bank has paid the costs so far.

Q. Do you know whether that is true or not?

A. I know we have paid some costs of this litigation.

Mr. Burns: The Citizens Gas and Coke Utility paid a substantial amount of it.

Mr. Thompson: Yes, we gave a check for $450.00 for costs on appeal, if that is what you refer to.

The Court: That was after the reversal?

Mr. Thompson: That was after the reversal, and I might say we were not allowed much more than a day's time in which to do it.

Q. The insurance companies were present at this meeting of March 11th, were they not?

A. Yes.

Q. Mr. Rowe, representing the Massachusetts Mutual?

A. Yes.

Q. And Mr. Kugler, representing the New England Mutual?

A. That is correct.

766 Q. Did they say anything about your taking the sum of $171,575.00 from the Indianapolis Gas Company that was to be paid under this agreement of March 2nd?

A. Not to my knowlege.

Q. Did they make any objection to it?

A. I don't have any recollection of that question being discussed, even.

Q. Did you make any objection—

A. (Interposing) No.

Q. (Continuing) —at that time to the Indianapolis Gas Company going ahead and performing that agreement?

A. The agreement was already made at that time.

Q. I know, but it had not been executed yet, had it?

A. Wait a minute.

Q. It had not been performed or carried out?

A. Yes.

Q. The writing had been executed, but you did not make any objection to the City of Indianapolis or to the Indianapolis Gas Company about the City proceeding with paying money under the terms of that agreement? Never have you made any?

A. No. We were just protecting the rights of our Bondholders.

767 Q. You saw nothing inimical to your Bondholders in taking that money?

A. No, I think it belonged to the Bondholders.

Q. You saw nothing inimical to the rights of the Bondholders in making deposits in escrow—

Mr. Burns: I object to the question, as a matter of opinion.

Q. You saw nothing inimical to the interests of the Bondholders in the City paying this money into escrow so if the Trustee won the suit the Bondholders would get the money?

A. No, I don't see anything wrong with that.

Q. You thought that was a good thing for the Bondholders?

A. I didn't say that.

Q. But you saw nothing wrong in it?

A. Saw nothing wrong in it.

Q. You were very much interested as to whether these payments were being regularly and promptly made by the City of Indianapolis?

A. After we heard of its execution, yes.

Q. And wrote each time a payment was due,—you
768 wrote either to the Indianapolis Gas Company or to the Indiana National Bank inquiring whether in fact the payment had been made?

A. That is true.

Q. You never expressed any dissent to the City?

A. Only by bringing the bill of complaint.

Q. Of course. Aside from that?

A. That is all.

The Court: When was this complaint filed?

The Witness: In June, 1936.

Mr. Thompson: June 6, 1936.

Q. You never learned extensions had been made by the City of Indianapolis to the distributing system of the Indianapolis Gas Company?

A. I never knew anything about that until I testified yesterday, I think it was.

Q. Are you also the registrar of this bond issue as well as the Trustee?

A. Yes, I think we are.

Q. You never asked to certify any bonds on account of the additions and betterments so made?

769 A. Within the last year or so, do you mean?

Q. I am talking about those made by the City of Indianapolis at any time.

A. We have never certified any bonds on improvements made by the City I know of.

Q. You know, of course, those additions were made in

pursuance of letters exchanged between the Indianapolis Gas Company and the City of Indianapolis?

A. I have learned of it.

Q. You see nothing inimical to the Bondholders in the City having added $95,000.00 to this property, do you?

Mr. Burns: I object to the question. It merely calls for an opinion.

The Court: Sustained.

Mr. Thompson: That is all.

Redirect Examination by Mr. Burns.

Q. Mr. Beardslee, Mr. Thompson called your attention to interrogatory No. 2 which was propounded to you, which reads: "At whose request did you bring this action?

Please answer fully the names of each person or cor-
770 poration who requested this action be commenced, whether Bondholders of the Indianapolis Gas Company or others." At whose request did you bring this action?

A. The Bondholders.

Q. The New England Mutual?

A. And the Massachusetts Mutual Life Insurance Company.

Q. And those were the people at whose request you brought the action?

A. Yes.

Q. When Mr. Higgins asked you whether you would bring the action, what did you tell him?

A. We told him that if the Bondholders asked us to do it, we would. That was the final answer.

Q. Would you have brought the action at the request of the Indianapolis Gas Company if the Bondholders had not requested you to bring it?

A. Certainly not.

Q. You have stated that Mr. Higgins, when he came to New York on the 10th of April, did not bring with him any bill of complaint which was referred to in his previous letter of April 4th, is that right?

A. That is true.

771 Q. Did you ever see any bill of complaint or draft of bill of complaint or any provisions for a bill of complaint prepared by Mr. Higgins?

A. No, I never saw such a document.

Q. Mr. Thompson asked you whether the Trustee has certified any additional bonds for additions and better-

ments made by the City during the period since September 9, 1935, and you said it had not. Is that true?

A. That is true.

Q. As a matter of fact, the Trustee has not certified and additional bonds for additions and betterments since 1932, has it?

A. Somewhere along there; I do not know the exact time.

* * * * * *

780 The Court: Do you have much more evidence?

Mr. Burns: Very little.

In connection with the Exhibits 58, 59, 67 and 76, which were introduced yesterday, they were not signed copies and it has been agreed by counsel that the signatures may be supplied.

The Court: All right.

Mr. Burns: I take it the Court doesn't care to have these depositions read?

The Court: No, not at this time.

Mr. Burns: We offer in evidence the direct examination and the exhibits identified in connection therewith, in the deposition of Robert E. Simond, which has been previously filed in this case, and ask to have the—

The Court: Was he one of the parties?

Mr. Burns: No, he is the manager of the Municipal Bond Department of Halsey Stuart & Company.

(Continued.) —and ask to have this marked—does your Honor wish to have the deposition marked with an exhibit number?

The Court: I think it had better be marked, per-
781 haps. Do you have several depositions?

Mr. Burns: There is just one here.

Mr. Thompson: Your Honor, we have filed a motion to suppress this deposition as well as the depositions taken in New York. I assume that your Honor will dispose of the questions arising on this motion to suppress—

The Court: That is right.

Mr. Thompson: (Continued.) —at some later time?

The Court: Yes, and you may show the offer at this time to read the entire deposition, or is this the cross-examination?

Mr. Thompson: He only offered the direct.

The Court: You are not asking that the cross-examination be read?

Mr. Thompson: I will when it comes to my turn.

The Court: All right.

Mr. Burns: We offer the direct examination and the exhibits attached thereto in Mr. Simond's deposition as PLAINTIFFS' EXHIBIT 133.

We offer in evidence, as PLAINTIFFS' EXHIBIT 134, the direct examination and the exhibits attached there-
782 to in the depositions of Chester M. Clark and Joseph Edwards Baker, taken in New York.

We offer as PLAINTIFFS' EXHIBIT 135 the brief of the City of Indianapolis and certain other defendants, in the Supreme Court of Indiana, in the case of Allen G. Williams against Citizens Gas Company of Indianapolis, et al.

Mr. Thompson: To which the defendant City objects on the ground that no admission which is signed by a lawyer can bind his client in litigation other than that in which the admission is made, and no statements in this brief can foist a lease on the City of Indianapolis.

The Court: What is the purpose?

Mr. Burns: Well, if the Court please, this is generally in connection with the other evidence that is introduced by the stipulation in the Williams case, to show what issues were presented and decided by the Court in that case.

The Court: Well, haven't you offered the pleadings in the case?

Mr. Burns: Yes.

783 The Court: Well, they would show the Court what the issues were, would they not? I doubt whether a brief of a lawyer, representing a party, is competent.

Mr. Burns: Well, it seems to me it is clearly competent.

The Court: I will take that up later on when we come to pass on all of these exhibits that you have offered.

Mr. Burns: Well, now, if the Court please, in connection with the rulings that have been reserved on the admission of various exhibits offered by the plaintiff, may we have the understanding that, to the extent that any of those exhibits are excluded, they may appear in the record as offers to prove?

The Court: I want to do this either at the conclusion of the plaintiffs' case or all of the entire case; then take up each exhibit and see which ones are read and the ones that are not, and take the objections up and pass upon them at that time. It might be well to do that at the conclusion of all of the evidence unless there is some-

784 thing that would come up in the plaintiffs' case which would raise a question. That is, we can begin at the first of these exhibits that are offered, and I will pass on them all at once.

Mr. Burns: It has been called to my attention that we failed yesterday to offer the minutes of The Indianapolis Gas Company of May 12, 1936, Exhibits 123-A, 123-B and 123-C, and we now offer those minutes.

The Court: Those are the minutes that have the copies of the letters?

Mr. Burns: Yes.

The Court: Is there any objection?

Mr. Thompson: None whatever.

The Court: Let them be read.

The said pages of minutes, so offered, respectively marked for identification PLAINTIFFS' EXHIBITS NOS. 123-A, 123-B AND 123-C, were admitted and read in evidence.

Mr. Burns: I would like to call Mr. Yule back.

The Court: Come around, Mr. Yule.

785 WILLIAM J. YULE, a witness on behalf of the Plaintiffs, being recalled, testified as follows:

Mr. Burns: Now, without encumbering the record, I want to ask Mr. Yule again about the telephone conversation of which he overheard Mr. Brown's end of the conversation, here. As I understand it, that has been brought out with some idea of charging the Chase Bank with knowledge and it seems to me Mr. Yule can testify as to what he heard as limiting what possible knowledge could have come to the Chase Bank through that conversation.

Now, I think, as your Honor said, it is clearly hearsay that Mr. Brown was talking to the Chase Bank because Mr. Yule doesn't know that and if—

The Court: There is no evidence as to whom he was talking. Did he talk to Mr. Beardslee?

Mr. Burns: Oh, no, no, no. Mr. Yule said, I think in response to Mr. Higgins' question, that he called up somebody at the Chase Bank.

The Court: I don't think it would be competent. Mr. Brown was on the stand and he remembered nothing about it.

786 Mr. Burns: I thought, if it is relied upon as giving any knowledge to the Chase Bank, it seems to me—

The Court: Well, of course, it would not be notice unless there is some evidence of what took place. There is no evidence of that at all.

Mr. Burns: That is all, Mr. Yule.

Witness excused.

The Court: If the defendant offers any evidence as to that conversation, then perhaps, in rebuttal, it might be competent to call this witness to show what he heard, but in the absence of it, I would say that the mere fact that a telephone conversation took place and no evidence of what the contents of the conversation—

Offer to Prove.

Mr. Burns: Well, we offer to prove by Mr. Yule that the only information which Mr. Brown conveyed over the phone was that a check had been wired or money
787 had been wired by The Indiana National Bank to the Chase Bank to pay the coupons, and he waited on the phone to see whether the Chase Bank had received the check, and that there was no conversation, and nothing that Mr. Brown said, that related either to the dispute between The Indianapolis Gas Company and the City about the lease or to the circumstances under which the money had been paid to the Indianapolis Gas.

The Court: That is your offer?

Mr. Burns: That is our offer.

The plaintiff rests both cases.

And the plaintiffs here rested.

* * * * * *

790 Indianapolis, Indiana,
Friday, March 3, 1939,
One-thirty O'clock P. M.

The Court met pursuant to adjournment and the trial of the cause was resumed as follows:

Whereupon, the defendants, City of Indianapolis and the individual defendants who are members of the Board of Trustees and Board of Directors for Utilities of the City of Indianapolis, to maintain the issues on their behalf, offered and introduced the following evidence, to-wit:

Mr. Thompson: Is it your Honor's desire that before we proceed with the introduction of the testimony on be-

half of the City that I should state my objections to these exhibits?

791 The Court: I should rather take them up separately, and then make a separate objection, or groups, and I will pass on them then.

Mr. Thompson: You would rather do that at the conclusion of the case?

The Court: I think I would rather, if there is no objection. If it becomes necessary to pass upon any one before the conclusion of it, why, we will take it up.

WILLIAM J. YULE, a witness being recalled on behalf of the City of Indianapolis and certain individual defendants, testified as follows:

Direct Examination by Mr. Thompson.

Q. You have testified before in this case?

A. Yes, sir.

Q. And are Secretary of The Indianapolis Gas Company?

A. Yes, sir.

Q. I hand you an instrument which has been identified as City's Exhibit No. 9, rejection of an assignment of lease, and I will ask you to state to the Court whether that instrument, or a copy of it, was served

792 on The Indianapolis Gas Company on September 9, 1935.

A. Well, I think so.

Q. It was handed to you personally, was it not, by Mr. Rabb?

A. Yes.

Mr. Thompson: That is all.

The Defendants, City of Indianapolis and the individual defendants who are members of the Board of Trustees and Directors of the Department of Utilities of the City of Indianapolis, offer in evidence an instrument identified as City's Exhibit No. 1, which is a certificate by John M. Layton, Clerk of the City of Indianapolis, authenticated by the Judge of the Circuit Court.

The Court: Is that the exhibit you just had?

Mr. Thompson: No, your Honor.

Mr. Burns: What is the exhibit number?

Mr. Thompson: No. 1.

The Court: Any objection?

Mr. Burns: Yes, we object to it. It is wholly irrelevant and immaterial and not binding in any way on
793 the Trustee or the bondholders.

The Court: What is the substance of the certificate?

(Mr. Thompson here read City's Exhibit No. 1.)

Mr. Burns: I object on the further ground that the certificate contains many conclusions as to the effect of supposed legislation and so forth, and is not a certificate of fact.

Mr. Higgins: The Indianapolis Gas Company also objects to the admission of this evidence on the same grounds as already stated.

The Court: Objection overruled.

The said document, so offered, marked for identification CITY'S EXHIBIT NO. 1, was admitted and read in evidence.

Mr. Thompson: The same defendants offer in evidence Exhibit No. 2, which is a similar certificate by Martin H. Walpole, Executive Secretary and Clerk of the Department of Public Works of the City of Indianapolis, and showing that no such action has been taken by the Board of Public Works.

794 The Court: The same objection?

Mr. Burns: The same objection.

The Court: Show the same ruling and read in evidence.

The said document, so offered, marked for identification CITY'S EXHIBIT NO. 2, was admitted and read in evidence.

Mr. Thompson: The same defendants offer in evidence City's Exhibit No. 3, which is a certificate from Charles S. Rauh, Secretary of the Board of Trustees, to the same effect.

(Mr. Thompson here read City's Exhibit No. 3.)

The Court: These statements as to the sale of bonds or securities were made before the taking of the property owner. Are there exhibits in evidence of any action of the City?

Mr. Thompson: There is a deposition that has not been read to your Honor.

The Court: That was after?

Mr. Thompson: That was after the sale of the Utility District bonds, before the resale of them and before
795 the City had taken the property.

The Court: I see. Let that be read in evidence, with the same objection.

Mr. Elam: We object further that the evidence already admitted shows the certificate is not true. The evidence before your Honor shows that the Department did authorize the sale of revenue bonds and that the City did authorize advertisements, and those advertisements constituted the representations.

The man is merely certifying to his conclusion as to what the written instruments mean that are before the Court, and for the Court to interpret, and it is not for the Secretary to say what the instruments mean.

The Court: All right, let it be read.

The said document, so offered, marked for identification CITY'S EXHIBIT NO. 3, was admitted and read in evidence.

Mr. Thompson: The same defendants offer in evidence City's Exhibit 4, which is a similar signed certificate from Roy Sahm, Secretary of the Board of Directors for
796 the Utilities Department.

The Court: The same objection and ruling. Let the record show that both The Indianapolis Gas Company and the plaintiffs make the same objection.

The said document, so offered, marked for identification CITY'S EXHIBIT NO. 4, was admitted and read in evidence.

Mr. Thompson: The same defendants offer in evidence City's Exhibit No. 6-A, which is a copy of the interrogatories propounded by the defendant, City of Indianapolis, and the individual defendants, to the plaintiff.

The Court: And the answers?

Mr. Thompson: The interrogatories only.

The Court: Any objection to these?

Mr. Higgins: Interrogatories of what?

Mr. Thompson: Interrogatories of the plaintiff in No. 1844.

The Court: Were these the interrogatories to which the objection was overruled just a few weeks ago?

Mr. Thompson: Yes, your Honor.

797 The said document, so offered, marked for identification CITY'S EXHIBIT NO. 6-A, was admitted and read in evidence.

Mr. Thompson: Now, I am going to offer 6-B, the answers. The same defendants offer as City's Exhibit No. 6-B all of the answers to the interrogatories identified as Exhibit 6-A, which have not already been introduced in evidence by the plaintiffs. I say that, your Honor, because certain of these letters have already gone in.

The Court: I am not certain. The ruling has been withheld on some of them; for instance, 12.

Mr. Burns: They substantially amount to a duplication between the letters shown in the answers to interrogatories propounded to the plaintiff and the answers on those propounded to the Indianapolis Gas; but there are some letters—

The Court: I say there should be no duplication. Let 6-A and 6-B be read in evidence.

The said document, so offered, marked for identification CITY'S EXHIBIT 6-B, was admitted and read in evidence.

798 Mr. Thompson: Now, as 5-A, the same defendants offer in evidence the interrogatories propounded to The Indianapolis Gas Company and also Exhibit 5-B, the answers of The Indianapolis Gas Company to the interrogatories, except I do not offer any portion of the answers which have already been offered in evidence.

The Court: Any objection?

Mr. Higgins: Not at all.

The Court: Let them be read.

The said documents, so offered, respectively marked for identification CITY'S EXHIBITS 5-A and 5-B, were admitted and read in evidence.

Mr. Thompson: The same defendants now offer in evidence the minutes of a special meeting of the Board of Directors of The Indianapolis Gas Company held at Indianapolis, Indiana, on September 26, 1935, identified as City's Exhibit 7-A.

The Court: Any objection, Mr. Higgins?

799 Mr. Higgins: May I see that just a second?

Mr. Thompson: I have a copy of this I am offering that I can give Mr. Burns.

Mr. Burns: We have no objection to these minutes to show the action was taken by the Board of Directors for the Utilities, but we do object to them as being any evidence of the facts recited therein.

Mr. Thompson: This is The Indianapolis Gas Company.

Mr. Burns: It doesn't make any difference.

Mr. Higgins: Objected to as legal conclusions therein set out.

The Court: Of course, I think it is competent, as I stated yesterday, I believe it was, with reference to this contract, upon the theory that the defendant was paying under this contract and under the lease. That is compe-

tent for that purpose. Just the effect, I don't know, but I think it is only fair to show why the City is making those payments.

The said document, so offered, marked for identification CITY'S EXHIBIT NO. 7-A, was admitted and read in evidence.

800 Mr. Thompson: The same defendants offer in evidence City's Exhibit 7-B, being a photostatic copy of the minutes of an adjourned meeting of the Board of Directors of The Indianapolis Gas Company held in Indianapolis, Indiana on September 30, 1935.

The Court: Any objection?

Mr. Higgins: No objection.

The Court: Let that be read.

The said document, so offered, marked for identification CITY'S EXHIBIT NO. 7-B, was admitted and read in evidence.

Mr. Thompson: The same defendants offer in evidence—

Mr. Burns: I make the same objection, that we object to the minutes insofar as they are offered to prove any facts recited in them. I make no objection as to what action took place at the directors' meeting of the company.

Mr. Higgins: We understand that they are being admitted on that phase.

Mr. Thompson: I am offering it generally for 801 whatever it proves.

Mr. Burns: Do I understand the Court overruled my objection?

The Court: I have not passed on this one.

Mr. Burns: That is incompetent to prove the facts recited.

The Court: I am admitting it for whatever it is worth. As I say, the action by The Indianapolis Gas Company and the City certainly is evidence tending to show why the City made those payments. Before this, as I understand the record, the City had already served notice that it would not be bound by the lease; then, of course, this evidence will show—be competent to show why.

Mr. Burns: What I have in mind is this: in almost all resolutions there are a lot of whereas clauses which set forth a lot of reasonings why the action is taken, and this recitation seems to me clearly is not competent evidence of the facts stated in there.

The Court: I am not prepared to say on that.

Mr. Burns: We want to have our objection to each of

these exhibits insofar as they are offered, for that
802 purpose.

The Court: Let the record show the objection overruled.

Mr. Thompson: The same defendants offer in evidence, as City's Exhibit 7-C, a photostatic copy of the minutes of the special meeting of the Board of Directors of The Indianapolis Gas Company held in Indianapolis, Indiana on November 6, 1935.

The Court: What are the contents of those?

Mr. Thompson: They contain a number of things. They contain correspondence between the City of Indianapolis and The Indianapolis Gas Company, and also the minutes which contain the authorization for the employment of the Baker firm, the exchange of correspondence between the Baker firm and The Indianapolis Gas Company. I am not sure, it may be that letter has already been introduced by Mr. Burns. If it has, I shall not offer it now.

The Court: Any objection?

Mr. Burns: We make the same objection.

The said document, so offered, marked for identifi-
803 cation CITY'S EXHIBIT NO. 7-C, was admitted and read in evidence.

Mr. Thompson: The same defendants offer in evidence the City's Exhibit 7-D, a photostatic copy of the minutes of a called meeting of the Board of Directors of The Indianapolis Gas Company, held in Indianapolis, Indiana on March 4, 1936.

The said document, so offered, marked for identification CITY'S EXHIBIT NO. 7-D, was admitted and read in evidence.

Mr. Thompson: The same defendants offer in evidence, as City's Exhibit 7-E, a photostatic copy of the minutes of a called meeting of the Board of Directors of The Indianapolis Gas Company, held in Indianapolis, Indiana on April 3, 1936.

And the next one is 7-F, which is minutes of a meeting of the Board of Directors of The Indianapolis Gas Company of May 12, '36, but I am not offering that because an offer of the same minutes has already been made by Mr. Burns.

The Court: What are those exhibits?

Mr. Burns: 123-A, B and C.

804 The Court: If the record does not show those exhibits are read in evidence, let it be shown at this time, 123-A, B and C.

The said document, so offered, marked for identification CITY'S EXHIBIT NO. 7-E, was admitted in evidence.

Mr. Thompson: The same defendants now offer in evidence City Exhibit 7-G, the minutes of a called meeting of the Board of Directors of The Indianapolis Gas Company held on June 3rd, 1936.

The Court: Any objections?

Mr. Higgins: Show all those same—

Mr. Thompson: Yes.

Mr. Burns: We object to that on the same ground; and I should like to state this general objection to all these exhibits, and that is that any action taken by The Indianapolis Gas Company or by the City of Indianapolis could in no way affect or prejudice the rights of the bondholders and Trustee. This is the same question we raised before, and we want all these minutes of The Indianapolis Gas Company to be received subject to that same objection.

The Court: The last may be read in evidence.

The said document, so offered, marked for identification CITY'S EXHIBIT 7-G, was admitted and read in evidence.

Mr. Thompson: The same defendants now offer in evidence an instrument identified as City's Exhibit No. 8, which is a general ordinance of the City of Indianapolis, being No. 82, for the year 1935, and the substance of which is a ratification by the City of Indianapolis, through its Common Council, of the action taken by the Board of Directors for the Utilities of the City of Indianapolis, in taking over the property of the Citizens Gas Company, and in rejecting the assignment of The Indianapolis Gas Company lease.

Mr. Burns: We object to that as not binding on the Trustee or the bondholders; could not affect the obligations of the City after the City had accepted the property subject to all obligations of the Citizens Gas Company.

Mr. Higgins: And The Indianapolis Gas Company also objects.

Mr. Ewbank: What is the date of this ordinance?

Mr. Thompson: October 21, 1935.

Mr. Burns: The same objection.

Mr. Higgins: The same objection. It cannot affect the rights of The Indianapolis Gas Company.

The Court: Objection overruled.

The said document, so offered, marked for identification

CITY'S EXHIBIT NO. 8, was admitted and read in evidence.

Mr. Thompson: The same defendants now offer in evidence an instrument identified as City's Exhibit No. 9, which is a rejection of the assignment of the lease and refusal to assume, executed on the 9th day of September, 1935, signed by the Board of Directors of the Utilities for the City of Indianapolis, by H. L. Dithmer, its President.

The Court: The same objection?

Mr. Burns: The same objection. Any resolution of rejection could not possibly affect the bondholders or Trustee.

807 The Court: Of course, that is true if it is a valid lease, but I think it is competent to show what action was taken, so the Court will have all before it. Objection overruled.

The said document, so offered, marked for identification CITY'S EXHIBIT NO. 9, was admitted and read in evidence.

Mr. Thompson: The same defendants now offer in evidence an instrument identified as City's Exhibit 10, which is twelve sheets, being photostatic copies of the record of the Utility District of the City of Indianapolis, showing entries made in connection with payments and the amounts, quarterly, of the bond interest and stock interest, Federal taxes and other items.

The Court: Is that the same that was offered yesterday?

Mr. Burns: We object to this as a purely self-serving declaration; simply entries made in the Utility District records, showing how it charged the items that have been paid to The Indianapolis Gas Company, or put in 808 escrow, being purely a self-serving declaration.

The Court: Are those the same amounts stipulated yesterday that were paid?

Mr. Thompson: Yes, your Honor.

Mr. Burns: These include all charges for all money that has been put in escrow?

Mr. Thompson: Yes, but they begin here, December 31, '35, an amount equal to the stock interest. The purpose of this, your Honor, is to show the kind of entries made in our books at the time those payments were made.

The Court: Has it been stipulated—I have not read the stipulation at all—the amount that has been placed in escrow and the times that it was placed, and the amount there at this time? Is that in your stipulation?

Mr. Burns: The stipulation covers what has been paid to escrow. This is simply a self-serving declaration showing what they put on their books.

The Court: I am not exactly certain that is competent. It simply goes to confirm the position of the City that it acted in accordance with its understanding of the agreement made back in September, 1935. I think that would be all the purpose it would serve.

Mr. Thompson: That is the purpose of our offering it. We show we did enter into certain agreements between The Indianapolis Gas Company and the City of Indianapolis in respect to certain payments to be made for the use and occupancy of this property. Now it is our claim that all of these payments were made in accordance with the agreement; and we are offering to show the entries that were made on our books currently, which show our interpretation of that agreement; and it seems to me—

The Court: Any objection on the part of The Indianapolis Gas Company?

Mr. Higgins: Purely as a self-serving declaration, whatever they put on their books. It is already stipulated when they paid the amounts.

The Court: The contracts are in evidence?

Mr. Higgins: They are all in evidence.

The Court: This is in the nature of a self-serving declaration, yet it might go to further carry out the position of the City as to how it understood the agreement. I don't think it will hurt anyone. Let it go in for that purpose and that only.

The said documents, so offered, collectively marked for identification CITY'S EXHIBIT NO. 10, were admitted and read in evidence.

Mr. Thompson: The same defendants offer in evidence an instrument identified as City's Exhibit No. 11, which is a transcript of the Department of Public Utilities of Indianapolis, Indiana in connection with the issuance and sale of eight million dollars of Utility District revenue bonds. These contain the resolutions authorizing them, the advertising and the entire transaction.

The Court: That was made at the time of taking over the property or just prior thereto?

Mr. Thompson: Prior to it, your Honor. The bids were opened on May 28 and the bid was awarded to Halsey Stuart Company and Otis Company on the 29th of May, and the property was not taken over until September 9th following.

811 The Court: That was for the purpose of raising money to take the property over?

Mr. Thompson: That is right.

Mr. Ewbank: I didn't get what that was.

Mr. Thompson: It is a transcript of all the proceedings had by the City of Indianapolis, through its Department of Utilities, in connection with offering for sale and the sale of the eight million dollars of Indianapolis Utility District revenue bonds.

The Court: Any objection?

Mr. Burns: I should like to have the record show, in connection with this exhibit, we do not object to it except as it may be offered as evidence of—independent evidence of facts recited therein; but we should like to have the record show that this is an exact copy of Exhibit 6, which was identified but not offered, in connection with the deposition of Mr. Simond, in Chicago; and Mr. Thompson agreed there to save the trouble—all counsel for defendants agreed there, to save the trouble of making a copy to attach to the deposition, that we would produce it here.

May I see it?

812 Mr. Thompson: Certainly.

Mr. Burns: And that it could be—

The Court: It is not necessary to be read in connection with the deposition.

Mr. Burns: It is agreeable to have it show this is an accurate copy of the same document?

Mr. Thompson: Yes, sir.

The Court: Let the exhibit be read.

Mr. Burns: Mr. Rabb says it is a duplicate original.

The said document, so offered, marked for identification CITY'S EXHIBIT NO. 11, was admitted and read in evidence.

Mr. Thompson: The same defendants now offer in evidence, as City's Exhibit No. 12, Pages 178 to 236, both inclusive, of the minute book of the Board of Directors for the Utilities of the City of Indianapolis, in which there is set forth the minutes of a meeting of that Board on September 9, 1935, the day when the City took over the property of the Citizens Gas Company.

The Court: Have you had opportunity to examine it?

813 Mr. Burns: I have had opportunity, generally, to go through those minute books at various times. We object to it, first, insofar as it is offered as any evidence of the facts recited therein.

The Court: I think you can have that objection to all of these, as far as the Court is concerned. Of course, we have to determine what the legal effect is.

Mr. Burns: We would also object insofar as it is offered to establish the so-called rejection of the lease. We believe the evidence shows the lease was accepted and the property was accepted.

Mr. Higgins: We have not had opportunity to examine it. May we have that right?

The Court: I will reserve the ruling on this last exhibit, and he can examine it.

Mr. Thompson: The same defendants offer in evidence a letter dated September 10, 1935, identified as City's Exhibit No. 13, from the firm of Smith, Hornbrook, Remster & Smith to Thompson, Rabb & Stevenson, acknowledging the physical delivery of the resolution for the
814 rejection of the assignment of the lease.

The Court: Any objection?

Mr. Burns: Only the same objection we have to the whole proceeding, so far as this rejection is incompetent. We have no particular objection to this exhibit. Perhaps it would save time if we objected to this whole line of evidence, so far as it relates to the rejection of the lease, rather than make an objection to every separate document.

(CITY'S EXHIBIT NO. 13 admitted and read.)

STIPULATION.

Mr. Thompson: Will it be agreed that, at the time Exhibit No. 13 was written on September 10, 1935, Mr. Henry H. Hornbrook was a member of the firm of Smith, Remster, Hornbrook & Smith, which signed this letter, and that at that time he was attorney for the Citizens Gas Company and a member of its Board of Directors and of the Executive Committee?

Mr. Burns: We will so agree.

The Court: Let the record show that that is stipulated.

Mr. Thompson: Your Honor, there has been of-
815 fered in evidence here, as Plaintiffs' Exhibit No. 1, certain portions of a stipulation, signed by counsel for all of the parties to this cause.

The defendants, City of Indianapolis and the individual defendants who are members of its Board of Direc-

tors and Board of Trustees for Utilities, now offer in evidence all the remaining portions of the stipulation, identified as Exhibit No. 1, which were not offered by the plaintiffs, and all of the exhibits, attached to that stipulation, which have not already been offered.

The Court: I would like to take that up at the time we take up the offers of the plaintiff, so that we can go through the stipulation and see what they are.

Mr. Burns: And take up the objections which we wish to make at that time?

The Court: That is right, and the objections which I understand Mr. Thompson wishes to make to the offer of some of the exhibits that were offered by the plaintiffs.

Mr. Thompson: Will you be sworn, Mr. Higgins?

816 WILLIAM R. HIGGINS, a witness called on behalf of the Defendant, City of Indianapolis, the individual defendants who are members of the Board of Trustees for Utilities of the City of Indianapolis, and the individual defendants who are members of the Board of Directors for Utilities of the City of Indianapolis, being first duly sworn, testified as follows:

Direct Examination by Mr. Thompson.

Q. You may state your name to the Court.

A. William R. Higgins.

Q. You reside in Indianapolis?

A. I do.

Q. You are, and for many years have been, a Director of The Indianapolis Gas Company?

A. For some years.

Q. How long does your service as a Director of that company go, Mr. Higgins?

A. Perhaps ten years—approximately.

Q. You have served continuously during that time?

817 A. Yes.

Q. Are you also an attorney and a member of the Bar of this Court?

A. Yes.

Q. Do you represent, together with Judge Ewbank, The Indianapolis Gas Company in this controversy?

A. I do.

* * * * * *

824 BRODEHURST ELSEY, a witness called on behalf of the Defendant, City of Indianapolis, the individual defendants who are members of the Board of Trustees for Utilities of the City of Indianapolis, and the individual defendants who are members of the Board of Directors for Utilities of the City of Indianapolis, being first duly sworn, testified as follows:

Direct Examination by Mr. Thompson.

Q. You may state your name.
A. Brodehurst Elsey.
Q. Where do you reside, Mr. Elsey?
A. 1335 Central Avenue, Indianapolis.
Q. What is your occupation?
A. Secretary-Treasurer of the Indianapolis Glove Company.
Q. How long have you been connected with the Indianapolis Glove Company?
A. Thirty-four years.
Q. Are you a member of the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis?
825 A. Yes, sir.
Q. How long have you been connected with that Board?
A. Since 1931.
Q. Are you also Vice Chairman of the Board?
A. Yes, sir.
Q. Were you at one time Treasurer of the Board?
A. Yes, sir.
Q. For how long a period were you Treasurer?
A. From 1931 until the last election.
Q. That was sometime last year?
A. Yes, sir.
Q. Who is the Chairman of the Board and who is the Secretary?
A. Mr. Henry L. Dithmer is Chairman and Mr. Roy Sahm is Secretary.
Q. Have you given a substantial portion of your time and attention to the work of the Board of Directors and are you familiar with the action taken by it in the several matters involving the transfer to the City of Indianapolis of the property formerly owned by the Citizens Gas Company?

A. Yes, sir.

826 Q. I have shown you, before you came into the court room, Mr. Elsey, an instrument identified as Exhibit "B", attached to the City's answer and counterclaim in this case, which is a circular issued by Otis & Company—no, Halsey Stuart & Company in connection with the resale of Utility District Bonds. You are familiar with that circular?

A. Yes, sir.

Q. I wish you would tell the Court whether or not the Board of Directors for Utilities of the Department of Utilities had anything whatever to do with the issuance or circulation of that circular.

A. No.

Mr. Burns: I object to that. It calls for a conclusion, very obviously.

The Court: Overruled.

Q. You say you had nothing to do with it?

A. No, sir.

Q. What instructions, if any, did you give to your attorneys in connection with the resale of bonds purchased by the City from Otis & Company and Halsey Stuart & Company?

827 A. We had no interest in the resale of the bonds.

Q. What is the fact as to whether you had a conversation in my office—

Mr. Thompson: Withdraw the question.

Q. These Utility District bonds were offered for sale May 28, 1935? Is that correct?

A. That is my recollection, yes.

Q. And the joint bid of Otis & Company and Halsey Stuart & Company was accepted on the next day?

A. Yes, sir.

Q. You know Mr. R. E. Simond, President of Halsey Stuart & Company?

A. I met him once.

Q. Yes, and you also met Mr. Cyrus Eaton of Otis & Company?

A. Yes, sir.

Q. Did you meet those two gentlemen in my office after the Utility District advertised the sale of its revenue bonds and before the bond offering was made with these two houses?

A. Yes, sir.

828 Q. Was I also present at that meeting?

A. Yes, sir.

Q. I wish you would state what, if anything, was said at that meeting in connection with the request, by these two bond houses, that the Utility District approve a circular which they proposed to issue.

A. We said that we would not approve it.

Q. Well, did they ask you to approve it?

A. Yes, sir.

Q. And you said—

The Court: I understand they were present at this conference.

The Witness: Yes, sir.

Q. And you said that the Utility District would not approve it and would not have anything to do with the resale of the revenue bonds?

A. That is what we told them.

Q. Did I say anything in that conversation in connection with the statutory authority of the City in that matter?

A. Will you ask that question again?

829 Q. I want to know whether, in that conversation, where you and Mr. Simond and Mr. Eaton were present in my office, I said anything as to whether the City of Indianapolis had any statutory right to approve this circular for the resale of the bonds.

A. You said it did not have.

The Court: As I understand, this circular was prepared by Halsey Stuart?

Mr. Thompson: That is right.

Mr. Burns: The deposition shows, if the Court please, that it was prepared by Halsey Stuart and approved by Thompson, Rabb & Stevenson and marked "Approved" by Mr. Rabb.

Mr. Thompson: I will tell you what it shows.

The Court: Well, I can go into it.

Mr. Thompson: Mr. Simond admits, in his deposition, on cross examination, the conversation that I have just related to Mr. Elsey, and admits that he forwarded this to our firm as attorneys and did not even address us as attorneys for the Utility District because I had told him that the City of Indianapolis would not approve the bond circular.

830 Now, that is what the deposition shows.

The Court: Does it have an approval of Mr. Rabb on it?

Mr. Thompson: There is written, in pencil, on a bond circular, the word "Approved, T. R. S."

The Court: "T. R. S."?

Mr. Thompson: "T. R. & S."—Thompson, Rabb & Stevenson—an abbreviation.

Mr. Burns: "By A. L. Rabb"?

Mr. Thompson: I think that is probably correct. I said that the initials were the initials of our firm.

Q. Did the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis, at any time, formally or informally, authorize any representation or statement to be made by anyone in your behalf or that of the City in connection with the resale of such revenue bonds by Otis & Company or Halsey Stuart & Company?

A. No, sir.

Mr. Burns: I object, if the Court please. If the
831 inquiry is being made as to statements that were made by the Utility District, in connection with the offering of these bonds, to Otis & Company and Halsey Stuart & Company, certainly they were entitled to rely on those statements in marketing the bonds, statements that had been made to them, and, when they so made these statements,—the Utility District made these statements to the purchasers, without doubt, about the property and so forth that they were describing as a basis for the issuance of these bonds—they were necessarily making representations to those purchasers that those purchasers were authorized to use in the resale of the same bonds.

The Court: Well, there are so many exhibits that I don't know—

Mr. Burns: I appreciate that, but this question obviously calls for the witness's conclusion. It is about a large mass of material rather than any statement of fact, at all.

The Court: I think he may answer the question and it can be considered along with all the other evidence. Go ahead.

832 Q. In connection with the resale of the Utility Revenue Bonds by Otis & Company and Halsey Stuart, I want to ask you specifically whether the Board made, or authorized anyone in its behalf to make, either formally or informally—I am speaking now of the authorization—anyone of the following representations to any person:

First: That upon the acquisition of the Citizens Gas Company property, the City of Indianapolis would con-

trol the gas business in Indianapolis, supplying the entire domestic and commercial gas requirements of the City of Indianapolis and its suburbs;

Second: That the Citizens Gas Company held a lease for ninety-nine years, covering the property and business of The Indianapolis Gas Company, thereby giving it control of the entire gas business of the City of Indianapolis and vicinity;

Third: That the property, covered by said lease from The Indianapolis Gas Company, had a depreciated physical value of $9,181,960 and a reproduction value of $12,734,090 as against which the capital value of said company's outstanding first consolidated mortgage five per cent gold bonds was $6,881,000 and the capital
833 value of its outstanding stock was $2,000,000;

Fourth: That, upon the acquisition of the entire property operated by the Citizens Gas Company, the City of Indianapolis would cause the same to be continuously operated as a gas system in an efficient manner and at a reasonable cost and would use all reasonable efforts to resist competition and maintain the exclusive right to serve gas in the City of Indianapolis and in Marion County and in the towns therein?

A. No, sir.

Q. Did your Board—

Mr. Burns: I would like to make the same objection to that question.

The Court: All right. Same ruling.

Q. Did your board cause an appraisal to be made by an independent engineer, as of January 1, 1935, of the cost of reproduction new and the depreciated value of the property of the Citizens Gas and Indianapolis Gas, all as referred to in the circular issued by Otis & Company and Halsey Stuart & Company?

A. No, sir.

834 Mr. Burns: Same objection.

The Court: Do you have that circular? I haven't seen it.

Mr. Thompson: I can give it to your Honor.

Mr. Burns: I can give you a copy (handing copy to the Court).

Q. Do you remember, Mr. Elsey, that two opinions were given in respect of the Utility District bonds that were sold by the Utility District?

A. Yes, sir.

Q. One of those was given by the firm of Matson, Ross, McCord & Clifford?
A. Yes, sir.
Q. Is that correct?
A. Yes, sir.
Q. And whom did that firm represent?
A. It represented Otis & Company.
Q. And another was given by our firm?
A. Yes, sir.
Q. Is that correct?
A. Yes, sir.
835 The Court: By whom?
Mr. Thompson: By our firm.
Q. Representing the Utility District?
A. Yes, sir.

* * * * * *

837 Q. Mr. Elsey, will you state to the Court whether, at any time, the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis
838 authorized your counsel, Thompson, Rabb & Stevenson, in connection with the sale of Utility Revenue Bonds, the sale of which you have referred to, to give any opinion on the non-taxability of the income of those bonds for Federal income tax purposes?

Mr. Burns: I object, if the Court please. It asks, obviously, for a conclusion of law as to what authority was given.

The Court: Overruled.

A. We felt—

The Court: Just answer the question.

A. No, we never authorized it.

Q. Mr. Elsey, was your attention and that of the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis directed to a mortgage, which had been executed by the Citizens Gas Company on July 1, 1912, under which there were outstanding, on September 9, 1935, $2,745,000 par value of first mortgage bonds, issued by the Citizens Gas Company?

A. Yes, sir.

839 Q. Was the attention of your Board also directed to the provisions of Subdivision 22(i) of the franchise contract between the City of Indianapolis and Alfred F. Potts, et al., subsequently assigned to the Citizens Gas Company, which reads as follows:

"If the plant and system of mains of said company shall not have became the property of said city by the

cancellation of the certificate of subscribers and conveyance of such property to such city by the Board of Directors and Trustees of said Company on or before the expiration of the aforesaid period of said franchise, then said city by and through its Board of Public Works, upon the expiration of said franchise period shall have the right to pay any balance remaining due said certificate holders and the plant and property of said company shall be conveyed to said city as above provided to be owned and operated or owned and leased by it; or at the option of said city the Board of Directors of the corporate successor of the second parties shall, as heretofore provided, upon the conclusion of said franchise period, mortgage its plant and with the proceeds thereof or with
840 the mortgage notes issued in proper amounts pay off and discharge the amount due certificate holders and thereupon convey said plant to said city subject to such obligation and other legal obligations against said company."

I am asking you whether the Board's attention was directed to that.

A. It was.

Q. And did you seek the advice of your counsel as to whether the mortgage, executed by the Citizens Gas Company on July 1, 1912, to which I have referred, on which there were outstanding these bonds, was a valid mortgage or otherwise?

A. You said it was not—

Q. Yes.

A. (Continued)—but the holders of the mortgage had an equitable interest in the property.

Q. An equitable lien on the property?

A. An equitable lien because the money had been used for the benefit of the Citizens Gas Company.

Q. Now, the Board of Directors furnished the money—they issued the advertisement that is contained in
841 this stipulation? You have seen that advertisement about taking up these bonds?

A. Yes.

Q. Now, I want you to tell the Court whether the Board of Directors, in making the payment of these bonds or, rather, in paying the amount of the bonds, acted in pursuance of the advice of your counsel and whether, without that advice, you would have made that payment?

A. We acted on our counsel's advice.

Q. Well, without that advice, would you have made that payment?

A. We would not have done it.

Q. As a practical matter, did the existence of this mortgage prevent the Citizens Gas Company from executing a mortgage upon its property to secure the money with which to pay off the precedent charges provided for in the franchise contract?

A. Our Board deemed it so.

Q. Yes. Now, following the receipt of this advice, to which I have just referred or you have just referred to, did the Board of Directors adopt a resolution, Exhibit 842 48 to the Stipulation in this case, and publish two notices, Exhibits 49 and 50 to the stipulation? I showed you those in my office.

A. Yes, sir.

Q. I will ask you to state to the Court whether the Board of Directors for Utilities of the Department of Utilities of the City, at any time, recognized this mortgage as a valid obligation.

Mr. Burns: Oh, I object.

The Court: Objection sustained.

Mr. Thompson: Will you give me the Stipulation, please, Mr. Rabb? (Procuring Stipulation from Mr. Rabb.)

Q. I want to call your attention next, Mr. Elsey, to Subdivision 16 (a):

"The City caused the sum of $2,500,000 to be paid on or about July 1, 1935 for the retirement of all the Citizens Gas common stock, in full satisfaction of the common stockholders' interest in the property and assets of said company. Said $2,500,000 included $2,000,000 as the par value of said common stock and $500,000 as dividends 843 on said common stock at the rate of 10% per annum from January 1, 1933 to June 30, 1935. The City also caused the sum of $1,050,000 to be paid on or about September 1, 1935, for the redemption of all the Citizens Gas preferred stock, in full satisfaction of the preferred stockholders' interest in the property and assets of said company. Said $1,050,000 included $1,000,000 as the par value of said preferred stock and $50,000 as the premium of 5% on the redemption thereof required by the terms of said preferred stock. Citizens Gas paid all the dividends on said preferred stock up to the time of said redemption. All of said common stock was retired and all of said preferred stock was redeemed."

Now, I ask you, Mr. Elsey, whether, before the payments were made by the City of Indianapolis in accordance with the statements contained in Subdivision 16(a) of this Stipulation, your Board sought an opinion from your counsel as to whether your Board was legally bound to make those payments.

A. They did.

Mr. Burns: I object to that as wholly immaterial to any issue in this case.

844 The Court: Overruled. It goes to the fact of why those payments were made.

A. They did.

• • • • • •

848 Q. You had taken advice from us?

A. Yes, sir.

Q. Was that advice oral or in writing?

A. I think it was oral.

Q. But what was the nature? What was the charagted of that advice? What was told you?

A. Well, we were to take over the property and we couldn't secure moneys to carry on the program without we discharge the obligations as provided for in the original covenant.

Q. Weren't you advised, in addition, Mr. Elsey, that it had been decided, in the Todd case, that, before the City of Indianapolis could take this property over, it had to discharge the precedent obligations to its stockholders?

A. Yes, sir.

Q. The stockholders of the Citizens Gas Company?

A. Yes, sir.

849 Q. Evidence has been introduced in this case of certain payments made or authorized to be made by the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis to or on behalf of The Indianapolis Gas Company subsequent to September 9, 1935, and, in this connection, I ask you whether you are familiar with a resolution for the temporary use of property of The Indianapolis Gas Company, adopted September 9, 1935, by the Board of Directors for Utilities, which has been introduced in evidence here, and also certain correspondence exchanged between The Indianapolis Gas Company and your attorneys in connection with the payments so made?

A. Yes, sir.

Q. You may state whether the Board of Directors for

Utilities of the Department of Utilities would have authorized any such payments to be made except for the adoption of such resolution and the exchange of such correspondence?

A. They would not.

Q. Has the Board of Directors ever made—and
850 by that I mean the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis—ever made or authorized to be made, any payments on account of interest or dividends or for any other purpose under the terms of said lease of September 30, 1913?

A. No, sir.

Q. Has the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis ever recognized in any way, formally or informally, the validity of said lease of September 30, 1913, between the Citizens Gas Company and The Indianapolis Gas Company or its enforcibility against the City of Indianapolis?

Mr. Burns: I object.

A. No, sir.

Mr. Burns: It calls for a conclusion.

The Court: Let the answer go out. Objection sustained.

Q. Before the transfer to the City, as Successor
851 Trustee, did the Board give any instructions to its attorneys in connection with said lease of September 30, 1913?

First, I ask you whether you gave any instructions.

A. Yes.

Q. What instructions did you give?

Mr. Burns: I object to that as not binding on the Bondholders or the Trustee.

The Court: Overruled, if that is the only objection.

A. We gave as our reason that we were not bound by the lease.

Q. Well, did you give any instructions to your attorneys, Mr. Elsey, as to what they were to do in connection with the lease?

A. They were to notify The Indianapolis Gas Company.

Q. Of a rejection of the lease?

A. Yes.

The Court: Was that in any minutes of any kind or just orally?

The Witness: I think it was written into the
852 record.

Q. The record of September 9, 1935, shows the authorization of the rejection, but I am about to call your attention to a letter that is attached to the Stipulation, with which you are familiar, no doubt, Mr. Elsey, dated July 23, 1935, addressed to the President of The Indianapolis Gas Company and signed by Thompson, Rabb & Stevenson. You remember that letter?

A. Yes, I remember that letter.

Q. In which it was stated that the City felt that it was not bound by the lease?

A. Yes, sir.

The Court: Was that passed in a resolution?

Mr. Thompson: No, it is not copied into the resolution, your Honor.

Did I say July 23rd? It is July 23rd.

Q. Do you know of any controversy between The Indianapolis Gas Company and the City as to the validity of the lease of September 30, 1913, prior to July 23, 1935?

A. No, sir.

853 Mr. Thompson: Now, Mr. Burns, there are certain averments in the bills in this case about attempts to negotiate between the City of Indianapolis and The Indianapolis Gas Company. As I understand it, you have offered no evidence in support of those averments.

Mr. Burns: I have some correspondence that has been offered, supporting those averments.

Q. Did you attend meetings, which were held in Indianapolis, at which representatives of the stockholders of The Indianapolis Gas Company were present?

A. Yes, sir.

Q. How many of those meetings did you attend, Mr. Elsey?

A. I can't say. There were several of them.

Q. Who was present at those meetings?

A. Well, Mr. Brown was present at one of them—

Q. Mr. Arthur V. Brown?

A. (Continued)—and Mr. Higgins was there, and Mr.—we had one man from Halsey Stuart, I believe, at one time. There have been a good many meetings and I can't remember.

854 Q. Did I attend those meetings?

A. Yes, sir. We also had Mr. Stearns there, representing Estarbrook & Company.

The Court: When were those meetings?

The Witness: I can't give you the dates of them, Judge.

Q. Some of them were in 1935, weren't they, Mr. Elsey?

A. Yes, sir.

Q. Were all of them prior to the time when the complaint was filed in the Trustee's case, here, which was on June 6, 1936?

A. I think most of the meetings were, yes.

Q. Now, I want you to tell the Court whether any statement was made at such meetings as to on what terms and conditions the City of Indianapolis would consider negotiations with The Indianapolis Gas Company.

A. Well,—

Q. First, was any statement of that kind made?

A. Yes. We refused to negotiate unless the bondholders and the stockholders were both fully represented.

Q. And was that stated in everyone of those meetings?

855 A. Yes, sir.

The Court: You mean the bondholders?

Mr. Thompson: Of The Indianapolis Gas Company?

The Witness: Of The Indianapolis Gas Company.

Q. That was definitely stated, and stated by me, personally, in the meeting, was it not?

A. Yes, sir.

Q. That, under no circumstances, would the City of Indianapolis consider any negotiation unless it was participated in by both the bondholders and stockholders of The Indianapolis Gas Company? Is that correct?

A. That is correct.

856 The Court: Is that all?

Mr. Thompson: That is all.

Cross-Examination by Mr. Burns.

Q. Mr. Elsey, the Board of Directors for Utilities of the City of Indianapolis did authorize the representation in connection with the sale of the bonds that the payment of the principal and interest on the bonds is secured by and a charge upon all the revenue from and the operation of all of the gas system owned and/or operated by the City of Indianapolis, did they not?

A. Would you read that again to me?

Q. (The last question was read by the reporter.)

A. Well, I would say we restricted that to the revenue of the Citizens Gas and Coke Utility.

Q. You would say you did not make the representation that was just read to you, is that right?

A. I think not.

Q. You think not?

A. I think not. That seems to be out of line with the—

Q. (Interposing.) This paper which I am calling
857 your attention to, City's Exhibit No. 11, has been offered by Mr. Thompson to show the proceedings by the Board of Directors for Utilities for the Utility District in connection with the issuance of the revenue bonds, and I will ask you to read the language in the middle of page 29 of this transcript, beginning the first four paragraphs. Read it out loud, if you will.

A. (Reading): "The payment of the principal and interest of this and all other bonds of this issue is secured by, and a charge upon, all the revenue from and the operation of all of the gas system owned and/or operated by the City of Indianapolis."

Q. So that the answer to the question I asked you is that you did authorize that representation?

A. Is this in the circular?

Q. That is in the bond itself which the Board of Directors for Utilities authorized the issuance of, and that is in the resolution of the Board of Directors for Utilities authorizing the bond.

A. If this is in the bond then we must have authorized it, but if it is in the circular and not in the bond I would say we had nothing to do with it.

858 Q. Then, as a matter of fact, if it is in the bond, several of the statements you made as to the authority you gave in connection with the sale of these bonds were not accurate, were they?

A. I wouldn't say that.

Q. You would not say that?

A. No, sir.

Q. Did the Board of Directors for Utilities in connection with the sale of these revenue bonds authorize the representation that the City agreed to take all necessary or desirable steps promptly to acquire said property of the Citizens Gas Company of Indianapolis, and also agrees when it has obtained possession of the property operated by the Citizens Gas Company of Indianapolis it will cause

the same to be continually operated as a gas system in an efficient manner and at reasonable cost and to maintain in good operating condition, and it will use all reasonable efforts to resist competition and to maintain exclusive right to serve gas in the city of Indianapolis and in Marion County and in the towns therein.

Mr. Thompson: From what are you reading, Mr.
859 Burns?

Mr. Burns: I think I am entitled to an answer to the question.

Mr. Thompson: I think Mr. Elsey is entitled to know what Mr. Burns is reading from.

The Court: I think he is entitled to an answer.

A. Will you read that question?

(The last preceding question was read by the reporter.)

A. That would be a matter of record. I can't recollect that language.

Q. You have testified in answer to a great many questions here by Mr. Thompson as to what the Board did or did not authorize, have you not?

A. Yes, sir.

Q. As a matter of fact, you cannot recall what the Board did or did not authorize?

A. I remember the answer to the particular questions Mr. Thompson asked.

Q. That is, Mr. Thompson phrased the answer and
860 you said "Yes" because—

A. (Interposing.) I knew in that case what it was about.

Q. You knew in that case what it was about?

A. Yes.

Q. You do not know whether the Board made this representation or not?

A. I cannot recall.

Q. You did know, did you not, Mr. Elsey, at the time you were considering taking over the property of the Citizens Gas Company that the Citizens Gas Company was operating not only its own property but the Indianapolis Gas property, did you not?

A. Yes, sir, I knew that.

Q. That was a matter that was discussed among the Board of Directors for Utilities frequently?

A. That was discussed often.

Q. So there was not any doubt in the minds of the Board of Directors for Utilities that the property operated by the Citizens Gas Company included both the Citi-

zens Gas Company property and the Indianapolis Gas Company property, was there?

A. We were operating the Indianapolis Gas Com-
861 pany under a lease.

Q. I am talking about what was operated by the Citizens Gas Company.

(The last preceding question was read by the reporter as follows: "So there was not any doubt in the minds of the Board of Directors for Utilities that the property operated by the Citizens Gas Company included both the Citizens Gas Company property and the Indianapolis Gas Company property, was there?")

A. We were operating—

Q. (Interposing.) I am talking about what the Citizens Gas Company was operating; not about what the Citizens Gas and Coke Utility was operating.

A. The Citizens Gas Company was operating the Indianapolis Gas Company at the time under a lease.

Q. You knew that was a fact?

A. Yes.

Q. That was a matter that was frequently discussed in the Board?

A. Yes, sir.

862 Q. And you don't remember whether the Board of Directors for Utilities authorized the representation that the City agrees that when it has obtained possession of the property operated by the Citizens Gas Company of Indianapolis it will cause the same to be continually operated as a gas system in an efficient manner and at reasonable cost and maintain it in good operating condition?

A. We knew that was a provision in the lease.

Q. I am asking you whether you authorized that representation in connection with the bonds which you were selling.

A. I cannot remember that detail.

Q. You cannot remember?

A. Not that detail about it.

Q. You do not know whether you authorized that or not?

A. No, I can't remember the details of the bond.

Q. You, of course, knew when the bonds were sold that the form of the bond would have to conform to the form that was fixed by your resolution, did you not?

A. I am not the attorney; I couldn't say that.

Q. No, but didn't you know that the resolution which

the Board of Directors was passing set forth the form of the bond which was to be sold to the public?

863 A. I should think it ought to.

Q. Were you at that time Vice Chairman of the Board?

A. No, I was the Treasurer.

Q. You were Treasurer?

A. Yes.

Q. But you did hear the resolution read, and went over it and knew what the terms of it were?

A. I may have at that time, yes. I didn't attend all the meetings, but I usually did.

Q. Did the Board of Directors for Utilities authorize the representation in connection with the sale of these bonds that they were offered for the purpose of providing funds for taking over property owned by Citizens Gas Company of Indianapolis and/or in which it has an interest?

A. My recollection is that the bonds were sold to obtain money to pay off the obligations of the Citizens Gas Company, that is, the stock, which amounted to $2,000,000.00 and the accrued dividend of five hundred thousand, one million dollars of bonds—preferred stock—and fifty thousand dollars premium and two million seven hundred odd thousand of the debt that was owed on account of

864 the other Citizens Gas Company bonds.

Q. I am sorry. Perhaps I didn't make my question clear. I stumbled over it. I will read it to you again, ask it again. Did not the Board of Directors for Utilities authorize the representation in connection with the sale of these bonds that the bonds were issued for the purpose of providing funds to take over property owned by Citizens Gas Company of Indianapolis and/or in which it has an interest. I am asking you if you did not authorize that representation in connection with the sale of these bonds?

A. I can only remember the figures.

Q. You cannot remember whether you authorized that representation or not?

A. No, it would be impossible for me to remember all those things. I can remember the figures and the specific obligations that were to be taken over and discharged.

Q. You did know in 1935 that the Citizens Gas Company had a lease on the Indianapolis Gas property and was operating it, did you not?

A. Yes.

Q. And that the Citizens Gas Company had that
865 sort of an interest in the property of the Indianapolis Gas Company?

Mr. Thompson: I object to the question because that is a legal conclusion, as to whether that constituted an interest or not.

The Court: Overruled.

A. I knew that that lease existed.

Q. You knew that lease existed and that the Citizens Gas Company had the lease from the Indianapolis Gas Company?

A. Yes.

Q. Would you not consider that the Citizens Gas Company had an interest in that property?

A. The Board took the position that the interest ended with the take-over.

Q. I am asking you whether in May, 1935 you considered that the Citizens Gas Company had an interest in the property owned by Indianapolis Gas which Indianapolis Gas had leased to the Citizens Gas Company?

A. No.

Q. You don't think the Citizens Gas Company had any interest in property which it was holding under lease?

866 A. On advice of our counsel we considered that interest had terminated on the take-over—terminated with the take-over.

Q. You thought they had an interest down to the time of the take-over?

A. Down to the time of the take-over.

Q. On September 9th. So you thought Citizens Gas Company did have an interest in May, 1935?

A. We had an interest, with a doubtful—

Q. (Interposing.) What do you mean by that? Were you a stockholder of the Citizens Gas Company?

A. The Citizens Gas Company had the lease, and we deemed the lease illegal.

Q. Were you interested in any way in the Citizens Gas Company?

A. I was not

Q. Were you, Mr. Elsey?

A. No, sir.

Q. As a director?

A. No, sir.

Q. Or officer?

A. No.

Q. Or stockholder?

867 A. No.

Q. Either common or preferred stock?

A. No.

Q. Or a Bondholder?

A. No.

Q. Then when you referred to "we"—

A. (Interposing.) I was thinking of—

Q. (Interposing.) The Citizens Gas and Coke Utility?

A. Yes.

Q. Now, going back to the question I asked before, in May, 1935 the Citizens Gas Company did have an interest in the Indianapolis Company property, did they not?

Mr. Thompson: I object to the inquiry being pursued further.

The Court: Sustained. Of course, it is a legal question, as I understand, after it was held to be a trust. That is the question we have to determine.

Mr. Burns: Mr. Elsey has gotten up here, and answered a lot of leading questions Mr. Thompson has asked him, simply by saying "yes" in answering them, as to what authority was given. The fact is the authority
868 that was given was to say that the bonds were sold for the purpose of providing funds for taking over all of the property owned by the Citizens Gas Company or property in which the Citizens Gas Company had an interest.

The Court: Go ahead with your next question.

Q. You knew, did you not, in 1935, Mr. Elsey, that the distribution system operated by the Citizens Gas Company included both the distribution system of the Indianapolis Gas Company and the distribution system of the Citizens Gas Company?

A. Well, I knew that the Citizens Gas Company managed the distribution systems of both companies.

Q. And that, as a matter of fact, practically all of the gas was manufactured at the Citizens Gas Company plant and distributed through the mains of both companies?

A. I didn't know that as prior to 1935, because my connection was rather limited, my association with the management was rather limited up to that time.

Q. When did you become familiar with the facts?

A. In 1935.

Q. When in 1935?

869 A. We began to know about it in, you might say the early part of the year.

Q. In the early part of the year 1935?

A. Yes.

Q. When you began to know about it in the early part of the year 1935 did you learn that the Citizens Gas Company was operating not only its own plant but the plant of the Indianapolis Gas Company?

A. I knew they were being operated, but I didn't know to what extent the Indianapolis Gas Company was being operated or the Citizens Gas Company was being operated.

Q. Did you know what proportion of the mains in the City of Indianapolis were owned by the Indianapolis Gas Company and what proportion by the Citizens Gas Company?

A. No. That was a matter of detail that would come up occasionally, but I can't tell you that exactly.

Q. You did know that a substantial part of the mains operated by the Citizens Gas Company used to supply the customers were the mains of the Indianapolis Gas Company, did you not?

A. Yes.

Q. You did not know whether it was forty, or fifty, or sixty per cent?

870 A. Not exactly.

Q. But you knew it was a very substantial part of the total of the number of mains?

A. Yes.

Q. You knew the Citizens Gas Company was distributing gas to the customers in the city of Indianapolis through both its own mains and the Indianapolis Gas Company mains?

A. Yes, sir.

Q. So the Citizens Gas Company was operating the property of both Indianapolis Gas and Citizens Gas Company?

A. Yes.

Q. The answer was "yes"?

A. Yes.

Q. How long have you lived in the city of Indianapolis, Mr. Elsey?

A. Thirty-nine years.

Q. Calling your attention to Plaintiffs' Exhibit 104, attached to the deposition of R. E. Simond did you see this advertisement published by Halsey Stuart & Company and Otis & Company in the three Indianapolis papers on or about July 1, 1935?

A. Well, I may have seen it—I am sure I saw

871 it in one paper. I wouldn't say I saw it in all three.

Q. You are quite certain you did see it in one of the three papers?

A. Yes. I recall seeing that statement. Whether it was in the Indianapolis paper or New York Times or Chicago Tribune, I couldn't tell you.

Q. You do recall seeing this advertisement by Halsey Stuart & Company and Otis & Company, Plaintiffs' Exhibit 104, published in some paper?

A. Yes, sir.

Q. Did you also see on or about the 1st of July, 1935, the circular issued by Halsey Stuart & Company in connection with the sale of these bonds, Plaintiffs' Exhibit 102 to the Simond deposition?

A. Yes, I saw that statement.

Q. You saw that circular on or about the first of July, 1935?

A. I can't remember the date. I saw it when it was issued.

Q. At about the time it was issued?

A. Yes.

Q. So if it was issued July 1st, that was about the time you saw it?

A. Yes.

872 Mr. Burns: That is all.

The Court: That is all.

(Witness Excused.)

(At this point the Court took a recess.)

873 After Recess.

FREDERICK E. MATSON, a witness called on behalf of the defendant City, being first duly sworn, testified as follows:

Direct Examination by Mr. Thompson.

Q. You may state your name to the Court?

A. Frederick E. Matson.

Q. You reside in Indianapolis?

A. I do.

Q. You are a member of the bar of this Court?

A. I am.

Q. What is the name of your firm, Mr. Matson?

A. Matson, Ross, McCord & Clifford.

Q. Were you employed as attorneys for Otis & Com-

pany and Halsey Stuart & Company in connection with the acquisition by those two companies, or in connection with the making of a bid by those two companies for the bonds of the Utility District which were offered for sale on May 28, 1935?

A. We were.

874 Q. Did you continue to represent those two companies after the bonds were purchased and until the same were resold by them?

A. Yes, Mr. Thompson. Our employment was a little broader than merely giving an opinion on the bonds. It required us to examine the proceedings thoroughly up to the issuing of the bonds and also to follow the proceedings through to see that the transfers were made, because these, being revenue bonds, naturally the security depended upon the proper obtaining of the property, and for that reason we followed clear through.

Q. I call your attention now to an instrument identified as Defendant City's Exhibit 1 to the deposition of R. E. Simond, which was taken in Chicago on the 21st day of February, 1939. You know Mr. Simond, do you?

A. Yes, I do.

Q. Vice President of Halsey Stuart & Company?

A. Yes, sir.

Q. Did you yourself give the opinion of which this instrument that you have in your hand is a photostatic copy?

Mr. Burns: I object. It does not purport to be an opinion.

875 The Court: Go ahead. I don't know what it is.

Mr. Thompson: It is a memorandum.

A. Yes, I prepared this.

Q. After it was prepared did you mail it to Halsey Stuart & Company?

A. I mailed a copy of it to Halsey Stuart & Company and Otis & Company, and I think to your firm.

Q. On what date was that done?

A. That was done August 7, 1935.

Mr. Thompson: That is all.

The Court: Any questions.

Cross-Examination by Mr. Burns.

Q. Mr. Matson, Mr. Simond testified in Chicago that in connection with the sale of these bonds your firm approved a circular issued by Halsey Stuart & Company

and Otis & Company. Do you recall—

A. (Interposing.) I think we looked over that circular.

Q. And approved it for—

A. (Interposing.) Yes, so far as it was in our province to approve a circular of that sort. It was
876 merely a question of whether we found any objectionable statements in it.

Q. Did you notice in that circular that it contained a statement of the cost of reproduction new and the depreciated physical value of the Indianapolis Gas Company property?

A. Well, I don't recall the terms of the circulars. We look over a good many of those. It may have done so.

Q. If in that circular a statement was made as to the cost reproduction new of the Citizens Gas Company and the depreciated physical value of the Citizens Gas Company property and also of the Indianapolis Gas Company property, would not the natural impression of anybody getting that circular be that the City was taking over both of those properties?

Mr. Thompson: I object. He asks for the natural impression of someone getting the circular.

The Court: I think the circular would have to speak for itself on that.

Q. Did you approve this statement in the circu-
877 lar, Mr. Matson: "These bonds constitute in the opinion of counsel valid and binding obligations of the City of Indianapolis, Indiana in accordance with the terms and provisions thereof, secured by a charge upon all of the income and revenue of all the gas utility system now or hereafter owned and or operated by said city and payable solely and exclusively out of such income and revenue"?

A. May I see that, if you please, Mr. Burns?

Q. It is the second paragraph on the first page.

A. I think that is either quoted exactly or paraphrased from our opinion.

Q. And quoted or paraphrased from the language of the bond itself, was it not?

A. I believe so.

Q. Did you have before you when you were passing on this bond issue the transcript of the proceedings which has been introduced in evidence as City Defendant's Exhibit No. 11?

A. Yes, sir, I think we prepared the text of this transcript.

Q. And were you familiar with the fact that that transcript, and particularly the resolution of the Board of Directors for Utilities, authorizing the sale of
878 these bonds, included the representation that the bonds were issued for the purpose of providing funds to take over the property owned by the Citizens Gas Company of Indianapolis and/or in which it has an interest?

A. Yes, sir.

Q. And you knew in May, 1935, that the Citizens Gas Company was operating under a lease from the Indianapolis Gas Company?

A. I knew that, yes, sir.

Q. And that part of the property which it operated and part of the mains through which it distributed gas through the city of Indianapolis was the property of the Indianapolis Gas Company?

A. Yes, I knew that.

Q. And when you approved the circular in July, 1935, about July 1, 1935 you knew that the bond also would provide that it was secured by a charge upon all of the revenue from the operation of all the gas utility system now or hereafter owned and or operated by the City of Indianapolis?

A. I knew that, yes, sir.

Q. And that the city covenanted in connection with the offer for sale of these bonds as follows: "The
879 City agrees to take all necessary or desirable steps promptly to acquire said property of the Citizens Gas Company of Indianapolis and also agrees that when it has obtained possession of the property operated by the Citizens Gas Company of Indianapolis it will cause the same to be continually operated as a gas system in an efficient manner and at a reasonable cost, and maintain in good operating condition, and will use all reasonable efforts to resist competition and maintain exclusive right to serve gas in the city of Indianapolis and Marion County, Indiana."

A. Is that in the circular? It is not in the bond form, is it?

Q. No, it is in the resolution of the Board of Directors for Utilities—

A. (Interposing.) Whatever is in that transcript I knew of and was familiar with at the time.

Q. Of course, you might not be able to remember that

now. You, of course, knew in order to maintain the exclusive right to serve gas in the city of Indianapolis it would be necessary for the Citizens Gas Company to use the mains of the Indianapolis Gas Company?

880 A. I wouldn't go that far here on the stand, sir; that is a legal question.

Q. You knew a large part of the gas was distributed through the mains of the Indianapolis Gas Company?

A. Yes, I knew that.

Q. And perhaps fifty per cent or more of the mains through which the gas was distributed were the Indianapolis Gas Company's mains?

A. Yes, I knew that.

Q. And that you necessarily also knew that if the City gave up that part of the property that it would not have the exclusive right to serve gas throughout the city of Indianapolis?

A. Well, I suppose that if it entirely disconnected itself from that property, it would not, for the time being, have the exclusive right.

Q. And if it rejected the lease and did not take the property of the Indianapolis Gas Company and turned the property back to the Indianapolis Gas Company that then it would not have been exclusively serving all of the city of Indianapolis?

A. Mr. Burns, when the City took over—

881 Q. (Interposing.) I would like to have you answer the question, if you will, please, Mr. Matson.

A. I don't care to answer that question, because I think it involves a legal inference.

Mr. Burns: Will you read the question to the witness, please.

(The reporter read the question as follows: "And if it rejected the lease and did not take the property of the Indianapolis Gas Company and turned the property back to the Indianapolis Gas Company that then it would not have been exclusively serving all of the city of Indianapolis?")

Mr. Thompson: I object to the question, your Honor, on the ground that it calls for the legal conclusion and opinion of this witness, and further it is perfectly apparent if the lease had been rejected, the city, by condemning this property, could have readily continued in the exclusive service of gas in this county.

The Court: I think that is a question that is a

882 question that is hardly fair to ask the witness to answer.

Mr. Burns: We will take an exception.

Q. Mr. Matson, in connection with the circular of Halsey Stuart & Company, Plaintiffs' Exhibit 102 to the deposition of R. E. Simond, which you said that you approved for Halsey Stuart & Company, I call your attention to the language reading as follows: "In that year" —meaning 1913—"the Company leased for a period of 99 years the properties and business of the Indianapolis Gas Company, thereby gaining control of the entire gas business of the City of Indianapolis and its environs." Was that language on the circular when you approved it?

A. I presume it was, yes, sir.

Q. And further, "By the terms of this lease, the lessee pays a rental consisting of (a) the interest on the first consolidated mortgage five per cent bonds due October 1, 1952, of which there were $6,181,000.00 outstanding at the end of 1934, and the interest on such additional bonds as may be issued from time to time for refunding or extensions to the leased property." That language was also there?

883 A. Yes, that is a description of the terms of the lease.

Q. And one of the descriptions of the terms of the lease was it was a lease for 99 years, was it not?

A. That is correct.

Q. Of course, Mr. Matson, I don't have to ask you but the fact is that when you approved this circular you thought it was a proper circular and an exact representation of what Halsey Stuart & Company were offering, or you would not have approved it?

A. I didn't consider there were any misstatements in there.

Q. Mr. Matson, when you gave your opinion in connection with the approval of this bond issue, did that include a certificate that you did not know of any litigation, pending litigation or contemplated litigation involving this property?

A. Well, I think the transcript itself contains such a certificate.

Q. You think the transcript contains such a certificate?

A. Yes, sir.

Q. Will you point it out in the transcript?

A. Here is the certificate, dated June 27th—that is the date the bonds were taken up—signed by the

884 Mayor, City Clerk and City Controller.

"We further certify that no litigation of any kind is now pending or threatened in either state or federal courts seeking to restrain or enjoin, or in any manner questioning the authority or proceedings for, the issuance, sale, execution and delivery of the aforesaid bonds, or in any manner questioning the validity thereof, or the right, authority, or power of said City of Indianapolis to acquire, own and operate or lease to others to operate, the gas plant and property of the Citizens Gas Company of Indianapolis referred to in the above mentioned resolution and in said bonds; that neither the corporate existence of said city nor the title of its present officers to their respective offices is being contested, and that no proceeding or authority for the issuance, sale, execution and delivery of said bonds has been rescinded, revoked, or repealed."

I wrote that certificate myself, and had it signed.

Q. When you wrote that certificate, Mr. Matson, did you know that the City was contemplating rejecting the
885 lease of the Citizens Gas Company?

A. No, I didn't. I don't think I knew what, if any opinion, they had with reference to the 99-year lease.

Q. When you approved the circular of Halsey Stuart & Company you did not know that?

A. I hardly think so. I gave that opinion based upon my knowledge of the entire situation, which was very complete, and I certainly did not know of there being any litigation threatened.

Mr. Burns: That is all.

(Witness excused.)

886 H. S. PAYSON ROWE, a witness called on behalf of the defendant City, being first duly sworn, testified as follows:

Direct Examination by Mr. Thompson.

Q. State your name.

A. H. S. Payson Rowe.

Q. Where do you live?

A. Long Meadow, Massachusetts.

Q. What official connection, if any, do you have with the Massachusetts Mutual Life Insurance Company?

A. I am manager of the Bond Department of that company.

Q. How long have you been manager of its Bond Department?

A. Four and a half years.

Q. Before that time were you connected with the company in any capacity?

A. No, I was not.

Q. Did you attend a meeting at the office of the Chase National Bank in the City of New York on the 11th day of March, 1936?

A. I did.

887 Q. You heard Mr. Beardsley's testimony this morning, did you?

A Yes.

Q. And the people whom he stated were present were at that meeting?

A. Yes, I believe so.

Q. Your company is the owner of how many bonds of the Indianapolis Gas Company?

A. Two hundred and sixty-five thousand.

Q. Were you advised at that meeting—

The Court: (Interposing.) Two hundred and sixty-five thousand dollars worth of bonds?

The Witness: Yes, sir.

Q. Were you advised at that meeting of March 11, 1936 that the City of Indianapolis had entered into an agreement with the Indianapolis Gas Company in connection with the payment of certain sums of money to the Indianapolis Gas Company and in escrow to the Indiana National Bank?

A. I don't recall. I think that I remember that there was a statement made that the April 1st interest would be paid, and that pending further discussion of the matter
888 that future interest payments would be placed in escrow with the Indiana National Bank.

Q. After you had been advised of that fact your company received from the Chase National Bank of New York an interest coupon—the money for an interest coupon on your bonds, which would be two and one-half per cent of $265,000.00?

A. That would be the April 1, 1936 coupon. I believe so.

• • • • • •

896 *Cross-Examination by Mr. Burns.*

Q. You said at the meeting of March 11, 1936 at the Chase Bank you were advised by Mr. Higgins or Mr. Brown or somebody at the meeting that the April 1st coupon would be paid, but that after that the coupons would

897 not be paid. Is that correct? After that the money would be put in escrow?

A. As I remember it, that was so.

Q. Was anything said, as far as you can recall, at that meeting as to the terms or any qualifications or conditions being attached to the April 1st coupons?

A. There were no conditions.

Q. That is, none you were advised of at that meeting?

A. None I knew of. I think we merely transmitted the coupon in the usual way and got our money.

Q. When did you first learn the City of Indianapolis was disputing its liability under this lease?

Mr. Thompson: I object to that question, "disputing its liability under the lease".

The Court: Go ahead and answer the question.

A. I don't know the exact date. It was either the latter part of 1935 or first part of 1936. We keep very close track of the news items. I assume it was when a news item was first published of the matter.

Mr. Burns: That is all.

898 *Redirect Examination by Mr. Thompson.*

Q. You keep close track of the market quotations on the bonds your company owns?

A. Yes, we do.

Q. There was a big drop in the price of these bonds immediately after the transfer of this property to the City, was there not?

A. Without looking it up, I don't remember at the moment. I think there was some market fluctuation.

Q. Was not your attention called to this matter that after the City's denial under this lease, in September, 1935, because of the publicity incident to the transfer, there was a drop in the price of the bonds in the market?

A. I don't remember what month it was; I know it was in the latter part of 1935 sometime.

(Witness excused.)

(A short recess was taken.)

* * * * * *

912 Whereupon, the Trial was adjourned until tomorrow, Saturday, March 4, 1939, at nine o'clock A. M.

End Tk 16

914 Indianapolis, Indiana,
Saturday, March 4, 1939,
Nine o'clock A. M.

The Court met pursuant to adjournment and the trial was resumed as follows:

* * * * * *

968 WILLIAM J. YULE, being recalled as a witness on behalf of the Defendant, City of Indianapolis, and the individual defendants, testified as follows:

Direct Examination by Mr. Thompson.

Q. You are the same Mr. Yule who testified before in this case?

A. Yes.

Q. I asked you, when you were on the stand before, whether there had been served on you, as Secretary of The Indianapolis Gas Company, on September 9, 1935, a rejection by the City of Indianapolis of an assignment of the ninety-nine year lease, and you said that there had. I also want to ask you whether there was also served upon you at that time a certified copy of the City's resolution for a rejection of the lease and a certified copy of the City's resolution for the temporary use and occupancy of the Indianapolis Gas property.

The Court: What date was that?

Mr. Thompson: September 9, 1935.

969 Mr. Burns: I would like to have a general objection to this line of questioning on the ground that it cannot affect either the rights of the Trustee or the bondholders.

The Court: Let the record show the objection overruled.

A. These papers were delivered to me late in the afternoon of September 9, 1935.

Q. When you say "these papers", the papers that I referred to? I say, when you say "these papers," you mean the papers that I have just referred to?

A. The papers that you have copies of here. I have just looked them over. I have them here and they were delivered to me on that afternoon.

Q. That won't get it in the record, Mr. Yule. I am asking you whether the papers that I inquired about were delivered to you on that day.

A. They were delivered to me on that day, yes, sir.

Mr. Thompson: That is all.

Witness excused.

970 WILLIAM G. SPARKS, a witness called on behalf of the Defendant, City of Indianapolis, and the individual defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. Thompson.

Q. You may state your name.
A. William G. Sparks.
Q. You are a practising attorney and a member of the Bar of this Court?
A. Yes, sir.
Q. What is the name of your firm now, Mr. Sparks?
A. Davis, Pantzer, Baltzell & Sparks.
Q. Were you formerly connected with the firm of Smith, Remster, Hornbrook & Smith?
A. I was.
Q. Was that true during the entire months of August and September of 1935?
A. That is right.
Q. Mr. Henry H. Hornbrook was the senior member of the firm at that time?
971 A. That is right.
Q. And he is now dead?
A. That is right.
Q. Your firm was the attorney, at that time and for many years prior thereto, for the Citizens Gas Company of Indianapolis?
A. That is right.
Q. Did you have any connection or transactions in connection with the transfer from the Citizens Gas Company of Indianapolis of the plant and property owned by it to the Utility District of the City of Indianapolis?
A. I did.
Q. Were you ever advised, prior to September 9, 1935, as to the attitude of the City as to whether it would accept an assignment of a certain lease between The Indianapolis Gas Company and the Citizens Gas Company, dated September 30, 1913?
Mr. Burns: I object to that, your Honor.
The Court: You may have the same objection.
A. I was.
Q. How long before September 9, 1935 were you
972 advised of that fact?
A. I was advised of it about August 27th, 1935.
Q. Do you know of your own knowledge as to whether

Mr. Hornbrook had known of the attitude of the City prior to that time?

A. I do.

Q. For how long a period of time?

A. All I can say is that he knew it for at least a month or maybe longer. I don't know how long.

Q. Was it because of the City's statement that it would not take an assignment of the lease referred to that that assignment was drawn in a separate instrument?

Mr. Burns: I object.

A. That may have been one of the reasons. I don't recall any conversation about that—

Mr. Burns: Will your Honor rule on the objection?

The Court: He says he doesn't know.

A. (Continued.) —or studying it.

Q. That was a matter that Mr. Hornbrook had attended to with Mr. Rabb? Is that correct?

973 A. I can't remember definitely about that. I don't know. My files don't show it.

Mr. Thompson: That is all.

The Court: Any questions, Mr. Burns?

Cross-Examination by Mr. Burns.

Q. You say, Mr. Sparks, that you learned, on August 27th, for the first time, that the City was going to reject the lease?

A. That is right.

Q. That was the first time that you knew anything about that?

A. Yes, that was the first time I had been called upon to do anything in connection with the transfer.

Q. So that any information you have about what Mr. Hornbrook knew prior to August 27th is something that you learned from him or that he told you, but you have no personal knowledge otherwise?

A. Yes, that is right. He told me, by letter that I received the 27th, that the City was going to attempt to reject the lease.

974 Mr. Burns: We ask to have the answer stricken out in his original examination about what Mr. Hornbrook knew, as obviously hearsay.

The Court: Let that go out.

Q. The Citizens Gas Company, as shown by the stipulation, conveyed its property or, at least, the instruments of conveyance which were made out described all of the prop-

erty that the Citizens Gas Company had immediately prior to the delivery of those instruments? Isn't that correct?

A. That was our intent.

Q. And that is what the stipulation shows?

A. Yes.

Mr. Thompson: If the stipulation shows it—

Mr. Burns: I am just leading up to the next question.

Q. And you have represented the Citizens Gas Company continuously since then?

A. We have represented the Board of Directors of the Citizens Gas Company. The Trustees, when the Board had some function to perform, had separate counsel.

975 Q. And the Citizens Gas Company as such has not been in business since that transfer?

A. Not so far as I know.

Q. Or received any property?

A. Not that I know of.

Q. And, in this case, in accordance with the indemnity agreements attached to the bills as Exhibit J in each case, your compensation and expenses are being paid by the City or the Utility District in accordance with the indemnity agreement?

A. They have not been paid. We have never submitted a statement to our client, for any services or disbursements, since that transfer.

Q. But you have an understanding that the Utility District or the City will pay them?

A. Based on that indemnity agreement and the fact that the City did honor our statement, made to our client immediately after the transfer, for services up to that date, but after the transfer—

Q. And have you had any conversations with Mr. Thompson that the City would take care of your fees and expenses in connection with this litigation?

976 A. Whether with Mr. Thompson, or not, I don't know. I think Mr. Rabb—I don't know whether in those words, but I think, on one or two occasions, he has indicated to me, by words, that the City did recognize its obligations to assume any obligations of the Citizens Gas Company in connection with this litigation.

Q. Including your fees and expenses?

A. That is right. I don't know whether we discussed it definitely. That is my understanding and I think that is his. That has never been a very important point for us. We would have gone through, regardless, because of our

long association with the Board of Directors of the Gas Company.

Q. On the 9th of September, 1935, you went with Mr. Rastenburg to the office of Thompson & Rabb and took the four instruments of conveyance, which have been identified in the stipulation?

A. That is right.

Q. At the time you took them there—they had not been recorded, had they?

A. No.

Q. (Continued.) —and left them there, did Mr.
977 Rastenburg deliver them there to Mr. Dithmer, the President of the Board of Directors for Utilities?

A. He handed them either to Mr. Rabb or to Mr. Dithmer. I don't recall which.

Q. And the Board was there in session at that time?

A. A group of men was there which, I was informed, was the Board. I couldn't say they were.

Q. Do you know Mr. Henry Dithmer?

A. I know him by sight.

Q. And was he there?

A. Yes.

Q. And Mr. Rabb was there?

A. Yes.

Q. Was Mr. Thompson there?

A. No.

Q. And the four papers were all handed over together? They were all four numbered in some way?

Mr. Thompson: I object to the question as to them being numbered in some way because the evidence shows just what was done.

The Court: He may state what was done.

978 Q. You may state what was done.

A. They were all four handed either to Mr. Rabb or to Mr. Dithmer or somebody there representing the City.

Q. And then you and Mr. Rastenburg left?

A. No, I stayed for a few minutes until they had a meeting. I think Mr. Rastenburg did, too.

Q. And you waited while the Board of Directors for Utilities had a meeting?

A. That is right.

Q. And about what time of the day was that?

A. I think it was around one o'clock, but I am not certain. I know it was supposed to be in the morning, but

we were late in getting there. It was around noon, as I recall, but I cannot be certain.

Q. Did you take any of those four papers away with you when you left, the four instruments of conveyance that you brought?

A. Not that I recall.

Q. And you have never received any of them back?

A. No.

Q. And as far as you know, the Citizens Gas Company has never received any of them back?

979 A. Not so far as I know.

Q. And did Mr. Rastenburg come away with you?

A. I think so.

Q. And he did not bring any of the four instruments of conveyance away with him when he left?

A. No.

Q. The answer was "No"?

A. "No". That is right.

The Court: That is all.

Mr. Thompson: I have a question, if I may, your Honor.

Redirect Examination by Mr. Thompson.

Q. At this meeting that Mr. Burns has inquired about, there was delivered to you a rejection of the ninety-nine year lease, signed by Mr. Dithmer as President of the Board of Directors, for the Board of Directors for Utilities?

A. Yes.

Q. And a certified copy of the resolution that had been adopted by the Board, rejecting the lease?

A. Yes.

980 Q. And a certified copy of the resolution of the Board for the temporary use and occupancy of the property?

A. I think the latter, yes.

Q. You knew, when you went to the office of Thompson, Rabb & Stevenson, that the City was going to deliver the rejection to you when you turned over physically this assignment of the lease?

A. That is right.

Mr. Thompson: That is all.

Recross Examination by Mr. Burns.

Q. When you say that you received the rejection, Mr. Sparks, of the lease, you mean you received an instrument which was entitled, "Rejection of Lease"?

A. That is what I mean.

The Court: That is all.

Mr. Thompson: That is all.

Witness excused.

981 Mr. Thompson: Your Honor, in connection with the deposition of R. E. Simond, taken in Chicago, and the depositions of J. E. Baker and Chester M. Clark, taken in New York, we have filed a motion to suppress these depositions. If that motion should be overruled, I want to offer the remaining portions of those depositions, which Mr. Burns did not offer in evidence.

The Court: That is, the cross-examination?

Mr. Thompson: And the reexamination and recross, and also, particularly in connection with Mr. Simond's deposition, City's Exhibits 1 to 5, both inclusive.

The Court: Attached to the deposition?

Mr. Thompson: Yes, sir.

Mr. Burns: I might say that, by stipulation shown in each of these depositions, when a deposition was taken, it was agreed by all counsel that it could be used in both cases, and the Trustee and the bondholders objected to the cross-examination or, at least, to the exhibits offered in connection with the cross-examination on the various grounds shown in the deposition, itself, and also on the ground that the correspondence between Thompson &
982 Rabb and Halsey Stuart and the opinion of Mr. Matson are self-serving declarations, not binding in any way.

The Court: You mean the opinion as to the invalidity?

Mr. Burns: No, that is a memorandum that was written sometime in August, 1935, that Mr. Matson testified to yesterday. It seems to me that can have no possible relevancy to any issue in this case. It was not said to be an opinion. It was just labeled, "Memorandum," not signed by anybody and not delivered to anybody who was a party in this case. It was delivered to Halsey Stuart & Company.

The Court: I think I saw a photostatic copy of it yesterday. I don't know whether it was offered or not.

Mr. Burns: No, it was not offered.

We also object to the other exhibits, as well as that opin-

ion or memorandum, on the ground that they are mere self-serving declarations and not such as can bind either the bondholders or the Trustee.

The Court: All right. I will take this question up.

983 Mr. Thompson: If the motion to suppress the deposition of R. E. Simond should be overruled, we offer in evidence a carbon copy of a letter from Thompson & Rabb to Halsey Stuart & Company under date of January 4, 1937.

The Court: This deposition had to do with the action taken by Halsey Stuart & Company?

Mr. Thompson: On the resale circulars, and I point out to your Honor, in connection with that motion to suppress, that the stipulation in this case shows that the named plaintiffs in 1950 all bought their bonds before the transfer was made to the City and that there is no evidence in this case that any present bondholder of The Indianapolis Gas Company bought his bonds in reliance on the bond circular or knew anything about it. The plaintiff, up to this time, has absolutely failed to make one element of estoppel or make any proof in connection with one element of an estoppel.

The Court: All right. I will go into that question.

Do you have any other evidence?

984 Mr. Burns: I would like to object to the City's Exhibits 28 A and B, a letter dated January 4, 1937 from Thompson & Rabb to Halsey Stuart & Company on the ground that it is merely a self-serving declaration. This was in 1937, a year and a half after the bonds were sold.

Mr. Thompson: Your Honor, the reason I am offering this is that it shows what I think Mr. Simond has testified to in part: that these circulars were sent us as a matter of courtesy.

Now, Mr. Burns has attempted to prove some estoppel against the City of Indianapolis because of certain letters that were exchanged, and here again we say in this letter —it was another circular that had been sent to us—"We appreciate that the draft of circular has been submitted to us merely as a matter of courtesy on your part."

Mr. Burns: That is your letter of January, 1937. We call the Court's attention to the fact that this letter that is now offered was not even written until after this suit was filed and after the bill was based on the conten-

985 tions that we were making as to the effect of the representations that had been made in the sale of the bonds.

The Court: Does the record show that these letters, identified by Mr. Higgins, have been read in evidence? If it doesn't, I understood that there was no objection to them, and they may be read in evidence.

The said letters, so offered, respectively marked for identification CITY'S EXHIBITS NOS. 13-B TO 27, both inclusive, were admitted and read in evidence.

Mr. Elam: May we have the record show that all of the exhibits that have been admitted have been read in evidence?

The Court: Yes, all that have been admitted, but there are some that I am withholding the ruling upon.

Do you have any rebuttal?

Mr. Thompson: That is all. The defendant rests.

And the Defendant, City of Indianapolis, and the Individual Defendants Here Rested.

986 The Court: Do you any rebuttal? Would you like a few minutes recess?

Mr. Burns: If we may, your Honor.

(Pursuant to a brief recess, the trial was resumed as follows:)

Whereupon the Plaintiffs, Further to Maintain the Issues on Their Behalf, Offered and Introduced the Following Evidance in Rebuttal, to-wit:

PAUL C. BEARDSLEE, being recalled as a witness on behalf of the Plaintiffs, testified as follows:

Direct Examination by Mr. Burns.

Q. Mr. Beardslee, you have testified before in this case?

A. I have.

Q. Did the Chase Bank or you, representing the Chase Bank, either request or suggest to the bondholders,

987 Massachusetts Mutual Life Insurance Company, New England Mutual Life Insurance Company or Savings Bank of Baltimore, plaintiffs in case No. 1950, that that case should be filed?

A. We did not.

Q. Did the Chase Bank agree or have any understanding whatsoever that it would either share any or pay any part of the fees or expenses in connection with the bringing of that suit?

A. Absolutely not.

Q. Has it ever paid any part of the fees or expenses in connection with the bringing of that suit?

A. It has not.
Mr. Burns: That is all.
The Court: That is all.
Q. Oh, there was one other question.
Mr. Thompson has offered in evidence here—the City has offered in evidence here this morning various correspondence between Mr. Bennis of our office and Mr. Higgins and Judge Ewbanks. Did you receive copies of that cor-
988 respondence between Mr. Higgins and Mr. Bemis, or know anything about it?
A. No, sir.
Mr. Burns: That is all.
The Court: That is all.
Mr. Thompson: That is all.
Witness excused.

VICTOR C. SEITER, a witness called on behalf of the Plaintiffs, being first duly sworn, testified in Rebuttal as follows:

Direct Examination by Mr. Burns.

Q. Will you state your full name, your address, your age and your occupation?
A. Victor C. Seiter; age, thirty-six; residence, 47 South Pennsylvania; Assistant Secretary, Citizens Gas & Coke Utility.
Q. How long have you been connected with the Citizens Gas & Coke Utility?
A. May 1, 1936.
989 Q. And what have been your duties as Assistant Secretary?
A. The usual duties pertaining to such an office and also the keeping of the ledger and the journal for the Utility District.
Q. I call your attention to City's Exhibit 10, introduced, or offered in evidence yesterday, consisting of twelve sheets. Those are photostatic copies, are they not, of twelve sheets taken from the Utility District general ledger of the City of Indianapolis—Utility District City of Indianapolis General Ledger?
A. They are photostatic copies of seven sheets. Part of them reflect the entries made on the reverse side of the same sheets.
Q. And when the entry shows the reverse side, that is

shown by the account appear[illegible]ows on the reverse side of the sheet, "No. 2," is that correct?

A. Yes.

Q. Now, are these sheets in this ledger, which have been identified as Exhibit 10, what you call original entries; that is, is this the original, first entry that is made, or is it
990 transferred from some other account?

A. No, those are books of final entry.

Q. Where is the original entry made?

A. The original entry is made on the books of the Citizens Gas & Coke Utility.

Q. Well, are the entries made on the books of the Citizens Gas & Coke Utility even though the payment is not made—that is, when you are simply accruing the liability?

A. No, that entry is made on the books of the Utility District.

Q. So, then, the only place the various entries that are made of accruing liabilities are on—in this ledger, pages of which have been identified as Exhibit 10, is that right?

A. Yes, sir.

Mr. Burns: Of course, the Court will excuse me. I am not a very good bookkeeper.

The Court: That applies to a good many of us, I guess.

Q. Now, calling your attention to the first two pages
991 of Defendants' Exhibit 10, Account No. 621, Pages 1 and 2 of Sheet No. 1 and Sheet No. 2, that indicates that you accrued amounts from September 9th, 1935 to the end of the year of $37,333.33 on the ledger, making amount due I. G. Company for the use of property, accruing amount equal to stock interest, is that right?

A. Yes, sir.

Q. Does that also show that that amount was paid, that $37,333, or is that shown on a separate account?

A. Yes, I could state that this amount—that this statement reflects the amount of $37,333.33 was paid, not necessarily in a separate check, but it represents the amount paid for the period from September 9, 1935.

Q. To the end of the year?

A. To the end of the year, yes.

Q. And the fact that it has been paid is reflected by the evidence that $37,333.33 is not carried over in the other year, is that right?

A. That is correct.

Q. And beginning with the 1st of January, 1936,
992 this shows an accrual each month of $10,000 and the accrual at the end of 1936 of $120,000, is that correct?

A. Yes, sir.

Q. In 1937 it shows the accrual of an additional amount of $10,000 a month, and a combined accrual, in 1937, of $240,000?

A. Yes, sir.

Q. And similarly, by the end of 1938, it shows a total accrual of $360,000?

A. Yes, sir.

Q. And since then you have simply accrued the January —or you had not,—when these photostats were taken you had not accrued any amount for the month of January, 1939, had you?

A. No, sir.

Q. But as shown by the ledger, you have since accrued the amount of $10,000 for the month of January, 1939, is that correct?

A. Yes, sir.

Q. These photostats were taken about ten days ago?

A. I should say so, ten days, two weeks ago.

993 Q. Sometime along about the middle or latter part of February?

A. Yes.

Q. Now, without going over these ledger sheets in detail, in general the same scheme has been followed in accruing those liabilities under account No. 622, which is the account for bond interest?

Mr. Thompson: I object to the form of the question. He asks the witness to say that there is a liability, which is a legal question; and then he says it is accrued for bond interest, when it appears upon the face of this account, "equal to the bond interest".

The Court: Of course, those are law questions the Court is going to have to determine. Notice your phraseology of the question so as not to call for any objection. Go ahead. Answer the question.

A. Yes.

Mr. Thompson: I think the witness answered the question. Did your Honor overrule the objection?

The Court: Yes, I told him to go ahead and

994 answer.

Q. And similarly, on account 623, the same scheme has been followed generally as to what has accrued as amounts due I. G. Co. for the use of property, accruing the amount equal to state and local taxes?

A. In that case the payment was actually made, in accordance with the agreement that had been heretofore discussed.

Q. That is, as far as real estate taxes are concerned, they have been currently paid—I mean all of the taxes have been currently paid, to substantially a larger accruing amount, is that correct?

A. Yes.

The Court: These other accounts have been deposited in The Indiana National Bank?

The Witness: The amounts equal to the bond interest and the stock interest have been in escrow.

Q. Now, Mr. Seiter, when did you start to make those entries that are shown in City's Exhibit 10?

A. Is this the Exhibit 10 (indicating)?

Q. Yes.

995 A. These entries were made in the early part of 1936, probably in the month of January.

Q. Then that time is before you came to the Utility District?

A. They were made while I was in the employ of Howard W. Painter, who was retained by the Board of Directors.

Q. For Utilities?

A. Yes, sir.

Q. And while you were engaged by Howard Painter you opened up this ledger, from which Exhibit 10 has been taken, for the Utility District?

A. Yes, sir, under his instructions.

Q. And the entries have been made ever since that time in your hand?

A. Either in my hand or under my direction.

Mr. Burns: That is all.

The Court: That is all.

Witness excused.

Mr. Burns: The plaintiff in the Trustee's case and the plaintiffs in the bondholders case now rest as to the 996 branch of the case which is now being tried. Of course, there are other issues which are to be reserved for later trial.

And the plaintiffs here rested in rebuttal.

* * * * * *

The Court: I am wondering if it would not be 999 the proper time now to begin with the stipulation and go through those various exhibits that were offered, and the ruling withheld. You have the stipulation, so I might have a copy of it? As I recall, there are certain parts of the stipulation that were not offered, and there was objection made to the introduction of cer-

tain exhibits attached to the stipulation. Might I have the stipulation?

• • • • • •

1001 Mr. Thompson: I have identified as City's Exhibit No. 29 printed objections, which go to Subdivisions 7 (a), (b), (c), (d), (e) and (f); Subdivisions 9 (a), (b), (c), (d), (e), (f), (g), (h), (i) and (j); Subdivisions 13 (a), (b), (c), (d), (e), (f), (g), (h), (i), (j) and (k);—

The Court: All right. What are the objections?

Mr. Thompson: (Continuing.) Subdivisions 14 (a), (b), (c), (d), (e), (f), (g), (h), (i) and (j); Subdivision 15 (c); Subdivisions 21 (a) and (b) to the Stipulation and to an Indemnity Agreement—that is, the indemnifying agreement. May I, instead of reading these objections, hand these to the Reporter as though the objections were stated orally in open court?

The Court: Any objection to it?

Mr. Burns: I suggest you might save a place in the record to attach it as an exhibit instead of copying it in the record, if agreeable.

Mr. Thompson: It is City's Exhibit 29.

1002 The said document, so offered, marked for identification City's Exhibit No. 29, was admitted and read in evidence.

The Court: Does that Exhibit 29 contain all of the objections that you have to any part of the stipulation?

Mr. Thompson: I think so. I can tell you in just a moment.

The Court: If it does, it perhaps would be well for the Court to go over that exhibit and pass on it at a later date, rather than to undertake to do it at this time.

Mr. Thompson: I think it will be for the convenience of the Court and counsel both, if I may offer in evidence —not offering in evidence but as part of this record, as City's Exhibit 30, the typewritten statement that Mr. Burns made in connection with his offer, because in making the objections, he can more readily refer to that statement, if it is identified as an exhibit.

Mr. Burns: I think the Reporter copied it in the record exactly as it is here.

1003 The Court: I have a copy of that—five pages?

Mr. Thompson: Yes, sir.

Mr. Burns: I have not any objection.

Mr. Thompson: I offer this as Exhibit 30, for the convenience of the Court and counsel, with the stipulation

that if it has already been copied in the record, it will not be recopied.

The Court: All right.

The said document, so offered, marked for identification City's Exhibit No. 30, was admitted and read in evidence.

The Court: May I ask Mr. Burns if you want to file something in reply to this?

Mr. Burns: If the Court please, Mr. Thompson filed a long brief two or three weeks ago, dealing with those questions, while the Court was in Florida, and we filed a brief opposing it, so the questions are rather fully briefed.

The Court: May I get those so I can have them together?

Mr. Thompson: We are engaged now, your Honor,
1004 in the preparation of a reply brief, which will be in your Honor's hands in a few days.

The Court: This brief (indicating), filed on January 23rd by the City, and the Citizens Gas Company, on the 1st, and then on February 24th,—those are the briefs.

Mr. Thompson: I can now advise the Court that all objections to any matter appearing in the stipulation itself have been included in the printed objections contained in City's Exhibit 29, but there are two other offers made by Mr. Burns to which I desire to make special objections.

The City of Indianapolis and the other named defendants whom we represent object to the offer of Paragraph 4 of the Stipulation of Facts in the Todd case, appearing on Pages 192 and 193 of Exhibit 2; that is the stipulation that was signed in the Todd case by counsel.

It is preceded by a statement that the stipulation—that the facts are agreed to be true, for the final hearing and disposition of that case; and it seems to me clear
1005 that you cannot take a statement made in a stipulation of facts, which is limited to that case, and signed by the attorneys for the party, and offer it as an admission—successfully offer it as an admission in another case.

The Court: If they stipulated matter as being a fact, I don't know what the law would be with reference to that being in another case, but it would hardly be a fact in one case and not in another. As far as actually going in another, it might apply in an altogether different nature in one case than the other; but as far as being a statement of a fact, the Court accepts the stipulation, of course, as a fact. Now, if it is a fact, what would the law be with ref-

erence to admitting it in another case—as a fact in another case? It would be certainly a fact.

Mr. Thompson: We will be glad to furnish your Honor authorities on that.

And the other objection I have is to Exhibit 89, which is the second, third and fourth grammatical paragraphs from Section 18 of the Answer of the City of Indianapolis in the case of Cotter versus the Citizens Gas Com-
1006 pany—No. 1192, In Equity.

The Court: Is that the case in this court that was left pending the outcome of the Todd case?

Mr. Thompson: Yes, sir, that is right.

Mr. Burns: Heard together and decided by the Court of Appeals together.

Mr. Thompson: Now, I object for two reasons to this: The first objection that I have is because the answer in the Cotter case is not pleaded as res adjudicata here; but it is claimed to have an effect as an admission against the City of Indianapolis.

Now, in that case the answer was signed by the attorneys for the City of Indianapolis. It was not signed by the City, and it was not verified.

I will be able to furnish your Honor cases that it is well established that an admission contained in an answer does not bind the person making it in another case unless it has been signed by the person, personally. Some of the cases hold, sworn to by him, and has not been only signed by the lawyer, unless it affirmatively appear that the lawyer could not have obtained the information
1007 from any other source than his client.

The Court: You may furnish authorities.

Mr. Thompson: Yes, I will be glad to.

I also object to both of these—to both Exhibit 89 and to Paragraph 4 of the Stipulation of Facts in the Todd case because they are partial offers, really selections of certain paragraphs of the answer and certain paragraphs of the stipulation, and the context does not fairly appear.

Mr. Burns: If the Court please, if that is true, we are perfectly willing to offer the entire document; but we did not because we did not want to encumber the record. We are perfectly willing to have counsel offer what other parts he wants, or the entire document. We think it is entirely a fair excerpt and fairly sets forth what the admission was in both cases.

I think the authorities are very clear and have a number of cases from the Supreme Court that an admission

made by a party in one case is admissible against that party in another different litigation.

The Court: Suppose we fix a time for the filing of authorities and briefs upon these questions. I should
1008 like to have opportunity to study on that—the number of the exhibits and where the ruling has been reserved; and then give your authorities so we can take this up several days following. Then I can connect it up. Can you do that within the next five days?

Mr. Thompson: Be glad to.

The Court: That is 4, is it, Mr. Rabb?

Mr. Rabb: Yes, sir.

Mr. Thompson: I will not be here, but Mr. Rabb in my absence—

The Court: I want to fix a time—Mr. Burns file something by the 15th?

Mr. Burns: In reply, by the 15th, I shall be glad to.

Mr. Thompson: I am not sure the record shows—I think it does, your Honor—that an objection was made to an exhibit which was the brief in the Supreme Court of Indiana filed by the City in the Williams case.

Mr. Burns: You objected. There is no doubt on that. I think the Court reserved his ruling.

1009 The Court: I recollect that I made some comment on that.

Mr. Rabb: Exhibit 3—the appellant's brief.

Mr. Thompson: I want to object to any part—

Mr. Burns: Oh,—

Mr. Thompson: I make no objection insofar as it sets out the pleadings in the Williams case.

Mr. Burns: We simply had it identified—that was the method of showing those pleadings. We don't offer anything except the pleadings out of that.

Mr. Thompson: As to that we want the same objection, to that offer, as we had to the stipulation, on the ground that the Williams case is not res adjudicata of any question involved in this case.

The Court: Present all those questions at the same time.

Now, as I recall, Mr. Thompson, you made an offer to introduce other parts of the stipulation than were offered by—and is there some objection to that?

Mr. Burns: Yes, sir.

The Court: What were those parts of the stipulation?

1010 Mr. Burns: The parts of the stipulation which we did not offer are certain paragraphs of Section 18 of the stipulation—Section 18 of the stipulation identifies some twenty-three or four different documents, almost all of them letters, between The Indianapolis Gas Company and the City of Indianapolis.

The Court: Is that upon the theory that the plaintiff would not be bound?

Mr. Burns: That is going to be the basis of our objection. We offered certain of those letters and the paragraphs of the stipulation which identified them—the top of Page 2 would show what I gave the Reporter, namely, Sub-paragraphs, 1, 2, 9, 10, 13 and 14 of numbered Section 18 of the Stipulation; and we offered the six exhibits which were identified in those paragraphs of the Stipulation.

The Court: Those paragraphs contain certain letters?

Mr. Burns: Those paragraphs identify the letter and then the letter was attached as an exhibit, and we offered the paragraph so identifying the letter and the 1011 letter referred to in that paragraph of the stipulation.

The Court: Mr. Thompson has offered the remainder?

Mr. Thompson: Yes, sir.

Mr. Burns: He has offered the remainder of that paragraph. And we object to the remainder of that paragraph, and to each of the documents identified therein, and, perhaps, for clarity, I should refer to the numbers of the paragraphs and the numbers of the exhibits to which we are objecting.

We are objecting to numbered paragraphs and, Mr. Reporter, parenthetically, those are Roman numerals—

The Court: On Page 29?

Mr. Burns: We object to numbered paragraphs III, IV, V, VI, VII, VIII, XI, XII and XV to XXIII, both inclusive, and to the exhibits identified therein. The exhibits so identified are Nos. 60, 61, 62, 63, 64, 65, 68, 69, 70, 77, 78, 79, 80, 81, 82, 83, 84 and 85.

The plaintiffs object to these paragraphs of the stipulation and each of the exhibits identified therein, as just described, because they are letters exchanged between The Indianapolis Gas Company and the Utility District, or between The Indianapolis Gas Company and 1012 counsel for the Utility District, Thompson, Rabb &

Stevenson, or between counsel for the two parties; and none of those letters is binding on the Trustee or bondholders or can affect, in any way, the rights of the bondholders, since no action between The Indianapolis Gas Company and the City could prejudice or affect the bondholders' rights or the Trustee's rights.

We also object to one or two resolutions which are included among—perhaps I had better refer to that exhibit. It is Exhibit No. 70, identified in Paragraph XII of Section 18. We object to that especially on the ground that the resolution of the Board of Directors for Utilities is merely a self-serving declaration and cannot be used to prejudice the rights of the bondholders or Trustee. We also object to all of the exhibits previously enumerated and identified in Section 18 of the stipulation on the ground that they cannot be received as evidence of the facts recited therein, being merely a hearsay statement of the facts stated in such letters or documents.

1013 The Court: Well, would you not think it would be fair to have all of this before the Court, in view of the fact that Subdivisions 1 and 2 had letters from attorneys for the Utility District of the Gas Company, or some officer, that were introduced by the plaintiff? I think we should have the entire picture here. I don't know what they contain. I do notice that Sub-paragraphs 1 and 2, which were introduced by the plaintiff, refer to letters which passed between counsel and the Department of Utilities of the Gas Company and The Indianapolis Gas Company. Now, these offers, so far as the letters are concerned, appear to be the same.

Mr. Burns: I think the same general character, without any doubt, but I think the rule is this: if I sue Mr. Elam, he can bring in and offer against me, in that lawsuit, letters I had written, because they are admissions; but I cannot bring in letters that I have myself written and offer them against Mr. Elam, because those are merely self-serving declarations. Similarly, I can bring in letters Mr. Elam has written, because they are admissions by him, but Mr. Elam cannot offer, on his own

1014 behalf, letters he has written because they are only his self-serving declarations.

The Court: Don't you think this would be competent for the purpose of showing the attitude of the Utilities Department in paying this money in, and that is the purpose of them, as I understand.

Mr. Thompson: That is right.

Mr. Burns: If that was important, I think it might be competent, but I think no arrangement or attitude on the part of the Utility can make any difference, since they took the property and operated it.

The Court: I feel like I can pass on this objection at this time, simply to show as to whether or not there is estoppel here, by acting under the lease, and show why—I think that would be my ruling on that.

Mr. Burns: May we have an exception?

The Court: The objection advanced to the various subdivisions of Section 18 of the stipulation, made by the plaintiff, will be overruled and exception given; and as far as that section is concerned, it may be read in evidence.

1015 The said SECTION 18 of the Stipulation, so offered, was admitted and read in evidence.

The Court: Are there objections now to any other parts, Mr. Burns, that have been offered by Mr. Thompson, that were not offered by the plaintiff?

Mr. Burns: Well, I have made objections from time to time, during the course of Mr. Thompson's testimony.

The Court: I am referring now to the stipulation.

Mr. Burns: No, that concludes our objections to any—just a moment.

The Court: May I make myself clear, I am referring to certain parts of the stipulation, not offered by the plaintiff, and that Mr. Thompson offered.

Mr. Burns: No, I don't object to any other parts of the stipulation.

The Court: May the record show at this time that Exhibit 1, which is the stipulation, is read in evidence, with the exception of the objections which have been reserved to certain parts of it. I think there was some reservation as to certain parts.

1016 Mr. Thompson: Yes, your Honor.

The said Stipulation, so offered, marked for identification PLAINTIFFS' EXHIBIT NO. 1, was admitted and read in evidence, with the qualification as stated by the Court.

* * * * * *

1035 Whereupon, the trial was concluded.

PLAINTIFF'S EXHIBIT NO. 133.

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Consolidated Caption—1844 and 1950) * *

DEPOSITION OF ROBERT E. SIMOND.

("Notice to take Deposition, and Proof of Service thereof omitted in printing.")
(Inserted pursuant to stipulation filed November 22, 1939.)

IN THE DISTRICT COURT OF THE UNITED STATES.

* * * * * *

The Deposition of Robert E. Simond, taken on behalf of the plaintiffs in the above entitled actions before William C. Meyer, a Notary Public of Cook County, Illinois, on the 21st day of February, A. D. 1939, at the office of Nicholson, Snyder, Chadwell & Fagerburg, Room 2360, The Field Building, 135 South LaSalle Street, Chicago, Illinois, pursuant to notices hereto annexed.

Present:

Messrs. Baker, Hostetler & Patterson, by
Mr. Howard F. Burns,
appeared for plaintiffs;

Messrs. Thompson and Rabb, by
Mr. W. H. Thompson,
appeared for the City of Indianapolis and the Members of the Board of Trustees for Utilities and the Board of Directors for Utilities of the City of Indianapolis;

Messrs. Davis, Pantzer, Baltzell & Sparks, by
Mr. W. D. Sparks,
appeared for Citizens Gas Company of Indianapolis;

Mr. William R. Higgins,
appeared for The Indianapolis Gas Company.

* * * * * *

("Stipulation as to waiver of notice, waiver of signature, etc., omitted in printing.")
(Inserted pursuant to stipulation filed November 22, 1939.)

ROBERT E. SIMOND, a witness called on behalf of plaintiffs, having been first duly sworn, testified as follows:

Direct Examination by Mr. Burns.

Q. Mr. Simond, will you state your full name, your age, and your occupation?

A. Robert E. Simond. My age, 49; vice-president Halsey Stuart, in charge of municipal buying in the Chicago office.

Q. When you say "in charge of municipal buying," you mean in charge of the buying of Municipal bond issues and so forth?

A. That is correct.

Q. How long have you been connected with Halsey Stuart & Company?

A. Twenty-five years.

Q. Twenty-five years. And during that time what various offices have you held with Halsey Stuart & Company?

A. Assistant cashier, 1916; then in the Municipal Department from 1916 to the present date.

Q. And you have been head of the Municipal Department during all that time?

A. For about ten years.

Q. For the last ten years you have been head of the Municipal Department?

A. That is right.

Q. Do you have charge of both the purchase and the sale of municipal securities?

A. Well pretty much so.

Q. That is the whole Municipal Bond Departments are under your charge?

A. Yes, under our jurisdiction.

Q. So that you have charge both of the purchase of the securities and the marketing of them after Halsey Stuart & Company has purchased them?

A. Well, fixing the terms of marketing and so forth.

Q. The actual Sales Department is under somebody else?

A. Under the sales heads.

Q. Under the sales heads. Is Halsey Stuart & Company an Illinois corporation?

A. An Illinois corporation.

Q. And you are, you say, vice-president of the company?

A. That is right.

Q. Are you also a director?

A. No, sir.

Q. How many offices has Halsey Stuart & Company throughout the country?

A. I would say two offices, and representatives in Boston, Philadelphia, St. Louis, Detroit, and Milwaukee. They have office space in Boston, Philadelphia, Detroit, and St. Louis, and then representatives, at least one or more, without office space to my knowledge, in Milwaukee, Minneapolis, Omaha, Pittsburgh, Cincinnati—

Q. Indianapolis?

A. No, sir.

Q. No office or representative located in Indianapolis?

A. The gentleman who covers Indiana occasionally, he travels out of Champaign, Illinois.

Q. And his territory includes Indianapolis?

A. That is right.

Q. What is his name? Is it Mr. W. R. Cosby?

A. W. R. Cosby.

Q. And he comes to Indianapolis from time to time and visits bond buyers and also banks or other people interested in the purchase of securities?

A. Yes. How often he goes there I can't answer. His sales manager could answer that. I don't know now often he goes there.

Q. You said you had two offices. Those are the offices in Chicago and New York?

A. In Chicago and New York.

Q. And in the other cities you mentioned—

A. We have an office in Philadelphia, Detroit and St. Louis.

Q. You have offices in Philadelphia and Detroit?

A. Yes, where we have office space.

Q. And those offices are the headquarters of your sales representatives in those territories?

A. That is right.

Q. Do you also have an office in Cleveland, Ohio?

A. Yes—not an office; we have a sales representative.

Q. Does he have office headquarters there?

A. I don't think so, no. He travels out of his home.

Q. That is, he lives in Cleveland?

A. He lives in Cleveland.

Q. He covers the territory in and around Cleveland in the sale of securities?

A. That is right.

Q. Did you attend this deposition in response to a subpoena?

A. That is right, yes, sir.

Q. Have you the subpoena with you?

A. Yes, sir.

Q. May I see it?

A. This is one of the copies (handing document to counsel).

Q. Well, you received a subpoena in each of these cases, is that correct?

A. That is right.

Q. And the paper you have just handed me is a copy of the subpoena which you received in one of these cases?

A. That is correct.

Mr. Burns: I will ask the notary to mark it as P X 101. I think so as to save confusion with the exhibits already marked in connection with the stipulation, I will start with 101 and work from there.

(Said document was marked as requested P X 101.)

Mr. Burns: Q. In May or June, 1935, Halsey Stuart & Company and Otis & Company bid for and bought eight million dollars principal amount of bonds of City of Indianapolis Gas Plant Revenue bonds, dated June 1, 1935, is that correct?

A. That is corerct.

Q. Did you have anything to do with the negotiation or consummation of that sale?

A. With the negotiations.

Q. And what did you have to do with it?

A. Establishing a price which we could offer for the bonds.

Q. Establishing the price which Halsey Stuart & Company could offer the city for the bonds?

A. That is right. Halsey Stuart and Otis joined in that.

Q. Yes.

A. And the preparation of the bid itself which was submitted; then after we purchased the bonds, the preparation of the circular, arranging for the legal opinion, and my recollection is at the suggestion of the city we aranged for the preparation of the blank bonds as a matter of expediency. They were prepared here in Chicago.

Q. Now you said you arranged for or looked after the preparation of the circular which was used in the sale of those bonds. Have you a copy of that circular with you?

A. Yes, sir.

Q. May I see it?

A. Yes, sir (handing document to counsel).

Q. Is this an extra copy of the circular that we could have?

A. Yes, sir.

Mr. Burns: I will ask to have the reporter mark this P X 102.

(Said document was marked as requested P X 102.)

Q. Calling your attention, Mr. Simond, to P X 102, which I have just had marked, is that the circular which was prepared under your direction by Halsey Stuart & Company in connection with the sale of these bonds?

A. Yes, sir.

Q. And this was used, this same circular was used throughout your campaign in the sale of the bonds?

A. In the preliminary offering.

Q. What do you mean by the preliminary offering?

A. Well, in September we revised it slightly in the form of a sales memo, having some of the bonds remaining on hand, and we made a supplemental offering at that time.

Q. In September, 1935?

A. I think it was about September, 1935.

Q. Have you the supplemental one that you prepared in September, 1935?

A. September 28th (handing document to counsel).

Mr. Burns: I will ask to have this marked P X 103.

(Said document was marked as requested P X 103.)

Mr. Burns: Q. Now this paper which you have shown me, Mr Simond, marked P X 103, was issued by Halsey Stuart & Company on about September 28, 1935?

A. Yes.

Q. And was circulated by it in connection with the previous circular which has been identified as P X 102?

A. That is right. This was circulated among our sales organization.

Q. Simply among your sales organization?

A. Yes.

Q. The circular, P X 103, wasn't intended for circularization to the public, but merely to your sales organization?

A. That is right.

Q. And, as far as you know, the mimeographed sheet, P X 103, was not circularized to your—

Mr. Thompson: This question calls for something that the witness can have no possible personal knowledge of.

Mr. Burns: Q. —to the public generally, but only to the sales organization?

Mr. Burns: Will you read the question?

(Question read.)

A. My recollection is it wasn't circularized generally.

Q. That is, it went only to the sales organization?

A. To the sales organization. It was prepared for that purpose.

Q. And even after the preparation of P X 103 you continued to use the printed circular, P X 102, for the sale of the bonds to the public?

A. Well I can't answer that. I assume the salesmen referred to both. I can't answer that.

Q. You can't answer that?

A. I can't answer that.

Q. The circulars, P X 102, were still out and in the hands of your salesmen?

A. There was still a supply of them, yes.

Q. By the way, have you an extra copy of P X 103 so we can keep this for the record?

A. Yes, sir.

Q. Did Halsey Stuart & Company get out any other circulars for circulation among the public generally except this printed circular P X 102?

A. It seems to me I saw one covering $510,000. That was fully a year and a half later. The text was the same.

Q. The text was the same?

A. The text was the same. It simply reduced the amount.

Q. At that time Halsey Stuart simply had about $510,000 of them left and a supplemental circular was put out with the same text as P X 102?

A. Practically the same text.

Q. But indicating there were only 510,000 left?

A. That is right.

Q. Now can you tell me at the time the circular, the mimeographed circular, P X 103, was put out, about how many bonds Halsey Stuart & Company had left on their shelves?

A. I couldn't tell you.

Q. You couldn't tell me whether it was one million or two million?

A. No, I can't tell you, Mr. Burns.

Q. When you say the supplemental circular was put out similar to P X 102, indicating there were 510,000 of

the bonds left, did that mean that Halsey Stuart and Otis & Company had, or Halsey Stuart & Company had?

A. We had jointly.

Q. In the trading account?

A. In the trading account.

Q. Now in addition to the circular, P X 102, did Halsey Stuart & Company and Otis & Company, either separately or jointly, advertise these bonds in various newspapers?

A. Yes, sir.

Q. Have you a copy of the advertisement which they used?

A. This was a copy of the ad that appeared July 1st in the Boston Herald (handing document to counsel).

Q. Is this something that you wish to keep yourself?

A. I would like to.

Mr. Thompson: May I see it, please?

Mr. Burns: Q. Have you a record showing in what other papers that advertisement appeared, Mr. Simond?

A. I am afraid not. I would have to rely on my memory, but I know it appeared in New York and Chicago.

Q. And Boston?

A. And Boston. I mean aside from Boston it appeared in New York and Chicago. I generally just keep one copy for my own file record. I know it appeared, I will say broadly. It appeared in Cleveland also, because Otis & Company's advertisement appeared there.

Q. Now calling your attention, Mr. Simond, to a photostatic copy of a newspaper advertisement, which I will ask the stenographer to mark P X 104—

(Said document was marked as requested, P X 104.)

Q. —I will ask you if that is a copy of the advertisement used by Halsey Stuart & Company and Otis & Company in the newspapers of July 1, 1935?

A. It appears to be.

Q. And have you compared that with the advertisement which you produced from the Boston Herald?

A. May I glance at it? I didn't compare it.

Q. Will you?

Mr. Thompson: I assume, if Mr. Burns says this is a photostatic copy taken from some paper, we have no disposition to ask the witness to sit here and compare this thing. I am willing to agree that—

A. It appears to be a photostatic copy.

Mr. Burns: Is counsel willing to agree that this is a true copy of the advertisement which Mr. Simond has produced?

Mr. Thompson: On your statement, Mr. Burns, that it is a photostatic copy, we will so agree.

Mr. Sparks: That is right.

Mr. Burns: I will state that this is a photostatic copy, that P X 104 is a photostatic copy taken from the home edition of the Indianapolis Times of July 1, 1935. May that be stipulated?

Mr. Thompson: I will take that on your statement, Mr. Burns.

Mr. Sparks: Yes.

Mr. Higgins: Yes.

Mr. Thompson: I do not mean to agree by that that I believe it to be competent, but as far as its authenticity is concerned, yes.

Mr. Burns: Q. Did the same or substantially the same advertisement appear, Mr. Simond, in the Wall Street Journal of July 1st?

A. It appeared in New York. I don't know the name but we used the Wall Street Journal.

Q. How about the New York Times?

A. The New York Times.

Q. The New York Herald Tribune?

A. The New Yorw Herald Tribune. These are the papers we used. I can't say that it actually appeared in all those papers.

Q. You don't know in how many of those it appeared?

A. No, but I know it was given broad publicity.

Q. You know that it was given broad publicity?

A. Yes, sir.

Mr. Burns: Well, to save the trouble of proving it in some other way, if counsel is willing to agree that it is the fact, I will state that this advertisement, P X 104, has been compared with advertisements appearing in the Indianapolis News of July 1, 1935, the Indianapolis Star of July 1, 1935, the New York Times of July 1, 1935, the Chicago Tribune of July 1, 1935, the Wall Street Journal of July 1, 1935, and the Cleveland Plain Dealer of July 1, 1935, and that the advertisement in each of those papers is identical with P X 104, except that in one or two cases the order of the names, Otis & Company and Halsey Stuart & Company is reversed, and in the New York editions of the papers Otis & Company, I suppose in order to comply with the New York law, used the word "Incorporated" after the name Otis & Company.

Mr. Thompson: On behalf of the City of Indianapolis I am willing to make such an agreement, provided it is

agreed by you that in none of these advertisements did the name of the City of Indianapolis appear as a signer of such advertisement.

Mr. Burns: Well it appears right on its face that it didn't.

Mr. Thompson: I know, but then—

Mr. Burns: I am perfectly willing to agree that the City of Indianapolis does not appear as a signer of this advertisement.

Is other counsel willing to agree that these papers—

Mr. Sparks: Yes, on the agreement that nobody appears as a signer except as indicated in that exhibit.

Mr. Burns: That is perfectly all right.

Q. Do you know whether this advertisement of July 1, 1935, appeared in any papers in Chicago other than the Chicago Tribune?

A. Probably the Journal of Commerce.

Q. Probably the Chicago Journal of Commerce?

A. Yes.

Q. The Chicago Daily News?

A. I should say the News and American.

Q. Probably the Chicago Daily News and the Chicago American, the two evening papers and the Journal of Commerce, and the Chicago Tribune?

A. Yes; maybe the Herald & Examiner in the morning, that I don't know.

Q. That you don't recall?

A. No.

Q. But you would say that very wide currency was given to this advertisement, P X 104, throughout the country?

A. That is correct—throughout the country? I can't say that, I don't know about the west coast.

Q. Over what territory does Halsey Stuart & Company advertise?

A. The middle west.

Q. As far west as the Mississippi river?

A. Oh yes. I don't know that we advertise in San Francisco or Seattle.

Q. Yes, but over the east and the middle west you would say the advertisement was given very wide currency in the newspapers?

A. I don't know how to construe that "wide currency." It was given—I am sure it was given publicity where we had sales representatives.

Q. And you had sales representatives through most of the east and the middle west?

A. Through most of the east and middle west.

Q. Now, did Halsey Stuart & Company later get out a different form of advertisement in connection with the sale of these City of Indiana Gas Plant Revenue Bonds?

A. What do you mean by "legal"?

Q. Beg pardon?

A. What do you mean by "legal"?

Q. No, later.

A. Oh, later. I don't know, Mr. Burns. They may have. That would have been handled by our advertising department.

Q. Well, to refresh your recollection, I show you a photostat of an advertisement appearing in the Indianapolis Star of July 8, 1935, and ask you whether you can identify that?

A. I can't identify it without having seen an original. I don't recall at this date.

Q. You can't recall at this date whether that advertisement was published?

A. I would say it is our form and our type and everything but—

Q. From an inspection of it you would say that it looks as though it were your advertisement?

A. That is right.

Q. Do you notice in there a reference to some booklet, booklet S. J. 7, in one of the little boxes at the bottom?

A. Yes.

Q. Is that a booklet Halsey Stuart put out for bond buyers?

A. Well I can't answer that definitely. I know we get out a series of booklets but I don't read them; I have no time to read them, and I don't prepare them. They are prepared by our advertising department.

Q. From an examination of that advertisement which I have just shown you, you haven't any doubt that is is a photostat of the Halsey Stuart advertisement?

A. No.

Mr. Burns: I will ask to have the reporter mark the photostat, of which we have just been inquiring, P X 105.

(Said document was marked as requested, P X 105.)

Mr. Burns: May it be stipulated that this photostat, P X 105, is a photostat of an advertisement appearing in the Indianapolis Star for July 8, 1935.

Mr. Thompson: Subject to the same stipulation that it isn't signed—this is just one specific publication?

Mr. Burns: That is right.

Mr. Thompson: Yes, I will agree to that.

Mr. Higgins: Yes, we will agree.

Mr. Burns: Mr. Sparks?

Mr. Sparks: Yes. What was the date?

Mr. Burns: July 8, 1935.

Mr. Higgins: In the Star?

Mr. Burns: In the Indianapolis Star.

Q. Would you have in your records of Halsey Stuart & Company, Mr. Simond, any record of the papers in which the advertisement of July 1, 1935, P X 104, and the advertisement of July 8, 1935, P X 102, appeared?

A. Yes, our vouchers would show that.

Q. Your vouchers would show that?

A. Yes.

Q. Can you get that information for us?

A. Yes.

Mr. Thompson: It is agreed that the witness in answer to the last question may furnish a list to the reporter of the newspapers in which P X 104 and P X 105 were inserted by Halsey Stuart & Company.

Mr. Burns: And the dates of such insertions?

Mr. Thompson: Yes, and the dates of such insertions.

The Witness: Do you want that certified?

Mr. Thompson: No.

Mr. Burns: No, just give him a letter and we would like it soon, because I take it it won't be very hard for you to get.

Q. Now in connection with the purchase of these bonds, Mr. Simond, did the city prepare and give to Halsey Stuart & Company a transcript of the proceedings, or something of that sort, upon which the bonds were to be issued?

A. That is right.

Q. Have you got a copy of that with you?

A. Yes, sir.

Q. May I see it?

A. (Witness hands document to counsel.)

Mr. Burns: I will ask to have this marked P X 106.

(Said document was marked as requested, P X 106.)

The Witness: I would like to keep that copy if I may.

Mr. Burns: All I want to do is to have an opportunity to make a copy of it.

Q. Mr. Simond, calling your attention to the transcript

which you have produced, and which is marked P X 106, I will ask you if this is the transcript which Halsey Stuart & Company received in connection with the purchase of the City of Indianapolis Gas Plant Revenue Bonds?

A. That is right.

Q. And the information contained in this transcript was relied upon by Halsey Stuart in the purchase of those bonds?

A. That is correct.

Q. Do you know from whom Halsey Stuart & Company received this transcript?

A. It is just recollection, but we got that with the delivery of the bonds, so I presume the City Treasurer brought that up with the bonds.

Q. The City Treasurer of the City of Indianapolis?

A. That is right, that being a customary procedure.

Q. You had previously examined various parts of the documents that made up this transcript, I take it?

A. Our attorneys had.

Q. Your attorneys had. And your attorneys in this transaction were who?

A. The firm of Matson, Ross, McCord & Clifford.

Mr. Burns: Well now may it be stipulated, for the purpose of saving expense in the copying of this transcript, which contains some 72 pages, that the copy of the transcript in the possession of the city will be produced at the trial and that every one will agree that it is a correct copy of this transcript which has been identified as P X 106?

Mr. Thompson: Yes.

Mr. Sparks: That is right.

Mr. Burns: Q. Mr. Simond, in the event that we are unable to locate another copy of this transcript, will it be agreeable to you to have the reporter or somebody from Mr. Snyder's office make arrangements with you to have this copied as long as it is returned safely to you?

A. Yes, sir.

Mr. Burns: I take it that that is perfectly agreeable to counsel, in the event that we can't locate a copy of the transcript?

Mr. Thompson: Certainly. I just agreed that we have got one copy.

Mr. Burns: I know it, but sometimes they turn out not to be identical, or something of that sort.

Mr. Thompson: It is a certainty that Mr. Matson's firm will have a correct copy because they gave their opinion.

Mr. Burns: Yes.

Q. Mr. Simond, calling your attention to a photostatic copy of a letter dated September 20, 1935, I will ask you if you recognize that as a letter from your office?

A. Well I can say this, that the gentleman who signed the letter was and is in our employ.

Q. And you recognize his signature?

A. I recognize his signature.

Mr. Higgins: A letter to whom?

Mr. Burns: To Newton Todd.

Q. Is this man now here in Chicago?

A. No, sir.

Q. Where is he located?

A. You mean this man Walter?

Q. Yes.

A. In Minneapolis.

Q. Was he located here in Chicago at that time?

A. Yes.

Q. And you do recognize his signature attached to that letter?

A. I recognize his signature.

Q. And is W. R. Cosby, who is referred to in this letter which I have had marked P X 107, the same Cosby who you said traveled out of Champaign, Illinois, and covered Indianapolis?

A. That is correct. I may be mistaken about his home address being Champaign. I know he lived there.

Q. That isn't very vital.

A. In either Champaign or Urbana.

Q. The circular, Mr. Simond, referred to in that letter would be the circular, P X 102, which was currently in use by Halsey Stuart & Company?

Mr. Thompson: If you know of your own knowledge.

A. I don't know. I haven't seen this letter before.

Mr. Burns: Q. Was there any other circular that you were using at that time?

A. My assumption is—and it is only an assumption—that it refers to the circular of July 1st, because he shows here the available maturities.

Q. That is the circular identified as P X 102?

A. That is right.

Q. That is the circular which was then in current use by Halsey Stuart & Company in the marketing of these bonds?

A. That is right.

Q. Now showing you another letter, Mr. Simond, or

photostat of letter marked P X 108, is that your signature shown on that photostat?

A. Yes, sir.

Q. And did you write that letter on or about the date shown thereon?

A. Apparently so.

Q. And calling your attention particularly to your statement, "a circular of which released at the time of our general offering over a year ago is enclosed herewith". Can you identify from that what circular it was?

A. The one of July 1st.

Q. P X 102?

A. Yes, sir.

Q. A copy of P X 102 was the circular which you enclosed in the letter to Mr. Todd, P X 108?

A. That is the circular, because it refers to the one released at the time the bonds were offered generally.

Q. You haven't any doubt about it, have you, that that is the one you enclosed?

A. No, I haven't much doubt about it. I can't say for a certainty, but from the description and the reference in the letter, that is the one.

Q. There wasn't any other circular which you issued at the time the bonds were generally offered, was there?

A. Not at that time, no, sir.

Q. Now calling your attention particularly to the last sentence of that letter, Mr. Simond,—"The statements contained therein"—when you said "therein" you were referring to the cir ular, were you not?

A. That is right.

Q. —"were approved by attorneys for the City and by engineers whose report on this project was available to us"?

A. That is right.

Q. When you wrote that you understood that to be the fact, did you not?

A. Yes, sir.

Q. And you still understand that to be the fact?

A. Yes, sir.

Q. I show you a photostat of a letter, or a carbon copy of a letter marked P X 109. Can you identify that as a photostat of the carbon copy of the letter which you were answering to Mr. Todd?

A. Not very well, Mr. Burns.

Q. You haven't brought that letter with you, the letter from Mr. Todd?

A. No, sir.

Q. You would have it in your files at the office?

A. Probably in the sales files, yes, sir.

Q. And you could check that up and identify it?

A. Yes, sir.

Q. Have you with you, Mr. Simond, the other papers that were subpoenaed for you to bring here?

A. Have you a copy of the subpoena?

Q. I have.

A. Under (c) "The use which the City of Indianapolis expected to make of the proceeds of the sale of the Gas Plant Revenue Bonds it expected to issue or actually issued in 1935." The only information we have on that is in the transcript itself.

Q. You have no information on that other than the transcript?

A. I have no information on that other than the transcript.

Q. Now taking sub-paragraph (a) paragraph A, what have you on that subject?

A. Well I have this information here (indicating).

Q. May I see it?

A. I checked this—"All memoranda, minutes and records."

Mr. Thompson: What do you mean by "The plans of the City of Indianapolis"?

Mr. Burns: I think that is fairly clear. If I can see the papers which he has brought, I think it will save a little time.

The Witness: "All memoranda". You brought up Todd's letter. I didn't have that because that is filed under the individual's name.

Mr. Burns: I am not finding fault because you didn't bring it.

A. The heading is so general. Down in here (indicating) these paragraphs (indicating) you will see where I checked it. This (indicating) has reference to the circular. Now with respect to "(b) Any proceeding, meeting, transaction, negotiation, conversation or correspondence in connection with the sale". Here is a copy of the prospectus which was furnished by the City—

Q. May I see that please?

A. —on which we based our preliminary information.

(Handing document to counsel.)

Mr. Burns: Mark this P X 110.

(Said document was marked as requested P X 110.)

Mr. Burns: Q Mr. Simond, this paper which I have marked P X 110, containing 45 pages, is the statement pertaining to the proposed issue of Indianapolis Gas Plant Revenue Bonds which you just described as a prospectus, is that right?

A. Yes.

Q. And this was furnished to Halsey Stuart & Company by the City of Indianapolis?

A. It is furnished to any interested bidder interested in the bonds.

Q. This was furnished before the bid was made?

A. That is right.

Q. And do you remember, or is there anything shown in your records, just when you received this?

A. Not unless it is dated. Prior to the sale, that is all I can say, because our information is based on records of this sort.

Q. You relied upon this prospectus, as you describe it, P X 110, in making your bid for the bonds?

A. Not altogether; it was in part.

Q. But you relied in part upon that?

A. That is correct.

Q. And you had that at the time you made the bid which was accepted and resulted in the sale?

A. That is correct.

Q. From whom, if you recall, did you receive that?

A. From the city. Now who—

Q. Just who turned it over?

A. Who turned it over, I don't know.

Q. You don't recall?

A. I don't remember.

Q. Have you in your files any letter by which that was transmitted?

A. I haven't found any.

Q. Do you think it was probably handed to you or somebody in Indianapolis?

A. Yes.

Q. Have you another copy of this prospectus, or is that the only copy that you have?

A. Well I don't think it is material from our standpoint, because the transcript is all we would need, and so if you want it—

Q. Are you perfectly willing to have it marked and put in the deposition?

A. Yes, sir.

Q. Have you some other papers which you brought here in response to the subpoena?

A. Correspondence in reference to the circulars.

Q. May I see that?

A. We submitted them to the attorneys and to the engineers for their approval.

Q. May we see that correspondence, please?

A. (Witness hands papers to counsel.)

Q. Mr. Simond, I call your attention to three documents, marked respectively, P X 111, P X 112, and P X 113. Calling your attention to P X 111, is that a correct copy of a letter which you wrote to Thompson, Rabb & Stevenson, about June 27, 1935?

A. Yes, sir.

Q. And was that sent on or about its date?

A. On that date.

Q. And did you on the following day, June 28th, have a telephone conversation with Mr. Rabb in Indianapolis?

A. Yes, sir.

Q. Now with your letter, P X 111, to Thompson, Rabb & Stevenson, did you enclose a proof of the proposed circular which was issued July 1st?

A. Yes, sir.

Q. And is this the copy of the proof which you enclosed—P X 114?

A. Yes, sir.

Mr. Burns: I will ask to have this marked P X 114.

(Said document was marked as requested, P X 114.)

Mr. Burns: Q. Calling your attention again to P X 114, is this the copy of the proof as Mr. Rabb sent it back to you (indicating)?

A. Yes, sir.

Q. Can you tell us how many of the ink marks and changes that appear on that proof were made before it was sent to Mr. Rabb and how many were made by him?

A. I would say that the changes made in my writing were prepared prior to the submission to Mr. Rabb.

Q. And the changes in your writing—just so we will have this clear, suppose we mark the pages 1, 2, 3, and 4 respectively.

(Said pages were so marked by the Notary.)

Mr. Burns: Q. Now calling your attention to the change made in ink about the middle of page 2 by the insertion of the word "approximately", is that in your writing?

A. Yes, sir.

Q. And you would say that that was made prior to the time you sent it to Mr. Rabb?

A. Yes, sir.

Q. And calling your attention to the various changes in ink made on page 3 of P X 114, are all of those changes made on that page in your writing?

A. Yes, sir.

Q. And you would say that those changes were made prior to the submission of this proof to Mr. Rabb?

A. That is correct.

Q. And calling your attention to the underlining of the words "or sale or disposition of any part," appearing on page 4 of this circular; and calling your attention also particularly to Mr. Rabb's letter to you, do you know who made that underlining?

A. I would say Mr. Rabb. The changes I made were in ink. And he refers to it here: "As stated over the telephone and in our wire the words 'or sale or disposition of any part' in the third sentence of the next to the last paragraph of this circular should be eliminated." So he underscores here what should be eliminated.

Q. The words that should be eliminated. And calling your attention particularly to the pencil notations at the top of page 1, other than the marks made here by the reporter, are they your writing?

A. No, sir.

Q. Do you know whose they are?

A. They were signed by Mr. Rabb.

Q. That is all you know about it?

A. That is all I know, absolutely.

Q. Now as I understand it, this P X 114 was sent to Thompson, Rabb & Stevenson in your letter of which P X 111 is a copy, and was received back from Thompson, Rabb & Stevenson in P X 113, this letter from Albert L. Rabb to you, A. L. Rabb to you?

A. Yes, sir.

Q. And enclosed in the letter P X 113 was a confirmation of a telegram P X 112?

A. That is right.

Q. Now would you object to parting with the proof of the circular, P X 114?

A. No, sir, if we get it back.

Q. That is, you will let us take it long enough to photostat it?

A. Oh sure.

Q. And also the letters?

A. And the letters.

Q. Did you have any other correspondence with Thomp-

son, Rabb & Stevenson about this circular, or about anything in connection with these Indianapolis Gas Bonds?

A. Yes, with respect to the supplemental memorandum that we prepared, a copy of which you have entered as evidence.

Q. May I see that correspondence?

A. Yes, sir, (handing documents to counsel).

Q. Calling your attention, Mr. Simond, to the supplemental mimeographed memorandum dated September 28, 1935, which has been identified as P X 103, did you prepare that memorandum?

A. Yes, sir.

Q. And where did you secure the information from which that was prepared?

A. Well, it incorporated much of the stuff that was used in our original circular, from the prospectus and then from the City itself.

Q. When you say "prospectus" you are referring to P X 110?

A. Yes, sir.

Q. And when you were speaking of your original memorandum you were referring to P X 102?

A. That is right; and then discussions with the city with respect to the personnel of the Board of Directors and their affiliations.

Q. Now where did you get the information contained in that memorandum in regard to the city being engaged in negotiations with the Indianapolis Gas Company for a definite lease basis?

A. Where did we get that information?

Q. Yes.

A. From the city.

Q. From the city. In what form did you get that information?

A. Probably a conversation. There was a representative sent down for that purpose.

Q. There was a representative sent to Indianapolis?

A. Yes.

Q. Who was that representative?

A. I don't recall offhand.

Q. Do you know with whom he talked?

A. With whom he talked?

Q. Yes.

Mr. Sparks: How can he know that except by hearsay?

A. No.

Mr. Burns: Q. You do not?

A. Our correspondence as far as the city was concerned was with Mr. Rabb.

Q. Do you know what happened to the rest of this letter that appears to be torn off here, the letter of September 21, 1935?

A. No, sir.

Q. You don't know whether that letter was ever signed, or what was written on the bottom of it?

A. No, sir.

Q. Do you know when you received it, or whether it was signed when you received it, or anything of the sort?

A. I don't recall now.

Q. You don't recall anything at all?

A. I don't recall now.

Mr. Thompson: How could it be signed when it was received if it isn't signed now?

Mr. Burns: Part of it has been torn off. You can't tell whether it was signed or not. Half the page is torn off.

A. No, "Very truly."

Q. Isn't there half a page torn off that sheet?

A. Apparently a blank. I don't know.

Mr. Higgins: That has been torn off.

Mr. Burns: It is pretty plain that half the sheet has been torn off.

Mr. Thompson: Yes, and it is perfectly apparent the letter ends there too.

A. Occasionally we get letters that aren't signed, just sent out carelessly.

Mr. Burns: Q. You don't know what happened to the balance of that sheet that is torn off?

A. No, I have no idea.

Sometimes the boys pick up our mail before it is signed.

Q. Have you any more material that you brought here in response to the subpoena?

A. Well, the answers to some of those questions are in the transcript. I have indicated that.

Q. Yes, but have you any more material?

A. Here is an ordinance with the letter of transmission of Matson, Ross, McCord and Clif[illegible]d with respect to it (handing document to counsel).

Q. Did you bring with you the Mullergren report, Mr. Simond?

A. A photostatic copy. That is what we seemed to have in our files.

Q. Do you know where the original is?
A. Mr. Eaton may have it; I am not sure.
Q. Mr. Eaton of Otis & Comapny in Cleveland?
A. Yes.
Q. Or Mr. Daily, the president of Otis & Company?
A. Yes.
Q. Did you receive this report from Mr. Mullergren on or about the date shown there, June 22, 1935?
A. Yes, approximately that date.
Q. Did you have anything to do with engaging Mr. Mullergren?
A. No.
Q. Who did engage him, if you know?
A. I don't know; whether Mr. Eaton did or Mr. Schroeder did, I don't know.
Mr. Thompson: Q. Who is Mr. Schroeder?
A. Schroeder is one of our corporation buying department men.
Mr. Burns: Q. But you personaliy didn't have anything to do with engaging him?
A. No, sir.
Q. This report of Mr. Mullergren's was part of the information upon which you relied in the purchase of these securities of the Indianapolis Gas Plant and in making up the circular, P X 102?
A. That is right.
Mr. Thompson: How could he have relied on that report in purchasing bonds which were bought on May 28th when the report is dated in June?
Mr. Burns: Q. How much earlier than the date of this report was Mr. Mullergren engaged, do you know?
A. I don't recall, Mr. Burns. I know he made a verbal report to us, and then reduced it to this form.
Q. Did he make this verbal report to you before you made your bid to the City of Indianapolis?
A. That I don't know.
Q. Well if he didn't you would want to correct—
A. Before we made our purchase?
Q. Before you made your purchase.
A. Well I know he was familiar with that situation down there, and we discussed it with him, and he made his examination prior to the sale, and then—or, I will put it this way, he went over with us an examination he had made previously, and then at the request of Otis and ourselves brought that report up to date.

Q. And this preliminary discussion that you had with him was before you made your bid for the bonds?

A. That is right.

Q. And did you personally have that discussion with him?

A. I sat in on it. I wasn't alone.

Q. You weren't alone. Do you recall who else was there?

A. I don't recall definitely. I know who probably would be there.

Q. But you don't at this time have any definite recollection?

A. No, I don't.

Q. Except that you and Mr. Mullergren were there?

A. That is right.

Q. And that it was before you submitted your bid in the latter part of May, 1935?

A. Yes.

Q. Now in connection with this preliminary conference that you had in May, 1935, was there some discussion of the lease from the Indianapolis Gas Company to the Citizens Gas Company of the Indianapolis gas property?

Mr. Thompson: With whom?

Mr. Burns: Was there some discussion between Mr. Mullergren and Mr. Simond?

A. Not between us.

Q. Was anything said about the lease?

A. Well, I don't recall, because I wasn't alone in that discussion, you see. We knew of the lease.

Q. You knew of the lease?

A. We knew of the lease.

Q. Was anything said in that conversation about the lease?

A. With Mr. Mullergren?

Q. Yes, with Mr. Mullergren.

A. That I don't know.

Q. You don't know whether anybody mentioned anything about the lease?

A. To Mr. Mullergren? No, I don't know.

Q. Or to anybody else that was present there at the conversation?

A. I don't know.

Q. To whom were copies of this report of Mr. Mullergren's furnished?

A. Otis & Company and ourselves.

Q. Did you furnish copies to anybody else?

A. We may have in some instances where we were requested.

Q. Did you furnish a copy to the City of Indianapolis?

A. We didn't.

Q. Do you know whether anybody did?

A. I don't know.

Q. You don't know whether Mr. Mullergren did?

A. I don't know.

Q. Or whether Otis & Company did?

A. I doubt if Mr. Mullergren would because he was, for this occasion, in our employ. Whether Otis & Company did, I don't know.

Q. Is this the only report which you received from Mr. Mullergren?

A. No, there was a previous report. That was not our property.

Q. Did you receive that from him, receive copies from him?

A. No, sir.

Q. You received it from somebody else?

A. Otis & Company.

Q. Do you have a copy of that?

A. No, sir.

Q. Have you ever had a copy of it?

A. We had it in our possession. It was on the basis of that that we had our preliminary discussion with Mr. Mullergren, and that was a report which he brought down to date in this showing.

Q. Do you know when that previous report had been made by Mr. Mullergren?

A. No, sir. It was not made for us. I don't know when it was made.

Q. Now calling your attention particularly, Mr. Simond, to a statement appearing—the pages don't seem to be numbered—at the bottom of a page headed in caps "Leasehold"; calling your particular attention to the words "The lease in our opinion is a very favorable one for the Citizens Gas Company." In the conference that you had with Mr. Mullergren prior to your purchase of the bonds, was that opinion, or the substance of that opinion expressed by Mr. Mullergren?

Mr. Thompson: To which question the defendants, City of Indianapolis, and the individuals who are members of the Board of Trustees and Directors of the City of Indianapolis object, because this is purely hearsay as to them. This is a conversation between representatives of Otis &

Company and Halsey Stuart & Company, and is self-serving; the declarations would be self-serving, and could in no possible way bind the city.

Mr. Sparks: The Citizens Gas Company object for all those reasons, and for the further reason that that question or substantially that question has been asked and answered at least two or three times before.

Mr. Burns: Now will you read the question, please.

(Question read.)

A. Our discussion was primarily on the physical structure and situation. We didn't have anything to do with the lease as a legal matter.

Q. When you say the physical structure, was that the physical structure of the owned property or the leased property, or both?

A. All.

Q. All the property including the leased property?

A. Yes, sir.

Q. And that is what you were discussing with Mr. Mullergren?

A. That is right.

Mr. Burns: I would like to have this Mullergren report, or the photostatic copy of it furnished by Mr. Simond, marked P X 115.

(Said document was marked as requested, P X 115.)

Mr. Burns: Now we would like to get this long enough to make a copy of it, if we may, if that is all right.

Q. Did you bring something else with you in response to the subpoena?

A. A memorandum here with respect to the lease, a legal document, in order to determine the scope, discretion and authority that the Board of Directors may exercise in taking over the gas property.

Mr. Thompson: Who prepared that memorandum?

A. Mr. Matson.

Mr. Burns: It has no date. Do you recall when you received this memorandum from Messrs. Matson, Ross, McCord & Clifford?

A. No, I don't, Mr. Burns.

Q. Have you had an opportunity to check on that Newton Todd letter, Mr. Simond?

A. Yes, sir.

Q. Calling your attention again to P X 109, the photostat of a carbon copy from Newton Todd to Halsey Stuart, dated December 4, 1936, have you now found the original of that letter from Mr. Todd in your file?

A. Yes, sir.

Q. And this is a correct photostat of that letter?

A. A correct copy.

Q. Have you also found the carbon copy of your letter to Mr. Todd of December 7th?

A. Yes, sir.

Q. And that serves to confirm your former statement that Plaintiff's Exhibit 108 was a letter that you wrote to Mr. Todd?

A. That is correct.

Q. Does that letter show what you enclosed with it, in any other way than the original letter shows?

A. No, nothing further.

Q. Have you brought with you, Mr. Simond, all of the correspondence between your office and the office of Thompson, Rabb & Stevenson, or anyone representing the City of Indianapolis?

A. To my knowledge I have.

Q. You have caused a search to be made of your files to locate that correspondence?

A. Yes. I was just thinking a moment ago that they sent us copies of the reports showing earnings and so forth, which I neglected to bring.

Q. Did you ascertain over the phone on what days and in what papers those various advertisements were published?

A. They are preparing that.

Q. They are preparing that?

A. That is right.

Mr. Burns: You may cross examine.

Mr. Thompson: Will you identify this as Defendant City's Exhibit No. 1.

(Said document was marked as requested, Defendant City's Exhibit No. 1.)

Cross-Examination by Mr. Thompson.

Q. Mr. Simond, I hand you now a memorandum which has been identified as City's Exhibit 1 and ask you whether that is a memorandum which you received from your attorneys, Matson, Ross, McCord & Clifford?

A. That is right.

Q. And this Exhibit No. 1, City's Exhibit No. 1, was produced here this morning at the request of the plaintiffs in response to the subpoena duces tecum that had been served upon you?

A. That is correct.

Q. Now you don't know at the present time just when you received this opinion which is identified as City's Exhibit No. 1?

A. No, sir.

Q. Who was the particular member of the firm of Matson, Ross, McCord & Clifford with whom you dealt?

A. Mr. Matson.

Q. Mr. Frederick E. Matson, who is the senior member of the firm?

A. Yes.

Q. And he is a man that has had a long and intimate connection with the problems arising out of the gas properties at Indianapolis?

A. Yes.

Q. He has been connected for the William Eaton Estate in litigation in the Federal Court respecting the validity of this public charitable trust?

A. I don't know that.

Q. Now I call your attention—naturally when you received this opinion of course it was given careful attention by the firm of Halsey Stuart & Company?

A. Yes, sir.

Q. So that from whatever date it was received you were aware that in the opinion of your counsel the following was true—and I read from page 13:

"The exact situation on the lease must depend on true meaning of the terms in the franchise contract, and in those provisions in the Articles of Incorporation of the Company out of which a public charitable trust arose. Did the Board of Public Works and the Common Council, when granting the franchise in 1905 and reserving therein the right to take over 'plant and property' on payment of a minimum cost, have in mind or contemplate that when such time came there would be found in the 'plant and property' of the gas company a 99 year lease on other utility property greater in extent than its own, the annual rental charge for which would be nearly half a million dollars? Or, if the creation of a public charitable trust, to arise out of terms under which stockholders of the Company were to invest their money under its Articles of Incorporation, was specifically contemplated, did the Common Council, in adopting the ordinance approving the franchise contract, which was its only action 'to receive' the trust and 'to agree to conditions and terms accompanying the same and binding the corporation (the

City) to carry them out', contemplate or intend the trust res should ever include a lease with such burdens and obligations as the lease here involved?

"The answer to these questions would seem to be clearly and positively in the negative. It is inconceivable that the Board of Public Works, the Common Council, and the public spirited citizens of the City who promoted the enterprise, could at that time have had any such thing in mind. No such intention is expressed in the franchise contract, nor can any such intention fairly be implied therefrom."

Now that closes the quote for the present. Now you are familiar with that part of Mr. Matson's opinion?

A. Yes.

Mr. Burns: Just a minute. I would like to object to that as wholly irrelevant and immaterial, which is a mere speculation on the part of Mr. Matson. A copy of the opinion from an attorney to his client is privileged and otherwise objectionable.

Mr. Thompson: You caused it to be produced. You subpoenaed it. You can't subpoena something and then claim it is privileged.

Mr. Burns: I didn't subpoena that, as a matter of fact.

Mr. Thompson: You subpoenaed everything you could lay your hands on.

Mr. Burns: I didn't subpoena anything from Matson, Ross, McCord & Clifford.

Mr. Thompson: Q. In all your dealings—and when I say you, I mean Halsey Stuart & Company's dealings—after this opinion from Mr. Matson, you dealt with this proposition on the theory that this leased property was not a part of the trust res?

Mr. Burns: I object. That assumes he knows.

A. Of the trust what?

Mr. Thompson: Q. Of the trust res; that is to say, the trust property of the Citizens Gas Company that was being taken over by the City of Indianapolis, is that true?

A. That is true, but I don't know how many talks we had with Mr. Matson afterwards. I don't know when we received that.

Q. I understand that. I am going to find out from Mr. Matson what the date of this opinion was. Now Halsey Stuart & Company were interested jointly with Otis & Company in purchasing these Gas Plant Revenue Bonds?

A. Yes.

Q. And you made a joint bid for these bonds to the City of Indianapolis on the 28th day of May, 1935?

A. In response to advertised sale.

Q. And your bid was accepted on the following day, May 29, 1935?

A. Yes.

Q. Now when were these bonds physically delivered to you by the City and when did you pay the consideration for them?

A. Either on or subsequent to July 1st.

Q. Wasn't the payment made—

Mr. Burns: June 27th.

Mr. Thompson: Q. —June 27th?

A. That is right.

Q. Now between the date when your bid had been accepted and the date when the bonds were delivered, Mr. Simond, did you come to Indianapolis with Mr. Cyrus Eaton of Otis & Company and have an interview with me and with Mr. Broadhurst Elsey, who was then the Treasurer of the Board of Trustees for Utilities, City of Indianapolis?

A. Was that before or after sale?

Q. I say, after you had purchased the bonds but before you had issued this circular of July 1st, which is marked P X 102?

A. After we bought the bonds did we go to Indianapolis?

Q. Yes, and have a conversation with me, Mr. Elsey and Mr. Cyrus Eaton?

A. I don't recall whether it was before or after, Mr. Thompson.

Q. Well you remember that you did have a conversation with Mr. Elsey and me in connection with the City of Indianapolis participating in or becoming responsible for the bond circular which you and Otis & Company were to issue?

A. I am sorry. Will you repeat that question again?

Q. What I am asking you is this: that after you and Otis & Company had made this joint bid, and your bid had been accepted, and before you issued this circular that was dated July 1st, if it isn't a fact that you came to the City of Indianapolis and had a conference in my office at which was present yourself, Mr. Cyrus Eaton of Otis & Company, Mr. Boradhurst Elsey, who was then the treasurer of the Board of Directors for the Utilities district and myself?

A. With respect to the circular?

Q. Yes, sir. And to the City of Indianapolis participating in such a circular?

A. What do you mean by participating in the issuance of it?

Q. I will ask you if you didn't request the Board of Directors for Utilities to join with Otis & Company and your firm, Halsey Stuart & Company, in the issuance of this bond circular?

A. No, sir, we asked for the approval.

Q. You asked us to approve it?

A. That is right.

Q. And that conversation was held in my office, wasn't it, with the people present whom I have just indicated?

A. It was in your firm's offices, yes, sir.

Q. Now I will ask you if it isn't a fact that I told you at that time, in the presence of Mr. Eaton and in the presence of Mr. Elsey, that the only statutory authority which the Board of Directors for Utilities had was to make this offering of the bonds, and that the Board would not join in or approve the issuance of any circular whatever; that that was a matter that was entirely up to the people who had purchased the bonds?

A. That is right.

Q. So that when this circular was issued and when this correspondence was had with Mr. Rabb, you knew at that time that the only competent authority, that is, the Board of Directors for Utilities of the City of Indianapolis had declined your express request to approve any circular which the underwriter of these bonds would put out?

A. I don't know whether it was a declination or not. I know they said that Mr. Rabb, as attorney for the city, it seems to me would approve a circular.

Q. Didn't Mr. Elsey tell you and didn't I tell you there that the city would have nothing to do with the approval of any bond circular?

A. That the city nor you would have anything to do with it?

Q. Yes, sir, that the city would have nothing to do with the approval of a bond circular; that it had sold revenue bonds, had exercised its statutory authority, and that it would have nothing to do with the approval of the circular?

A. That may be true.

Mr. Burns: You don't recall it?

Mr. Thompson: Now wait a minute, Mr. Burns; I am cross-examining.

Q. Is that your recollection of that conversation?

A. I am frank to say I don't recall all the details of that.

Q. Don't you recall that you asked our firm to give an opinion as to the non-taxability, for income tax purposes, of these revenue bonds?

A. Asked your firm to give an opinion?

Q. Yes, in that same conference.

A. They may have, because we were getting it from Matson, and the city was getting your opinion.

Q. And if I didn't tell you in that same conference, emphasizing again that the city would have nothing to do with your re-sale of these bonds; that all that the city would do through our firm, as counsel, would be to give an opinion as to the legality of this issue, and that it declined to join in any opinion as to the non-taxability of these bonds, the income on these bonds, isn't that true, Mr. Simond?

A. I know we had your opinion on tax exemption.

Q. I know, but don't you recall that conversation?

A. No, I am sorry, I don't.

Q. You wouldn't say it didn't occur, will you?

A. I don't say it didn't occur at all.

Q. You do know that you requested in that conference that the city approve these bonds and that I told you that it would not approve them, and that Mr.. Elsey told you that—I mean this bond circular?

A. You mean the bond circular?

Q. Yes.

A. Yes, I recall that.

Q. And when you wrote to Mr. Rabb, or to our firm—let me have these exhibits here—I call your attention to your letter of June 27th, which has been identified as P X 111. You wrote to us individually; you didn't even address us as attorneys for the Utility District or for the City of Indianapolis, did you?

A. No, sir.

Q. And that was because, wasn't it, Mr. Simond, of this prior conference that we had had with you, at which we said we would not approve the circular for the City of Indianapolis and there emphasized that, that is right, isn't it?

A. That is right.

Q. And I call your attention also to P X 113, in which Mr. Rabb answered your letter and said, "As to the remainder of the circular we have no comment". You un-

derstood when you got that, that that was merely in line with what I had told you in the prior conference, that the city would have no part in the approval of this circular?

A. That is right.

Q. Now you produced certain other papers here this morning at Mr. Burn's request which he did not have identified as exhibits; that is right, isn't it—these papers that I have here before me now: a letter from Thompson, Rabb & Stevenson to Halsey Stuart & Company under date of September 25th; copy of a letter from Halsey Stuart & Company to Mr. Rabb under date of September 23, 1935, and an original from Mr. Rabb to yourself, or I will say from Mr. Rabb—it is on our letterhead, Thompson, Rabb & Stevenson, to yourself, on September 21, 1935; and also a letter from yourself to Mr. Albert Rabb under date of September 18, 1935.

A. Yes, sir.

Mr. Thompson: I will have these identified as City's Exhibits 2, 3, 3-A, 4, 4-A, and 5, respectively.

(Said documents were marked as requested, City's Exhibits 2, 3, 3-A, 4, 4-A, and 5, respectively.)

Mr. Thompson: Q. I will ask you first to state for the record whether that correspondence was produced by you this morning in response to the subpoena duces tecum that had been served upon you?

A. That is correct.

Q. I call your attention particularly to City's Exhibit No. 4, which is a letter on the letterhead of Thomson, Rabb & Stevenson, dated September 21, 1935, and ask you whether that letter, which is unsigned, apparently, was received by you in due course of mail from our firm probably on the 22nd or 23rd day of September?

A. I would say so. We acknowledged their letter of September 21st.

Q. And when in accordance with page 2 of this letter, Mr. Rabb wrote you as follows: "We make no comment on the other facts stated in the proposed circular, as to most of which we have no personal knowledge; and hence do not discuss," you understood also that that was in accordance with the former conversation which Mr. Elsey and I had had with you, that the city would not approve these circulars?

A. That is correct.

Q. Now your attention has been directed to certain newspaper advertisements which have been identified as P X 104 and P X 105. Those circulars were prepared by

Halsey Stuart & Company—I mean those advertisements were prepared by Halsey Stuart & Company?

A. That is right.

Q. On their own initiative?

A. That is right.

Q. Without the assistance of anyone else except members of your own firm and Otis & Company?

A. Or possibly our advertising counsel and advertising agency.

Q. And were published individually and on your own responsibility in the newspapers?

A. Yes, sir.

Q. Now your attention has also been directed to a prospectus issued by the City which has been identified as P X 110. That is a prospectus that went to bidders for these Gas Plant Revenue Bonds?

A. Yes.

Q. You did not furnish that prospectus to any purchaser of these bonds, did you; I mean, purchaser from you?

A. I don't think so

Q. All that you furnished to any purchaser of these Utility bonds was either the bond circular identified as P X 102 or possibly the bond circular P X 103, and the advertisements?

A. Yes.

Q. Plus the opinion of counsel if they asked for it?

A. That is correct.

Q. Now in the issuing of these circulars and the publication of these advertisements, Halsey Stuart & Company and Otis & Company were engaged in the sale of Gas Plant Revenue Bonds issued by the City of Indianapolis, is that true?

A. That is right.

Q. And these advertisements were published and these circulars were issued, were they not, Mr. Simond, for the purpose of inducing people to buy Gas Plant Revenue Bonds?

A. Yes.

Q. You had no Indianapolis Gas Company bonds for sale, did you? I am not talking about—

A. The 5% bonds?

Q. That is right?

A. No, sir.

Q. Did you ever make any representations to anyone on the basis of these circulars or these advertisements to

purchase from you the Indianapolis Gas Company 5's gold bonds?

A. Did our organization?

Q. Yes, on the basis of these circulars?

A. I can't answer that. I don't know how to answer that.

Q. What I am getting at, Mr. Simond,—maybe I haven't made myself very clear—all this information which you have produced here this morning, and all that has gone into—or been identified during the course of this deposition, was information which was acquired to the extent you have described by Halsey Stuart & Company and Otis & Company, who between them purchased Utility District Revenue Bonds?

A. That is right.

Q. And not Indianapolis Gas bonds?

A. That is right.

Q. You knew, of course, in the making of these purchases that you were dealing with a municipal corporation?

A. Yes, sir.

Q. Whose powers were strictly limited by statute?

A. Yes, sir.

Q. And you knew that anyone dealing with any officer, attorney or employee of the Indianapolis Gas Company, unless he had express statutory power, he was without authority to bind the city?

A. That is right.

Mr. Thompson: I have nothing more.

Redirect Examination by Mr. Burns.

Q. Mr. Simond, you said that the newspaper advertising which appeared in various papers, and was identified as P X 104 and P X 105, was prepared by Halsey Stuart & Company and Otis & Company and your advertising counsel, is that right?

A. Or agency.

Q. Or agency?

A. Rather agency than counsel.

Q. But in the preparation of that advertising material you relied, among other things, upon the prospectus, P X 110, that had been furnished to you by the city?

A. No, they relied on the circular for that.

Q. The circular was prepared in reliance upon the statements appearing in the prospectus, among other things?

A. In part, yes, among other things, that is right.

Q. Now calling your attention particularly to the language appearing on page 5 of the circular, or the prospectus, P X 110, "The lease is for a term of 99 years from October 1, 1913," and so forth; were you familiar with that language at the time the circular was prepared?

A. Yes, sir.

Q. You said in answer to a question by Mr. Thompson that from the time that you received the opinion of Matson, Ross, McCord & Clifford, identified as Defendant City's Exhibit 1, you proceeded upon the assumption that the lease of the Indianapolis Gas—the Citizens Gas Company was not a part of the property which the city was leasing, is that right?

A. Well I think we proceeded on that basis prior to that, because when they took over the property it seemed to me the showings indicated that they were taking title to certain properties not leased properties. They couldn't take title to a leased property.

Q. Well, whether they were taking an assignment of the lease, do you know approximately when that opinion was received from Matson, Ross, McCord & Clifford?

A. No, I am sorry, I don't.

Q. Was it received during the year 1935?

A. I don't recall.

Q. You don't know whether it was in 1935 or 1936?

A. No.

Q. Can you tell whether it was received before or after you issued this circular P X 102?

A. After.

Q. After?

A. That is right.

Q. Do you know how long after?

A. No.

Q. You don't know whether it was a month after or a year after?

A. No, or a year and a half or two years after.

Q. But you know it was not received until after you had issued the circular, P X 102?

A. I can't say, I don't know. I will have to say I don't think so. I don't know the date of that.

Q. Now calling your attention again to P X 111, and particularly to the second paragraph, in which you say: "While I appreciate that you cannot substantiate perhaps the figures which our engineers obtained for us, it would be very helpful if you would give us your approval of the circular, insofar as you are able."

A. That is right.

Q. That you wrote to Mr. Rabb and the only suggestions that you got from him about the circular were those contained in P X 112 and P X 113, is that correct?

A. That is correct.

Q. And when you wrote Mr. Rabb you knew that the firm of Thompson, Rabb & Stevenson represented the city in this matter, didn't you?

A. That is right.

Q. And you were writing them because they did represent the city?

A. Yes, we wrote Matson, we wrote the engineers and we wrote Mr. Rabb.

Q. You mean you wrote Matson in regard to the circular?

A. That is right.

Q. Have you got a copy of that letter here?

A. It was attached to those showings.

Q. No, Mr. Mullergren's letter. You haven't produced any letter from Matson in regard to the circular?

A. I thought I had it there. We got all three.

Q. But your recollection is that you did submit the circular to Matson, Ross, McCord & Clifford?

A. That is right.

Q. And did they approve the circular as issued by you?

A. I don't recall. The final circular incorporated the suggestions of all three. Now whether the preliminary copy we sent to Mr. Matson came back with changes or corrections on I don't recall now.

Q. But the circular as issued, P X 102, incorporated whatever suggestions Mr. Matson had to make about it?

A. That is right.

Q. And he approved it in its final form?

A. That is right.

Mr. Burns: We offer as part of the deposition—

Mr. Thompson: Pardon me, Mr. Burns, I want to ask one question about this, if you don't mind.

Mr. Burns: That is all right.

Mr. Thompson: Q. P X 115 is a report and appraisal dated June 22, 1935, made to Halsey Stuart & Company and Otis & Company by Arthur L. Mullergren, consulting engineer, of Kansas City, Missouri?

A. Yes, sir.

Q. Mr. Mullergren was employed by Halsey Stuart & Company and Otis & Company for the purpose of making this report?

A. Yes.

Q. He was not employed by the City of Indianapolis in any way?

A. No, sir.

Mr. Burns: I offer in connection with the deposition of Mr. Simond, P X 101 to P X 115, both inclusive. It is understood, however, that P X 106 will not be transmitted with the deposition, and will be later attached if it is found that it is impossible to locate a copy of it in Indianapolis, is that correct? Is that satisfactory?

Mr. Thompson: Yes, we have already stipulated it twice, Mr. Burns.

The defendant, the City of Indianapolis, and the individual defendants who are members of the Board of Directors and Board of Trustees of the Department of Utilities of the City of Indianapolis object to the admissibility in evidence of each of said exhibits, identified as P X 101, P X 102, P X 103, P X 104, P X 105, P X 107, P X 108, P X 109, P X 110, P X 111, P X 112, P X 113, P X 114, and P X 115, for each of the followng reasons: First. A city cannot be estopped expressly. It follows it cannot be estopped impliedly or in a quasi manner. Furthermore such circular has no probative force since it would not tend to prove or disprove any of the issues in this case.

Second. Such admission to be admissible must be an admission of fact. In the instant case to have probative value it would have to be one of law, namely that the lease was valid.

Third. Such admission must be sufficiently certain without the aid of a forced or strained construction to bear out the interpretations placed on it. In the instant case it is not possible even by the most tortured construction of the language of the circular to put any words in the mouth of the city respecting the validity of this lease.

Fifth. The admission must have been made by a person having knowledge. This prospectus at the bottom of the front page recites: "The information contained herein has been carefully compiled from sources considered reliable and while not guaranteed as to completeness or accuracy, we believe it to be correct as of this date.

July 1, 1935."

Sixth. Since the City of Indianapolis is the party against whom this prospectus is being offered in evidence, it must be shown that the statement was made, or the prospectus written, authorized or ratified by someone

having the legal right and power to do so and that such statement was made or such prospectus written, authorized or ratified within the scope of such authority. No one in this case had that authority with the possible exception, (which is not conceded) of the Board of Directors for Utilities and unless it can be shown that they had such authority and did in a proper legal manner either write, authorize or ratify the prospectus, it is not admissible in evidence.

Seventh. The entire prospectus is irrelevant and immaterial to the issues in this cause for the reason that there is nothing in such prospectus relating to any statement by the City of Indianapolis in respect to the validity of such lease. It is not shown who issued the prospectus since no signatures appear on it, nor is there any indication as to who the author or publisher is.

Eighth. As to the City of Indianapolis the prospectus is pure hearsay as is borne out by the many statements on its face.

Ninth. There can be no showing that plaintiffs relied on this prospectus for revenue bonds in their purchase of Indianapolis Gas Company bonds.

Tenth. There has been no showing that the lease is binding on or enforceable against the City; no showing that the City was a party to the lease, an assignee of the lease, or obligated to accept an assignment thereof or obligated by reason of recognition or adoption of the lease.

(Said Exhibi marked P X 101 to P X 115, both inclusive, except P X 106, are attached to this deposition and made a part hereof.)

Mr. Thompson: The defendant, City of Indianapolis, and the defendants individually who are members of the Board of Directors and Board of Trustees of the Department of Utilities, now offer in evidence City's Exhibits 1 to 5, both inclusive, identified by me in the course of the cross-examination of this witness.

Mr. Burns: The plaintiffs object to these exhibits. To Defendant City's Exhibit 1 on the ground that it is wholly irrelevant, incompetent and immaterial. It is the printed opinion of counsel to a client. It was not subpoenaed by the plaintiffs in this case, and it represents merely the conclusions of fact or conclusions of law which are wholly immaterial.

Plaintiffs object to City's Exhibits 2, 3, 4, and 5, as merely self-serving declarations of the City or its counsel,

which are not admissible against either the bondholders or the trustees of the bonds issued.

(Said City's Exhibits 1 to 5, both inclusive, are attached to this deposition and made a part hereof.)

Mr. Burns: I am not sure whether I understood you, Mr. Simond, that you didn't want this prospectus back, or is that wrong? You do want it back, do you?

A. I would like to have all these things back.

Mr. Burns: In that case I will offer in evidence only the cover which is marked by the stenographer and the first 13 pages of Exhibit 110. The remaining parts of the transcript, covering pages 14 to 45, inclusive, are merely copies of the Indiana Statutes, and I think there is no use of having those copies included in the deposition, so I will instruct the stenographer to include only the cover and pages 1 to 13, inclusive.

Mr. Thompson: I will object to any partial offer of the instrument. It has to be interpreted and construed together.

In accordance with the stipulation made by counsel during the course of taking the depositions, Mr. Simond, the witness, furnished to the reporter a list of the papers in which the two advertisements, marked P X 104 and P X 105, appeared. Such a list with a copy of the advertisements is attached hereto, marked P X 116, P X 116-A, and P X 116-B.

By stipulation of counsel for the respective parties the signature of the witness to the foregoing deposition was waived.

* * * * * *

"(Certificate of notary to deposition omitted in printing.)"

(Inserted pursuant to stipulation filed November 22, 1939.)

PLAINTIFFS' DEPOSITION EXHIBIT 101.

P X 101. W. C. M.

DISTRICT COURT OF THE UNITED STATES OF AMERICA,

Northern District of Illinois.

The President of the United States of America To R. E. Simond, 201 South LaSalle Street, Chicago, Illinois, Harold L. Stuart, 201 South LaSalle Street, Chicago, Illinois, and Halsey Stuart & Co., Inc., 201 South LaSalle Street, Chicago, Illinois—Greeting:

We Command You, that all business and excuses being laid aside, you and each of you attend before William C. Meyer, a Notary Public in and for said District, on the 21st day of February, A. D. 1929, at 10 o'clock in the forenoon and so on from day to day until your respective depositions are completed at Room 2360, The Field Building, 135 South LaSalle St., in Chicago, Illinois in said District, to testify and give evidence in a certain cause now pending and undetermined in the District Court of the United States, for the Southern District of Indiana, Indianapolis Division, wherein The Chase National Bank of The City of New York, Trustee Citizens Gas Company of Indianapolis, The Indianapolis Gas Company, is Plaintiff and The City of Indianapolis, Board of Trustees for Utilities of The City of Indianapolis, and Board of Directors for Utilities of The City of Indianapolis, are Defendants, on the part of the said Plaintiff. And that each of you also diligently and carefully search for, examine, and inquire after and bring with you, and produce at the time and place aforesaid, the following:

A. All memoranda, minutes and records of every kind, in the possession of Halsey, Stuart & Co. Inc., which discuss or make any reference to:

(a) The City of Indianapolis Gas Plant Revenue Bonds which the City of Indianapolis expected to issue or actually issued in 1935;

(b) Any proceeding, meeting, transaction, negotiation, conversation or correspondence in connection with the sale of, or efforts to sell, by the City of Indianapolis, Gas Plant Revenue Bonds issued by said City;

(c) The use which the City of Indianapolis expected to

make of the proceeds of the sale of the Gas Plant Revenue Bonds it expected to issue or actually issued in 1935;

(d) The plans of the City of Indianapolis in respect of its acquisition of the properties of Citizens Gas Company of Indianapolis;

(e) The plans of the City of Indianapolis in respect of its activities in supplying the inhabitants of the City with gas;

(f) The plans of the City of Indianapolis in respect of its control, ownership or operation of gas producing or distributing properties after its acquisition of the properties of said Citizens Gas Company;

(g) Any advertisement of the City of Indianapolis Gas Plant Revenue Bonds, whether by prospectus, advertising circular, newspaper advertisement, magazine advertisement, or otherwise, or any of the contents of any such advertisement;

(h) The lease from The Indianapolis Gas Company to Citizens Gas Company of Indianapolis, dated September 30, 1913, or any provision of said lease; or

(i) The property covered by the lease from The Indianapolis Gas Company to Citizens Gas Company of Indianapolis, dated September 30, 1913.

B. All correspondence and copies of correspondence between the City of Indianapolis, or any of its officers, agents, employees or attorneys, and Halsey, Stuart & Co. Inc., or any of its officers, agents, employees or attorneys, which discusses or makes any reference to any one or more of the various matters or things referred to above in sub-paragraphs (a) to (i) inclusive of paragraph A above.

C. Any and all advertising circulars, newspaper advertisements, or other advertising or publicity material of any sort, used by Halsey, Stuart & Co. Inc. or Otis & Co. Inc., or both of them, during the year 1935 in connection with the sale or offering for sale of the City of Indianapolis, Indiana, Gas Plant Revenue 4½% Bonds.

D. Any and all reports or letters from Arthur L. Mullergren, Consulting Engineer, to Halsey, Stuart & Co., Inc. and Otis & Co. Inc., or either of them, during the year 1935 in regard to an appraisal or valuation of the property of the Citizens Gas Company of Indianapolis, or the property of The Indianapolis Gas Company, or the leasehold created by the lease of September 30, 1913, from The Indianapolis Gas Company to Citizens Gas Company of Indianapolis.

together with all copies, drafts, and vouchers relating to the said documents, and all other documents, letters, and paper writings whatsoever, that can or may afford any information or evidence in said cause; and for a failure to attend and do as above directed you will be deemed guilty of contempt of Court and liable to pay all loss and damages sustained thereby to the party aggrieved.

To the Marshal of the Northern District of Illinois to execute and return in due form of law.

Witness, the Hon. James H. Wilkerson, Judge of the said Court, at Chicago, in said District, this 15th day of February, in the year of our Lord one thousand nine hundred and 39, and of the Independence of the United States of America the 163rd year.

(Signed) Hoyt King,
(Seal) *Clerk.*

Endorsed: Equity No. 1844. Proceedings pending in the District Court of the United States for the Southern District of Indiana, Indianapolis Division. The Chase National Bank of The City of New York, Trustee, vs. Citizens Gas Company of Indianapolis, The Indianapolis Gas Company, The City of Indianapolis, Board of Trustees for Utilities of The City of Indianapolis, and Board of Directors for Utilities of The City of Indianapolis. Subpoena Duces Tecum. Checked.

* * * * 102 * *

"(Plaintiffs' Deposition Exhibit ~~40~~ is identical with Exhibit B attached to the Answer and Counter-Claim of the City of Indianapolis, et al. (I R. 192-199).)"

(Inserted pursuant to stipulation filed November 22, 1939.)

PLAINTIFFS' DEPOSITION EXHIBIT 103.

P X 103. W. C. M.

Re: City of Indianapolis, Indiana

Gas Plant Revenue

4½% Bonds

* * * * * *

Acquisition of Gas Properties

As indicated in the descriptive circular, this issue was for the purpose, among other things, of providing funds for the City to exercise its franchise rights to acquire the properties of Citizens Gas Company, a privately owned company which was incorporated under the Laws of Indiana in 1906, and since 1913 has had control of the entire gas business in the City of Indianapolis and its environs. In this connection, it should be noted that such acquisition by the City was a logical outcome of the relationship of Citizens Gas Company to the City. The Articles of Incorporation of Citizens Gas Company as amended August 21, 1921, provided in effect that its common stock should be under the control of a board of self-perpetuating trustees who should hold and vote the stock and issue Certificates of Beneficial Interest to the subscribers to Capital Stock and that "it shall be the duty of the Trustees and Directors of the Company to convey the gas plant and property belonging to the Company to the City of Indianapolis" upon payment or assumption of all outstanding obligations, retirement of preferred and common stock at its face value plus accrued dividends. A similar provision was contained in the franchise of Citizens Gas Company. It has been established by the Courts that this franchise was not a purchase or contract to purchase by the City but created a public charitable trust in the Company's properties with the obligation on the part of the Company to transfer the property to the City when the Company's Capital Stock was retired. This set of circumstances explains the reason why the City was able to acquire properties with an appraised depreciated physical value in excess of $13,000,000 for a consideration of approximately $6,500,000.

* * * * * *

A change in ownership always suggests the possibility

of a change in personnel. This fact undoubtedly caused uncertainty in the minds of the management of the Company, which probably made it less aggressive in its sales methods than it would have been under other circumstances. Furthermore, the amount the Company could earn and distribute on its Certificates of Beneficial Interest was limited to 10%. Accordingly, it is believed that the management was content to operate the properties at a volume simply sufficient to meet all of the Company's obligations and to provide a substantial amount for additions and retirements. In this connection independent engineers state in their report.

"• • • we find that the Company does not have as large a percentage of the potential business as we feel is obtainable. There have been no campaigns in the last several years for water-heating and house-heating business and as a result the revenues of the Company are not up to their potential possibilities. It is our opinion that a rearrangement of the rate schedule and an aggressive new business campaign will result in an additional volume of profitable business."

Value of Properties

The ultra-conservative policy followed by the management of providing for additions and improvements out of earnings and charging a very large amount of depreciation is reflected in the property account of $9,577,280 as shown on the books of the Company as of April 30, 1935, as compared with the depreciated physical value of $13,431,000 as appraised by independent engineers as of January 1, 1935.

• • • • • •

The information contained herein has been carefully compiled from sources considered reliable, and while not guaranteed as to completeness or accuracy, we believe it to be correct as of this date.

9-28-35

PLAINTIFFS' DEPOSITION EXHIBIT 104.

Photostat from Indianapolis Times, July 1, 1935, Home Edition, page 11.

Exempt from all present Federal Income Taxation. Tax exempt in the State of Indiana.

$8,000,000

City of Indianapolis, Indiana

Gas Plant Revenue 4½% Bonds

Due serially in varying amounts from June 1, 1938 to 1967

Authorization: Under a resolution adopted May 7, 1935, by the Board of Directors for Utilities of the City of Indianapolis, the City authorized the issuance of these Gas Plant Revenue bonds for the purpose of obtaining funds to exercise its franchise rights to acquire the properties and business of Citizens Gas Company of Indianapolis and for improvements and extensions to such properties.

Security: These bonds constitute, in the opinion of counsel, valid and binding obligations of the City of Indianapolis, Indiana, in accordance with the terms and provisions thereof, secured by a charge upon all of the income and revenues of all the gas utility system now or hereafter owned and/or operated by said City and payable solely and exclusively out of such income and revenues.

Covenants: Under said resolution adopted May 7, 1935, the City covenants to fix, maintain and collect reasonable and just charges for gas service and faithfully to comply with all pertinent provisions of law including the requirement of Chapter 190 of the Acts of 1933 General Assembly of the State of Indiana, viz., that a reasonable and just charge shall be such as produces sufficient revenue to pay, among other things, principal of and interest on these bonds, maintenance cost, operating charges, adequate funds for working capital, repairs and upkeep.

The City further covenants that it will cause to be deposited in any one or more responsible banks or trust companies in the City of Indianapolis in a special account under such condition as that the monies cannot be withdrawn from such account or accounts except for the payment of interest on and principal of these bonds, on the fifteenth day of each month during the operation by the City of said gas system out of the revenues derived from the operation, a sum equal to one-twelfth of the annual amount due and payable for principal and interest on these bonds, and the

City agrees that there will be credited in this manner to such bond and interest fund not less than $360,000 annually in the years 1936 and 1937; $450,000 annually in the years 1938 to 1940, both inclusive; $500,000 annually in the years 1941 to 1967, both inclusive.

History: We are advised Citizens Gas Company of Indianapolis was incorporated under the laws of Indiana in May, 1906 and until 1913 supplied gas in part of the City. In that year the company leased for a period of 99 years the properties and business of the Indianapolis Gas Company, thereby gaining control of the entire gas business of the City of Indianapolis and its environs. As of January 1, 1935, the company served through owned and leased property, approximately 73,800 domestic, 866 commercial and 523 industrial consumers.

Valuation: Based on an appraisal made by an independent engineer as of January 1, 1935, which took into consideration an allowance of $700,000 for working capital for Citizens Gas Company, as well as present day average costs, the age of the equipment and the amount and kind of deferred maintenance, the following costs of reproduction new and depreciated physical values were estimated:

	Cost of Reproduction—New	Depreciated Physical Value
Citizens Gas Co.	$17,607,310	$13,341,230
Indianapolis Gas Co.	12,730,490	9,181,960
	$30,337,800	$22,613,190

Prices and descriptive circular upon application

Halsey, Stuart & Co. Otis & Co.
Incorporated

Dated June 1, 1935, Principal and semi-annual interest (June 1 and December 1) payable at the option of the holder at the offices of Halsey, Stuart & Co. in Chicago and in New York City, or at The Union Trust Company in Indianapolis or at the principal office of The Cleveland Trust Company in Cleveland. Coupon bonds in the denomination of $1,000, registrable as to principal. Legality of these bonds has been approved by Thompson, Rabb and Stevenson for the City and by Matson, Ross, McCord and Clifford for the bankers. Their opinion will be furnished upon delivery of the bonds. The information contained herein has been carefully compiled from sources considered reliable and while not guaranteed as to completeness or accuracy, we believe it to be correct as of this date.

July 1, 1935.

PLAINTIFFS' DEPOSITION EXHIBIT 105.

Indianapolis Star, July 8, 1935, p. 15.

$4,500,000 having been sold of the original offering of $8,000,000

City of Indianapolis, Indiana
Gas Plant Revenue 4½% Bonds

We offer available maturities, 1948-67
To Yield 3.75% to 4.00%
Tax Exempt in Indiana

Exempt from all present Federal Income Taxation

The City of Indianapolis, Indiana, in exercising its franchise rights to acquire the properties and business of Citizens Gas Company of Indianapolis, and for improvements and extensions to the properties, has issued $8,000,000 of Gas Plant Revenue 4½% Bonds, due serially, without option of prior payment, June 1, 1938 to 1967.

In the opinion of counsel, these bonds are exempt from all present Federal Income Taxation and are also tax exempt in the State of Indiana. The available yields, ranging from 3.75% to 4.00% according to maturities, compare favorably with those of many high-grade corporation bond issues lacking these tax-exempt advantages.

As to security, the City of Indianapolis will own and or control all of its gas utility system and the City covenants to maintain rates sufficient to produce revenues adequate for payment of principal and interest on these bonds, maintenance costs, operating charges, funds for working capital, repairs and upkeep. In addition, the bonds constitute, in opinion of counsel, valid and binding obligations of the City, principal and interest payable solely from revenues derived by the City from its operation of the entire gas utility system.

The City covenants to deposit monthly from operating revenues of the gas utility system, in special bank accounts, a sum equal to one-twelfth of the annual principal and interest requirements on these bonds; further agreeing that, in this manner, not less than $360,000 annually in 1936 and 1937, $450,000 annually in 1938 to 1940, and $500,000 annually in 1941 to 1967 shall be deposited (under conditions preventing withdrawal of monies from such account or ac-

counts except for the payment of interest on and principal of these bonds).

An appraisal of the Indianapolis gas utility system, including the leased property, made by an independent engineer as of January 1, 1935, which took into consideration an allowance of $700,000 for working capital, indicates the following values: cost of reproduction (new) $30,337,800; depreciated physical value $22,613,190. For the five calendar year period 1931-35, (1935, 5 months actual, 7 months estimated) the annual average balance available for bond service and depreciation (as compiled from the engineer's report, taking into account savings in taxes through municipal ownership as estimated by the City) was $804,854; annual service charges on these bonds are $360,000, 1936-37; $450,000, 1938-40; $500,000, 1941-67.

Revenue Issues—An
Attractive Type of
Municipal Bonds
Halsey, Stuart & Co.
Incorporated
Chicago, New York
and other principal cities

Informative booklet concerning Revenue Bonds. Recently published, this booklet provides facts of interest to investors concerning municipal bonds of the "revenue" type—how to appraise them, legal status, marketability, etc.

Write for booklet JS-7
Prices and descriptive circular upon application
Halsey, Stuart & Co.
Incorporated
201 South La Salle Street - Telephone State 3900
Chicago, New York and Other Principal Cities

The information contained herein has been carefully compiled from sources considered reliable and while not guaranteed as to completeness or accuracy, we believe it to be correct as of this date.
July 8, 1935.

"(Plaintiffs' Deposition Exhibit 106 is identical with City's Exhibit 11)".
(Inserted pursuant to stipulation filed November 22, 1939.)

PLAINTIFFS' DEPOSITION EXHIBIT 107.

(Letterhead of Halsey, Stuart & Co.)

September 20, 1935.

Mr. Newton Todd,
106 E. Market St.,
Indianapolis, Indiana
Dear Mr. Todd:

At the request of our representative, Mr. W. R. Cosby, we are enclosing circulars descriptive of our current offering of City of Indianapolis, Indiana 4½% Gas Plant Revenue Bonds. We are giving below a list of maturities in which these obligations are presently available, on which corresponding basis prices and concessions are shown:

Maturity	Basis	Concession
1947/48	3.75%	1 %
1949/50	3.80	1
1951/52	3.85	1½
1953/55	3.90	1½
1958/59	4.00	1½
1962/67	4.00	1½

Round amounts of bonds are available in the above maturities with the following exceptions, where we are noting the amount available: 1947, $6,000; 1948, $14,000; 1951, $4,000; 1958 $1,000; and 1959, $5,000.

This offering is, of course, necessarily made strictly subject to prior sale and change in price and concession without notice.

Please feel free to communicate with the writer, either by wire or telephone at our expense, for reservations or in case you desire additional information on the offering.

Very truly yours,
Halsey, Stuart & Co.
By R. H. Walter

R. H. Walter/DR
Encls.

PLAINTIFF'S DEPOSITION EXHIBIT 108.

(Letterhead of Halsey, Stuart & Co., Inc., Chicago.)

December 7, 1936.

Newton Todd,
415 Lemcke Building,
Indianapolis,
Indiana.

Gentlemen:

We are in receipt of your comments of the fourth instant regarding the Indianapolis Gas situation.

The questions which you raise are of a purely legal nature arising because of the controversy between Indianapolis Gas Company and the Municipal Utility District and for the reason that we have not at any time had much interest in this controversy we do not feel qualified to attempt to answer your questions. We presume Mr. Thompson, counsel for the Utility District can best advise you what his objective is. We have had no discussion or correspondence with him about the situation.

Our interest in the financing was confined entirely to the issue of Utility District Gas Plant Revenue 4 1/2s, a circular of which released at the time of our general offering over a year ago is enclosed herewith. The statements contained therein were approved by attorneys for the city and by engineers whose report on this project was available to us.

Very truly yours,

Halsey, Stuart & Co., Inc.,
By R. E. Simond

(Ans.)
RES:MES.
Encl.

PLAINTIFF'S DEPOSITION EXHIBIT 109.

December 4, 1936.

Halsey, Stuart & Co.,
201 S. LaSalle St.,
Chicago, Ill.

Gentlemen:

I am enclosing herewith a clipping from the Indianapolis News. What legal right does the City of Indianapolis have to use the income it receives from a property wholly owned by the City, to pay principal and interest on bonds issued by a separate corporation? The Citizens Gas & Coke Utility owns no property whatever and has no funds with which to pay bond interest or principal, except, such income paid to it by the City of Indianapolis from a property owned in fee by the City. It seems to me that a tax payer of the City of Indianapolis could enjoin the City from making payments to service the Gas Utility.

The Citizens Gas & Coke Utility is using the mains of the Indianapolis Gas Company to deliver about 70% of the total amount of gas supplied in this City and the City is paying into escrow the interest on the Indianapolis Gas bonds and the dividend on Indianapolis Gas stock. I hold Indianapolis Gas bonds and between six and seven hundred shares of Indianapolis Gas stock. I am advised that the escrow agreement was made between the City of Indianapolis and directors of the Indianapolis Gas Company. I am in no way a party to this agreement.

In his answer to the suit of the Chase National Bank, Mr. Thompson, the attorney for the Utility District, avers that your offering circular of the Indianapolis Gas Plant Revenue bonds was not authorized by him or the City. In this circular you place a value on the Indianapolis Gas property and the old Citizens Gas property. Some statements in the circular do not agree with reports made to the Public Service Commission.

I would like to know just what Mr. Thompson's objective is. I am informed that he made overtures to trade Gas Plant Revenue bonds for Indianapolis Gas stock. I would rather hold my Indianapolis Gas stock than exchange for these bonds on a par for par basis, unless, I could dispose of the bonds.

Yours very truly,

Newton Todd.

PLAINTIFF'S DEPOSITION EXHIBIT 110.

STATEMENT PERTAINING TO PROPOSED ISSUE OF INDIANAPOLIS GAS PLANT REVENUE BONDS.

Statement.

It has been adjudicated by the courts that a public charitable trust exists in the property of Citizens Gas Company of Indianapolis in favor of the inhabitants of the City of Indianapolis; and that the City of Indianapolis is to take over and operate such property, subject to outstanding legal obligations, when the capital stock of the Company has been retired.

The Articles of Incorporation of the Citizens Gas Company, as amended, provide that its common stock shall be under the control of a board of self-perpetuating trustees who shall hold and vote the stock and issue certificates to the subscribers to capital stock, and that:

"When all outstanding preferred stock of the company shall have been retired and the holders of the certificates representing the common stock shall have received by dividends, or otherwise, upon said certificates, an amount equal to the face value thereof, together with interest thereon at the rate of ten per centum per annum, payable semi-annually, then said certificates shall be deemed fully paid and cancelled, and it shall be the duty of the trustees and directors of said company to convey said gas plant and property belonging to said company to the City of Indianapolis, subject to all outstanding legal obligations of the company, to be owned and operated or leased by it, and all the rights, title and interest of said company or its certificate holders, stockholders, directors or trustees, shall be deemed to be fully paid and extinguished, and all such certificates, whether of stock or otherwise, shall be surrendered and cancelled and said corporation shall be wound up."

And it is provided by a franchise contract granted by the City of Indianapolis and assigned to the Citizens Gas Company that:

"If the plant and system of mains of said company shall not have become the property of said city by the cancellation of the certificates of subscribers and conveyance of such property to such city by the board of directors and trustees of said company on or before the expiration of the aforesaid period of said franchise, then said city, by and

through its board of public works, upon the expiration of said franchise period' (August 30, 1930) "shall have the right to pay any balance remaining due said certificate holders and the plant and property of said company shall be conveyed to said city as above provided to be owned and operated, or owned and leased by it."

Litigation by stockholders or certificate holders of the Citizens Gas Company to which the City of Indianapolis and the Company were defendants, established that this franchise contract was not a purchase or contract to purchase by the City but created a public charitable trust in the Company's property with the obligation on the part of the Company to transfer the property to the City when the Company's capital stock was retired: *Todd* v. *Citizens Gas Company*, et al., 46 Fed. 2nd. 855 (C. C. A. 7; c. d. 283 U. S. 852). The validity of this trust was recognized by the Supreme Court of Indiana: *Williams* v. *Citizens Gas Company* et al., 206 Ind. 448.

The City of Indianapolis has demanded that the Company pay off its stockholders and transfer its property to the City, reserving to the City the right to furnish funds for such purpose. The boards of directors and trustees of the Company have adopted resolutions recognizing the City's rights in the premises, and declaring that such boards would proceed in all lawful ways to carry out the obligations of the Company to certificate holders and stockholders and having discharged such obligations, transfer the property of the City to the Company.

* * * * * *

At present (May, 1935) the Mayor of Indianapolis is John W. Kern, Jr.; Walter C. Boetcher is city controller; the board of directors for utilities consists of Henry L. Dithmer, president; Fred Jungclaus, vice-president; Brodehurst Elsey, treasurer; Roy Sahm, secretary; and Isaac E. Woodard; and the board of trustees for utilities consists of Wm. J. Mooney, Sr., president, George J. Marott; A. D. Hitz, and A. M. Glossbrenner.

A statute effective March 13, 1935 (Chapter 311 Acts 1935) authorizes the board of directors for utilities to issue revenue bonds for the purpose of obtaining funds with which to pay for the acquisition of utility property in which the city has an interest, including money required to be paid for the purpose of redeeming or extinguishing capital stock and paying outstanding obligations of such utility, and making extensions, improvements and betterments. Such bonds are to be paid solely and exclusively from the

revenues of such utility property, and not out of taxes; they are to be exempt from taxation as to principal and income; and are valid without the necessity of any approval of or ratification by either the public service commission of Indiana or the state board of tax commissioners of Indiana. The board may cause such bonds to be sold at a discount of not to exceed five per cent, with interest coupons at a rate not to exceed five and one half per cent, with the right to reject any and all bids, but the interest cost to the city for the money so received shall not exceed five and one half per cent.

The City of Indianapolis has a population of 364,161 according to the Federal census of 1930, which is included within its metropolitan district, as established by the Census Bureau, with a population of 417,685.

For over twenty-one years gas has been supplied to the inhabitants of Indianapolis and neighboring communities solely through the system operated by Citizens Gas Company; a system having 867 miles of mains and with 75,949 meters in use as of May 1, 1935.

This system is in part owned by Citizens Gas Company and in part is leased by it from Indianapolis Gas Company, which is not an operating company.

The Citizens Gas Company owns a coke oven plant at what is known as its Prospect Street station, consisting of three batteries of forty ovens each, with two water gas sets, and holder capacity of 9,000,000 cubic feet. It owns approximately 40 per cent of the mains in the system.

The leased property owned by Indianapolis Gas Company and operated by Citizens Gas Company since October, 1913, includes a battery of forty one coke ovens, four water gas sets, and a holder capacity of 3,000,000 cubic feet, located at what is known as the Langsdale Avenue plant; also approximately 60 per cent of the mains of the system.

The lease is for a term of 99 years from October 1, 1913, subject to a mortgage dated October 1, 1902, from Indianapolis Gas Company to Trust Company of America securing a 5% fifty year bond issue of $7,500,000 (not all of which bonds have been issued). The rental thereunder is (a) the amount of the interest on the outstanding bonds under said mortgage, and on any refunding bonds; (b) an amount equal to six per cent. annually on the $2,000,000 capital stock of said Indianapolis Gas Company (with a possible increase of $15,000 if the price of gas to the consumer does not exceed 45 cents per thousand cubic feet);

and (c) $300 annually for organization expense. The lessee agrees to pay all taxes assessed against the Indianapolis Gas Company and its property. The covenants of the lease are for the parties, their successors and assigns. The lease contains a recognition of the rights of the City of Indianapolis under the terms of the franchise contract. In 1934 the total rent paid by the Citizens Gas Company under this lease was $482,527.76, consisting of $343,150 bond interest; $120,000 dividends on stock; $19,077.76 Federal income tax against Indianapolis Gas Company; plus $300.

* * * * * *

PLAINTIFFS' DEPOSITION EXHIBIT 111.

June 27, 1935.

Thompson, Rabb & Stevenson,
Consolidated Building,
Indianapolis, Indiana
Gentlemen:

In accordance with our conversation today I am enclosing herewith a preliminary copy of our proposed circular descriptive of the $8,000,000 Indianapolis Gas Plant Revenue Bonds, delivery of which we accepted today and which we expect to offer, jointly with Otis & Company, at the beginning of business Monday.

While I appreciate that you cannot substantiate perhaps the figures which our engineers obtained for us, it would be very helpful if you would give us your approval of the circular, insofar as you are able, either by telephone or telegraph, our expense, confirming this by initialing the circular and returning it to us.

I realize this means I am imposing on you to the extent that you probably will have to give this your prompt attention, but the circumstances are such that we are very anxious to have your approval of the circular as early tomorrow as possible.

Very truly yours,

RES:DR
Encl.

PLAINTIFFS' DEPOSITION EXHIBIT 112.

(Confirmation of telegram of Thompson, Rabb & Stevenson, Indianapolis.)

June 28, 1935.

Halsey Stuart & Co.
201 South LaSalle St.,
Chicago Illinois

Our only suggestion is that words quote or sale or disposition of any part unquote in next to last paragraph of Indianapolis Gas circular be eliminated see pages seventeen and eighteen of Utilities Board resolution.

Thompson Rabb & Stevenson.

Collect

PLAINTIFFS' DEPOSITION EXHIBIT 113.

(Letterhead of Thompson, Rabb & Stevenson, Indianapolis.)

June 28, 1935.

Mr. R. E. Simond,
Halsey Stuart & Co.
201 S. LaSalle St.
Chicago, Illinois.

Dear Sir:

Herewith we return proof of your circular with respect to City of Indianapolis Gas Plant Revenue Bonds enclosed with your letter of June 27th.

As stated over the telephone and in our wire the words "or sale or disposition of any part" in the third sentence of the next to the last paragraph of this circular should be eliminated so as to conform with the bond resolution as shown by its 17th and 18th pages.

As to the remainder of the circular we have no comment. As heretofore stated to you we, of course, can make no statement with respect to the facts furnished you by your engineer.

We shall be pleased to have for the permanent files of the city a copy of the circular in final form.

Very truly yours,

A. L. Rabb.

PRELIMINARY—Subject to Correction.

EXEMPT FROM ALL PRESENT FEDERAL INCOME TAXATION
TAX EXEMPT IN THE STATE OF INDIANA

$8,000,000

CITY OF INDIANAPOLIS, INDIANA
GAS PLANT REVENUE

4½% Bonds

Dated June 1, 1935

Due serially June 1, 1938 to 1967, both inclusive

Principal and semi-annual interest (June 1 and December 1) payable at the option of the holder in New York City, Chicago, Cleveland or Indianapolis. Coupon bonds in the denomination of $1,000, registerable as to principal.

Under a resolution adopted May 7, 1935 by the Board of Directors for Utilities of the City of Indianapolis, the City authorized the issuance of these Gas Plant Revenue bonds for the purpose of obtaining funds for acquiring the properties and business of Citizens Gas Company of Indianapolis and for improvements and extensions to such properties.

These bonds constitute, in the opinion of counsel, valid and binding obligations of the City of Indianapolis, Indiana, in accordance with the terms and provisions thereof, secured by a charge upon all of the income and revenues of all the gas utility system now or hereafter owned and or operated by said City and payable solely and exclusively out of such income and revenues.

Under said resolution adopted May 7, 1935 the City covenants to fix, maintain and collect reasonable and just charges for gas service and faithfully to comply with all pertinent provisions of law including the requirement of Chapter 190 of the Acts of 1933 General Assembly of the State of Indiana, viz., that a reasonable and just charge shall be such as produces sufficient revenue to pay, among other things, principal of and interest on these bonds, maintenance cost, operating charges, adequate funds for working capital, repairs and upkeep.

The City further covenants that it will cause to be deposited in any one or more responsible banks or trust companies in the City of Indianapolis in a special account under such condition as that the moneys cannot be withdrawn from such account or accounts except for the payment of interest on and principal of these bonds, on the fifteenth day of each month during the operation by the City of said gas system out of the revenues derived from the operation a sum equal to one-twelfth of the annual amount due and payable for principal and interest on these bonds, and the City agrees that there will be credited in this manner to such bond and interest fund not less than $360,000 annually in the years 1936 and 1937; $450,000 annually in the years 1938 to 1940, both inclusive; $500,000 annually in the years 1941 to 1967, both inclusive.

AMOUNTS AND MATURITIES

$ 90,000 June 1, 1938	$207,000 June 1, 1948	$322,000 June 1, 1958
93,000 June 1, 1939	216,000 June 1, 1949	336,000 June 1, 1959
99,000 June 1, 1940	226,000 June 1, 1950	351,000 June 1, 1960
152,000 June 1, 1941	236,000 June 1, 1951	367,000 June 1, 1961
159,000 June 1, 1942	247,000 June 1, 1952	384,000 June 1, 1962
166,000 June 1, 1943	258,000 June 1, 1953	401,000 June 1, 1963
173,000 June 1, 1944	270,000 June 1, 1954	419,000 June 1, 1964
182,000 June 1, 1945	282,000 June 1, 1955	438,000 June 1, 1965
190,000 June 1, 1946	295,000 June 1, 1956	458,000 June 1, 1966
198,000 June 1, 1947	308,000 June 1, 1957	175,000 June 1, 1967

Legality of these bonds has been approved by Thompson, Raib and Stevenson for the City and by Matson, Ross, McCord and Clifford for the bankers. Their opinion will be furnished upon delivery of the bonds.

Plaintiff's E

Principal and semi-annual interest (June 1 and December 1) payable at the option of the holder in New York City, Chicago, Cleveland or Indianapolis. Coupon bonds in the denomination of $1,000, registerable as to principal.

Under a resolution adopted May 7, 1935 by the Board of Directors for Utilities of the City of Indianapolis, the City authorized the issuance of these Gas Plant Revenue bonds for the purpose of obtaining funds for acquiring the properties and business of Citizens Gas Company of Indianapolis and for improvements and extensions to such properties.

These bonds constitute, in the opinion of counsel, valid and binding obligations of the City of Indianapolis, Indiana, in accordance with the terms and provisions thereof, secured by a charge upon all of the income and revenues of all the gas utility system now or hereafter owned and or operated by said City and payable solely and exclusively out of such income and revenues.

Under said resolution adopted May 7, 1935 the City covenants to fix, maintain and collect reasonable and just charges for gas service and faithfully to comply with all pertinent provisions of law including the requirement of Chapter 190 of the Acts of 1933 General Assembly of the State of Indiana, viz., that a reasonable and just charge shall be such as produces sufficient revenue to pay, among other things, principal of and interest on these bonds, maintenance cost, operating charges, adequate funds for working capital, repairs and upkeep.

The City further covenants that it will cause to be deposited in any one or more responsible banks or trust companies in the City of Indianapolis in a special account under such condition as that the monies cannot be withdrawn from such account or accounts except for the payment of interest on and principal of these bonds, on the fifteenth day of each month during the operation by the City of said gas system out of the revenues derived from the operation a sum equal to one-twelfth of the annual amount due and payable for principal and interest on these bonds, and the City agrees that there will be credited in this manner to such bond and interest fund not less than $360,000 annually in the years 1936 and 1937; $450,000 annually in the years 1938 to 1940, both inclusive; $500,000 annually in the years 1941 to 1967, both inclusive.

AMOUNTS AND MATURITIES

$ 90,000 June 1, 1938	$207,000 June 1, 1948	$322,000 June 1, 1958
94,000 June 1, 1939	216,000 June 1, 1949	336,000 June 1, 1959
99,000 June 1, 1940	226,000 June 1, 1950	351,000 June 1, 1960
152,000 June 1, 1941	236,000 June 1, 1951	367,000 June 1, 1961
159,000 June 1, 1942	247,000 June 1, 1952	384,000 June 1, 1962
166,000 June 1, 1943	258,000 June 1, 1953	401,000 June 1, 1963
174,000 June 1, 1944	270,000 June 1, 1954	419,000 June 1, 1964
182,000 June 1, 1945	282,000 June 1, 1955	438,000 June 1, 1965
190,000 June 1, 1946	295,000 June 1, 1956	458,000 June 1, 1966
198,000 June 1, 1947	308,000 June 1, 1957	175,000 June 1, 1967

Legality of these bonds has been approved by Thompson, Rabb and Stevenson for the City and by Mayson, Ross, McCord and Clifford for the bankers. Their opinion will be furnished upon delivery of the bonds.

HALSEY, STUART & CO.

INCORPORATED

CHICAGO, 201 *South La Salle Street* NEW YORK, 35 *Wall Street*

AND OTHER PRINCIPAL CITIES

The information contained herein has been carefully compiled from sources considered reliable and while not guaranteed as to completeness or accuracy, we believe it to be correct as of this date.

Circular No. 2406 July 1, 1935

Plaintiff's Exhibit 114

PURPOSE OF ISSUE

Pursuant to a resolution adopted by the Board of Directors for Utilities of the City of Indianapolis, Indiana, on May 7, 1935, entitled "A resolution (No. 2-1935) for the issuance of Gas Plant Revenue Bonds," and in compliance with all applicable provisions of law including Chapter 77 of the Acts of 1929, Chapter 67 of the Acts of 1931 and Chapter 125 of the Acts of 1933, as amended by Chapter 311 of the Acts of 1935 of the General Assembly of the State of Indiana, these bonds are issued to provide funds for the purpose of taking over property owned by the Citizens Gas Company of Indianapolis and or in which it has an interest including monies required to be paid for the redemption or extinguishment of its capital stock and or for the payment of certain of its obligations (including funded debt) and for the necessary expenses incurred in connection therewith, including the expenses of the City incident to obtaining such funds as well as for the purpose of making certain betterments, improvements, extensions and additions to such property.

TERRITORY SERVED

Upon consummation of this acquisition the City advises it will control a business supplying the entire domestic and commercial gas requirements of the City of Indianapolis and its suburbs. Indianapolis, the capital of the State of Indiana and the county seat of Marion County, is located in the central part of the State. It is an important manufacturing, commercial and financial center. According to the 1930 census the City had a population of 364,161 with an estimated population including the suburban area of more than 427,000. Seven railroads and numerous bus lines entering the city supply ample transportation.

HISTORY AND BUSINESS OF CITIZENS GAS COMPANY OF INDIANAPOLIS

We are advised Citizens Gas Company of Indianapolis was incorporated under the laws of Indiana in May, 1906 and until 1913 supplied gas in part of the City. In that year the company leased for a period of 99 years the properties and business of the Indianapolis Gas Company, thereby gaining control of the entire gas business of the City of Indianapolis and its environs. By the terms of this lease, the lessee pays a rental consisting of (a) the interest on the Indianapolis Gas Company First Consolidated Mortgage 5% Gold Bonds due October 1, 1952, of which there were $6,830,000 principal amount outstanding at December 31, 1934 and the interest on such additional bonds as may be issued from time to time for refunding or extensions to the leased property; (b) an amount equivalent to 6% per annum on the $2,000,000 of capital stock of Indianapolis Gas Company (with a possible increase of $15,000 if the price of gas to the consumer does not exceed 15 cents per thousand cubic feet); (c) $300 annually for organization expense and (d) such amounts equal to the taxes levied against the property including Federal Income Tax. As of January 1, 1935 the company served through owned and leased property, 73,800 domestic, 866 commercial and 523 industrial consumers.

An appraisal made by an independent engineer found that as of January 1, 1935 the owned property of Citizens Gas Company consisted of a coke oven plant, known as Prospect Street Station, comprising three batteries of forty 14-ton Wilputte ovens with a total daily capacity of 11,000,000 cubic feet and two 8' 6" water gas sets having a total daily capacity of 1,800,000 cubic feet and 9,000,000 cubic feet of holder capacity. The distribution system consists of approximately 336 miles of cast iron and steel mains. The leased property, owned by Indianapolis Gas Company according to the same appraisal, consists of a coke oven plant of one battery of forty-one 15-ton Semet-Solvay coke ovens with a daily capacity of 3,500,000 cubic feet, also two 11' 0" and two 7' 6" water gas sets, with a total daily capacity of 6,000,000 cubic feet and holder capacity of 3,000,000 cubic feet. The distribution system consists of approximately 531 miles of cast iron and steel mains. Based on this appraisal which took into consideration an allowance of $700,000 for working capital for Citizens Gas Company, as well as present day average costs, the age of the equipment and the amount and kind of deferred maintenance, the following costs of reproduction new and depreciated physical values as of January 1, 1935, were estimated:

	Cost of Reproduction—New	Depreciated Physical Value

and for the necessary expenses incurred in connection therewith, including the expenses of the City incident to obtaining such funds as well as for the purpose of making certain betterments, improvements, extensions and additions to such property.

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	Cost of Reproduction—New	Depreciated Physical Value
Citizens Gas Company	$17,607,310	$13,431,230
Indianapolis Gas Company	12,730,490	9,181,960
	$30,337,800	$22,613,190

At the present time we are advised the coke oven and water gas plants of the leased property are not used in operations but it is anticipated that the coke oven plant will be in operation by October 1, 1935. The by-products from the coke oven operations include coke, ammonia and coal tar, which in the past have

been sold in the open market through various sales agencies. The coal requirements of Citizens Gas Company have been purchased principally from the Milburn By-Products Coal Company, Milburn, West Virginia, the entire capital stock of which is owned by Citizens Gas Company. Other coal purchases are made from other coal producers of the quality and quantity necessary for blending purposes. We are advised the capacity of the Milburn coal mine is greatly in excess of requirements.

INCOME STATEMENT CALENDAR YEARS 1931-1935*

The following comparative earning statement of Citizens Gas Company was obtained from an independent engineer's report submitted us June 22, 1935:

	1931	1932	1933	1934	1935*
Total Income	$5,049,486	$4,326,724	$4,148,698	$4,773,273	$5,103,650
Operating Expenses, Taxes and Rentals	4,224,566	3,731,900	3,628,957	4,104,460	4,351,400
Balance	$ 824,920	$ 594,824	$ 519,741	$ 668,813	$ 752,250
Add: Estimated savings in taxes through municipal ownership and operation (see note)	$ 163,664	$ 142,516	$ 122,733	$ 113,811	$ 121,000
Balance available for bond service and depreciation	$ 988,584	$ 737,340	$ 642,474	$ 782,624	$ 873,250

The annual service charge on this issue is $360,000 1936-1937; $450,000 1938-1940; $500,000 1941-1967.

(Note)—The City states that through municipal ownership and operation of Citizens Gas Company there will be a savings of Federal Income and City taxes which in the years covered above would have approximated the amounts shown.

*1935—5 months actual, 7 months estimated.

THE FEASIBILITY OF NATURAL GAS

The City has been considering the possibility of introducing natural gas into Indianapolis provided it can be purchased at a sufficiently attractive price. An independent survey by recognized engineers finds it would be entirely feasible for the City to serve mixed natural and manufactured gas to domestic and commercial consumers and straight natural gas to industrial consumers. The change from manufactured gas to natural or mixed gas operation would, in engineer's opinion, necessitate a further expenditure of approximately $2,500,000 to extend the distribution system, but the belief is that such operation will materially improve the earning power of these properties. The sale of the present issue of $3,000,000 bonds, together with cash now on hand provides approximately $1,500,000 cash over and above the cost of acquisition of the property. It is the engineer's estimate that for the first normal year after the introduction of natural gas gross revenues would slightly exceed $5,000,000, net income before depreciation eligible under $2,935,000, while in the fifth year gross should approximate $10,000,000 and net income before depreciation should exceed $2,935,000.—

SECURITY

These Gas Plant Revenue bonds constitute, in the opinion of counsel, valid and legally binding obligations of the City of Indianapolis, secured by a charge upon all of the revenues derived from the entire gas system owned and or operated by the City of Indianapolis and principal and interest on the bonds are payable solely from such revenues.

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COVENANTS OF THE CITY

With respect to these bonds the City covenants:

That it will cause to be deposited in any one or more responsible banks or trust companies in the City of Indianapolis, in a special account under such conditions as that the monies cannot be withdrawn from such account or accounts, except for the payment of interest on and the principal of these bonds, on the fifteenth day of each month during the operation of said gas system by the City out of the revenues derived from the operation of said gas system a sum equal to one-

twelfth of the annual amount due and payable for principal and interest on the next succeeding date of said bonds and the City agrees that there will be credited to this bond and interest fund, $200,000 annually 1936-1937; $150,000 annually 1938-1940 and $500,000 annually 1941-1967;

That it will fix, maintain and collect reasonable and just charges for gas service and faithfully to comply with all pertinent provisions of law including the requirement of Chapter 190 of the Acts of the 1933 General Assembly of the State of Indiana, viz., that a reasonable and just charge shall be such as produces sufficient revenue to pay, among other things, principal of and interest on these bonds, maintenance cost, operating charges, adequate funds for working capital, repairs and upkeep;

That upon acquisition of the property operated by the Citizens Gas Company, it will cause the same to be continually operated as a gas system in an efficient manner and at reasonable cost and maintained in good operating condition; and it will use all reasonable efforts to resist competition and maintain the exclusive right to serve gas in the City of Indianapolis and in Marion County, Indiana and the towns therein;

That so long as any of these bonds are outstanding and unpaid the City shall maintain insurance on the insurable parts of said gas system of a kind and in an amount as would normally be carried by privately owned companies engaged in a similar business; which insurance shall be placed and maintained in responsible and qualified companies and the proceeds of such insurance shall be used in replacing, repairing or rehabilitating property destroyed or damaged, or in extensions, additions or improvements and if not so used shall be used in the purchase and retirement of outstanding bonds;

That so long as any of these bonds are outstanding and unpaid, not to sell, mortgage or dispose of said gas system or any substantial and useful part thereof unless the proceeds of such sale or disposition are used for the payment of the principal and interest of the then outstanding and unpaid bonds. The right to lease such utility property and gas system on terms and in a manner consistent with law may be exercised provided the terms do not adversely affect the rights and interest of the holders of these bonds. The city prior to the execution of any such lease or sale or disposition of any part of the gas system under the terms hereof, agrees to give notice of or when it intends to execute any such lease through publication in one newspaper, printed in the English language, of general circulation, in the City of Indianapolis, Indiana, in the City of Chicago, Illinois and in the City of New York, New York, at least four weeks prior to the execution of such lease.

That so long as any of these bonds are outstanding and unpaid, it shall not issue additional bonds or other obligations payable out of the revenues of said gas system except for refunding said outstanding bonds or for the acquisition of revenue producing property, betterments, extensions and or additions.

We Recommend These Bonds for Investment.

PRICE ON APPLICATION

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"(Plaintiffs' Deposition Exhibit 115 is the report of Arthur Mullergren and Company dated June 22, 1935. The testimony concerning this report appears in the deposition of R. E. Simond, Plaintiffs' Exhibit 133)".

(Inserted pursuant to stipulation filed November 22, 1939.)

PLAINTIFFS' DEPOSITION EXHIBIT 116.

U C M

Chicago Office
February 21, 1939

Mr. R. E. Simond,
Chicago Office.

The original offering advertisement on the $8,000,000 City of Indianapolis, Ind. Gas Plant Revenue 4½% Bonds (marked advertisement =1, attached) appeared on the dates and in the publications listed below:

Akron Press	July 1
Akron Beacon Journal	"
Anderson Bulletin	"
Boston Herald Traveler	"
Chicago Daily News	"
Chicago Herald Examiner	"
Chicago Journal of Commerce	"
Chicago Tribune	"
Cincinnati Post	"
Cincinnati Times Star	"
Cincinnati Enquirer	"
Cleveland Press	"
Cleveland News	"
Cleveland Plain Dealer	"
Columbus Citizen	"
Columbus Ohio State Journal	"
Columbus Dispatch	"
Denver Rocky Mountain News	"
Denver Post	"
Detroit Free Press	"
Evansville Courier	"
Elkhart Truth	"
Ft. Wayne Journal Gazette	"
Gary Post Tribune	"
Hammond Times	"
Indianapolis Times	"
Indianapolis Star	"

Indianapolis News	"
Kokomo Tribune	"
Lafayette Journal & Courier	"
Michigan City News	"
Muncie Star	"
New York Herald Tribune	"
New York Sun	"
New York Times	"
New York Wall St. Journal	"
Philadelphia Inquirer	"
Richmond Palladium Item	"
St. Louis Globe Democrat	"
South Bend Tribune	"
Terre Haute Star	July 2
Toledo News-Bee	July 1
Toledo Blade	"
Toledo Times	July 2
Commercial & Fin'l. Chronicle	July 6

A second advertisement—namely, the one marked =2, appeared at a later date in the following publications:

Anderson Bulletin	July 8
Evansville Courier	"
Elkhart Truth	"
Ft. Wayne News Sentinel	"
Gary Post Tribune	"
Hammond Times	"
Indianapolis Star	"
Kokomo Tribune	July 8
Lafayette Courier Journal	PM-8:AM-9
Michigan City News	July 8
Muncie Star	"
Richmond Palladium Item	PM-8:AM-9
South Bend Tribune	July 8
Terre Haute Star	July 9
Saginaw News	July 16

* * * * * *

"(Plaintiffs' Deposition Exhibit 116-A is identical with Plaintiffs' Deposition Exhibit 104)".

(Inserted pursuant to stipulation filed November 22, 1939.)

* * * * * *

"(Plaintiffs' Deposition Exhibit 116-B is identical with Plaintiffs' Deposition Exhibit 105)".

(Inserted pursuant to stipulation filed November 22, 1939.)

CITY DEPOSITION EXHIBIT 2.

(Letterhead of Thompson, Rabb & Stevenson, Indianapolis.)

September 25, 1935.

Halsey, Stuart & Co.,
201 South La Salle St.,
Chicago, Illinois.

Attention of Mr. Simond.

Gentlemen,—

Thank you for your letter of the 23rd.

Russell J. Ryan has now qualified as a director of the Board of Directors for Utilities of the City of Indianapolis. The membership of seven now completes the Board.

Very truly yours,
Thompson, Rabb & Stevenson.

CITY DEPOSITION EXHIBIT 3.

CCL Mr. C. S. Eaton,
Cleveland, Ohio.

September 23, 1935.

Mr. A. L. Rabb,
Thompson, Rabb & Stevenson,
115 No. Pennsylvania Street,
Indianapolis, Indiana.

Dear Mr. Rabb:

I am in receipt of your letter of the twenty-first instant making certain suggestions with respect to the memorandum we prepared regarding anticipating a supplemental offering of our Indianapolis Gas Plant Revenue 4½% bonds. As we understand your proposed changes, the text will now appear as follows:

Page 2. Second paragraph will read as follows:

"It is the opinion of counsel for the bankers that it is very doubtful, etc."

The second sentence on that page in which it appears will now read:

"Even if it should be held, however, that the rates are subject to approval of the Public Service Commission, it is the opinion of the bankers' counsel that: etc."

Page 3. The second paragraph beginning with the third sentence will now read as follows:

"Approximately 60% of the distribution system is leased property. It is reasonable to assume that Indianapolis Gas Company recognizes the difficulty of re-establishing itself at this time as a company operating in competition with natural or mixed gas which should be available through municipal operation. Pending satisfactory adjustment of the instrument executed by Indianapolis Gas Company to Citizens Gas Company covering the leased properties, the City rejected an assignment to it by Citizens Gas Company of this lease but indicated to Indianapolis Gas Company that it would continue to operate for six months the leased properties at an equivalent to the former rental. It is expected that the City and the Indianapolis Gas Company will consummate a satisfactory rental or, in the event of failure to accomplish this, the negotiations should result in acquisition by the City of such leased properties which are essential to municipal operation at a satisfactory price including the service charge on the Indianapolis Gas Company First Consolidated Mortgage 5% Gold Bonds due October 1, 1952, of which there were $6,881,000 principal amount outstanding at December 31, 1934.

Page 5 and again on Page 8, we are adding the word "Estimated" before "Leasehold rentals."

We observe your comments regarding the appointment of Russell J. Ryan, ex-judge of the Marion Superior Court, as a member of the Board of Directors for Utilities and the nomination of Mr. Charles Rauh as a member of the Board of Trustees. We understand Mr. Ryan has accepted his appointment although he is not yet qualified and that Mr. Rauh has not yet been appointed or qualified. Since we propose to release our memorandum this week, perhaps it would be advisable for us not to make any reference to these two gentlemen unless, of course, their appointments have been accepted and they have qualified within the next two or three days.

We appreciate the very prompt attention which you gave this matter and we trust you will keep us advised of any important situations which may develop.

Very truly yours,

Halsey, Stuart & Co.,

By _____

RES:MES

CITY DEPOSITION EXHIBIT 4.

(Letterhead of Thompson, Rabb & Stevenson, Indianapolis.)

September 21, 1935.

Mr. R. E. Simond,
Halsey, Stuart & Co.,
201 South LaSalle St.,
Chicago, Illinois.

Dear Mr. Simond,—

Answering your letter dated the 18th, with respect to a form of proposed supplemental circular on City of Indianapolis Gas Plant Revenue Bonds:

Reference is made in such form to opinion of counsel, from which quotations are made. Inasmuch as the original circular refers to the names of more than one counsel, we think mention by specific name should be given to counsel whose opinion is quoted in the present circular. We know of course that we are not the counsel whose opinion is there quoted, nor are we prepared to disagree with the opinion as quoted. But we suggest that counsel be named.

On page 3 of the draft sent us, we think the phrase "on the other hand" in line 7 of the 2nd paragraph should be eliminated, and that the words "an equivalent to" should be inserted in the 14th line of that paragraph after the 4th word; viz: so the line will read "the leased properties at an equivalent to the former rental"; the sentence then to conclude with the word "including" and the balance of what is now the last sentence in that paragraph commencing with the words "the service charge" etc. The words "It is not contemplated that these negotiations will impair" to be eliminated. The last sentence of such paragraph would then be the sentence beginning "It is expected that the City" etc.

On pages 5 and 8, should not the word "estimated" precede the words "leasehold rentals"? Otherwise the impression will be given that a lease is presently in effect; and none is now in effect.

Page 7: Russell J. Ryan, ex-judge of the Marion Superior Court, has been appointed a member of the Board of Directors for Utilities, and has indicated he will accept. He has not as yet actually qualified by filing an executed

certificate of appointment, oath, and bond; but is expected to do so next week. Of course he should not be represented to be a director until he has formally qualified as such. Mr. Charles Rauh has been nominated as a member of the Board of Trustees; but as yet has not been appointed or qualified.

We enclose copy of resolution for use of natural gas adopted by the Board of Directors on September 12th; also copies of two resolutions pertaining to The Indianapolis Gas Company on September 9, 1935.

We make no comment on the other facts stated in the proposed circular, as to most of which we have no personal knowledge; and hence do not discuss.

More specifically with reference to the subject matter of the 2nd paragraph of this letter: the opinion of counsel to which we refer is that quoted on page two of the draft you sent us; not, of course, to page one.

Very truly,

CITY DEPOSITION EXHIBIT 5.

CC: Mr. C. S. Eaton,
Otis & Co.,
Cleveland, Ohio.

September 18, 1935.

Mr. Albert Rabb,
Thompson, Rabb & Stevenson,
Consolidated Building,
Indianapolis, Indiana.

Dear Mr. Rabb:

It is with considerable hesitancy that I submit to you the enclosed copy of a memorandum we are extremely desirous of distributing together with a circular descriptive of the Indianapolis Gas Plant Revenue 4½% bonds, all in connection with another solicitation of both dealer and investor business.

In view of the rather unfavorable press notices that have come out with respect to negotiations between the city and the Indianapolis Gas Company concerning the lease we are, of course, anxious to present this matter in the proper light and only for this reason are we imposing upon you to the extent of asking your approval or constructive criticisms of the memorandum.

We trust, accordingly, that you can give us your reaction to this promptly in order that Otis & Co. and we may proceed with our supplemental offering.

Presumably you are aware of the unfavorable market reaction on Indianapolis Gas Company First Mortgage 5's during the past two or three weeks which we can attribute only to unfortunate press comments. First Mortgage 5's have dropped from a price above par to quotes as low as 72, resulting in numerous inquiries and possibly some apprehension about the outcome of your negotiations with Indianapolis Gas Company. Had you given any thought to preparing from time to time statements for the press that would represent properly the status and the aim of these negotiations? It might be helpful in clarifying the uncertainties which have arisen in the minds of some holders of the First Mortgage 5's concerning their investment and indirectly it might help your negotiations with the company itself.

With kindest regards, I am

Very truly yours,

RES:MES

Encl.

PLAINTIFFS' EXHIBIT NO. 134.

* * * * * *

"(Certificate of notary omitted in printing)".

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Consolidated Caption—1844 and 1950) * *

Depositions of Chester M. Clark and Joseph Edwards Baker, taken in behalf of the plaintiffs, by stipulation of the parties, before Ernest V. Downey, Notary Public in and for the County of New York, at 15 Broad Street, New York, N. Y., at 10:30 A. M., February 23, 1939.

Appearances:

Milbank, Tweed & Hope, Esqs., Solicitors for the Plaintiffs, Hugh L. M. Cole, Esq. and William J. O'Connell, Esq., of counsel.

William G. Sparks, Esq., Solicitor for defendant Citizens Gas Company of Indianapolis.

W. R. Higgins, Esq., Solicitor for defendant The Indianapolis Gas Company.

W. H. Thompson, Esq., Solicitor for The City of Indianapolis and the individual defendants who are members of the Board of Directors and Board of Trustees of the Department of Utilities of the City of Indianapolis.

CHESTER M. CLARK, of 41 Summit Avenue, Bronxville, New York, called as a witness in behalf of the plaintiffs, having been duly cautioned and sworn, testified as follows:

Mr. Cole: Before interrogating Mr. Clark, I want to offer this copy of a stipulation as an exhibit. The stipulation is signed by all the attorneys and it is to the effect that one deposition may be taken and filed with the Clerk in either one or the other of the two above-entitled causes. I don't believe anybody objects to that as a part of the record.

(Copy of stipulation above referred to received in evidence and marked PLAINTIFFS' EXHIBIT 1, annexed hereto.)

Mr. Cole: I also want to offer as another exhibit a copy of a letter sent to all the attorneys stating the time and place of the taking of the depositions, to which is annexed an affidavit of mailing.

(Copy of letter above referred to received in evidence

and marked PLAINTIFFS' EXHIBIT 2, annexed hereto.)

Mr. Thompson: As far as we are concerned, you don't need to do that. We agreed that the depositions might be taken at this time and no point will be raised about that.

Mr. Cole: May it be so stipulated on the record?

Mr. Thompson: Yes, so far as I am concerned.

Direct Examination by Mr. Cole.

Q. Mr. Clark, will you state your name and place of residence?

A. Chester M. Clark, 41 Summit Avenue, Bronxville, New York.

Q. Are you now associated with the corporation of Stone & Webster and Blodget, Inc.?

A. I am.

Q. Will you state your connection, please?

A. I am Assistant Vice-President of the corporation, in charge of research and analysis. As such I have custody of statistical files.

Q. How long have you been associated with this corporation?

A. Since early in 1927.

Q. Does Stone & Webster and Blodget, Inc. have the custody of any of the files that belong to the old partnership of Blodget & Company?

A. They do.

Q. Are you in charge of the custody of these files?

A. I am.

Q. Do these files include any of the documents relating to the bonds of the Indianapolis Gas Company and Citizens Gas Company?

A. Yes, they do; a number of offering circulars and earning statements, balance sheets, and so forth.

Q. I show you an offering circular of Indianapolis Gas Company, First Consolidated Mortgage 5% Bonds, which has certain data in it relating to Citizens Gas Company and Indianapolis Gas Company, including statements of earnings from 1916 to 1920, and ask you whether you can identify that as coming from the files of Blodget & Company (handing paper to witness)?

A. Yes, that came from the files of Blodget & Company.

Mr. Cole: I offer this in evidence.

Mr. Thompson: The notary had better mark it.

(Paper above referred to received in evidence and marked PLAINTIFFS' EXHIBIT 3, annexed hereto.)

Mr. Thompson: May I see it, please? I would like to ask a question for the purpose of making an objection.

By Mr. Thompson:

Q. Is this date down in the corner, "12/20/21," December 20, 1921, the date when you received this circular?

Mr. O'Connell: Is that in point?

Mr. Thompson: Yes. The circular is undated.

Mr. O'Connell: That is not on the circular itself.

Mr. Cole: All this witness is doing is identifying it. He has not been associated with the firms, as he has already testified, during that period, so I don't see how he can answer that question.

Mr. Thompson: You are offering something and I want to know when it was received. I want to make an objection to it.

Mr. O'Connell: If you know, you can answer, and if you do not know, you can so state.

A. I do not know.

Q. You have no idea when this circular came into the hands of Blodget & Company?

A. No, sir, because I was not a member of the firm at that time.

Q. And you don't know from whom Blodget & Company received the circular?

A. I do not.

Mr. Thompson: The City of Indianapolis and the individuals who are members of its Boards of Trustees and Directors of the Department of Utilities object to the introduction into evidence of this circular for each of the following reasons:

First, it does not purport to have been issued or authorized by the City of Indianapolis, a municipal corporation, and could, in no event, be binding on it.

Second, if this circular is introduced for the purpose of establishing an estoppel against the City of Indianapolis, it is ineffective for that purpose because there has been no showing of any authority on the part of the City of Indianapolis or any of its officers to issue or authorize the issuance of this circular.

Third, the circular is, as to the City of Indianapolis, hearsay, because it does not purport to have been issued or authorized by it or by any of its competent officers.

Mr. Sparks: The Citizens Gas Company objects to the introduction of this exhibit for the reason, first, that

it does not appear that it was authorized by the Citizens Gas Company or any of its authorized officers; that if offered for the purpose of establishing an estoppel, or as an admission, it has no probative value, being an instrument of a conclusion of law as to the extent of the term or the validity of the lease in question; third, it does not appear that anyone in authority from the Citizens Gas Company has issued or circulated or put forward in any manner the information and statements contained in this exhibit; fourth, it does not tend to prove or disprove any of the issues in this case; fifth, it does not appear that anyone relied upon the statements made in this exhibit, or that anyone was entitled to rely thereon; sixth, any statement made by the Citizens Gas Company at that time with reference to the binding effect of this lease upon the successor trustee of the charitable trust could not possibly be effective to bind the City of Indianapolis or the Citizens Gas Company upon a conveyance of its property to the successor trustee.

Mr. O'Connell: It has already been marked.

Mr. Cole: I would like to substitute for the original exhibit a photostatic copy, subject to comparison by the notary. Have that identified as Exhibit 3.

Mr. O'Connell: Is that agreeable to you, gentlemen, that a photostatic copy be substituted?

Mr. Thompson: Oh, surely.

Mr. Sparks: If you will state it is a true copy, we have no objection.

Mr. Cole: I think Mr. Clark will so state.

The Witness: That is a true copy.

Mr. Thompson: Put the photostat in. We have no objection to substituting the photostat.

(Photostat substituted for Plaintiffs' Exhibit 3.)

By Mr. Cole:

Q. I show you another offering circular relating to the Indianapolis Gas Company First Consolidated Mortgage 5% Gold Bonds, containing similar data as that contained in the last exhibit, and showing earnings of the Citizens Gas Company for the year ending December 31, 1924, and ask you if you can identify that as coming from the files of Blodget & Company (handing paper to witness).

A. Yes. This came from the files of Blodget & Company.

Mr. Cole: I offer that in evidence.

Mr. Thompson: May I see it, please?

By Mr. Thompson:

Q. You have no knowledge as to when this was received?

A. No, sir.

Q. Or from whom it was received?

A. No, sir.

Q. Or who prepared it?

A. No, I have not.

Mr. Thompson: The City of Indianapolis objects to the introduction in evidence of Exhibit No. 4 on the same grounds as stated in the objection to Exhibit No. 3, and on the additional ground that there is no proof as to when this circular was received, from whom it was received and that anyone purchasing bonds of the Indianapolis Gas Company relied or had the right to rely on any statement contained in the circular, particularly as to the statement of the legal question as to the lease for 99 years from the Indianapolis Gas Company to the Citizens Gas Company. In addition, the City of Indianapolis objects on the ground that no statement, even if it had been made, by the initial trustee of a public charitable trust could bind the successor trustee, which is a municipal corporation and which cannot be bound except in accordance with the terms of an explicit statute.

Mr. Sparks: The Citizens Gas Company objects to the Exhibit 4 for the same reasons given in the objections to the introduction in evidence of Exhibit 3.

Mr. Cole: This is off the record.

(Discussion off the record.)

(Paper above referred to received in evidence and marked Plaintiffs' Exhibit 4, annexed hereto.)

By Mr. Cole:

Q. I show you another offering circular relating to the Indianapolis Gas Company First Consolidated Mortgage 5% Gold Bonds, containing data similar to that contained in the last exhibit, including earnings of the Citizens Gas Company for the years 1924 and 1925, and ask you if you can identify that as coming from the files of Blodget & Company (handing paper to witness).

A. Yes. This came from the files of Blodget & Company.

Mr. Cole: I offer it in evidence.

By Mr. Thompson:

Q. You know nothing about the date of the issuance of this circular?

A. No, sir.
Q. Nor who issued it?
A. No, sir.
Q. All that you know about it is that you found this in the files of Blodget & Company?
A. Yes, sir.
Q. How does it happen to be on the letter-head of Blodget & Company? Is it a circular prepared by that company?
A. I would assume that, because it is on the letter-head of Blodget & Company, it was prepared in Blodget & Company's office.

Mr. Thompson: The City of Indianapolis makes the same objection to Exhibit No. 5 as it made to No. 4.

Mr. Sparks: The Citizens Gas Company objects for the same reasons given in objections to the admission of Exhibit No. 3, and for the further reason that any statement in the circular concerning any guarantee by the Citizens Gas Company as to the principal and the refunding of bonds is a statement of law which cannot be the basis for any estoppel or have any probative value as an admission as to any issue in this case.

(Paper above referred to received in evidence and marked PLAINTIFFS' EXHIBIT 5, annexed hereto.)

By Mr. Cole:

Q. I show you another offering circular relating to First and Refunding Mortgage Gold 5% Bonds of Citizens Gas Company, containing data similar to that contained in the offering circular which is the last exhibit, including earnings of Citizens Gas Company for the years 1924 to 1926, and ask you if you can identify that as coming from the files of Blodget & Company (handing paper to witness).
A. Yes. This came from the files of Blodget & Company.

Mr. Cole: I offer it in evidence.

By Mr. Thompson:

Q. This circular which has been identified as Exhibit 6 is on the letter-head of Blodget & Company and, presumably, prepared by that company; is that right?
A. Yes, sir.
Q. It is undated?
A. May I interrupt there?
Q. Yes.
A. At the foot of the circular, as I think possibly may have been the case in the previous exhibit and I overlooked it, there is a mark—may I look at that?

Q. Yes (handing paper to witness).
A. "2J6."
Q. What does that mean?
A. It is a code symbol used in the old days by Blodget & Co., subsequently by Stone & Webster and Blodget, Inc., indicating the month and year when the circular was prepared.
Q. Now, what does the code symbol mean?
A. The code symbol means that that was prepared in the year 1926.
Q. December?
A. The 10th month, October.
Q. October?
A. Yes, sir.
Q. And all you know about this circular is that it is on the letter-head of Blodget & Company and you found it in the files?
A. Yes.
Mr. Thompson: We make the same objection on behalf of the City to Exhibit 6 which we made to Exhibit No. 4.
Mr. Sparks: The Citizens Gas Company makes the same objection to this exhibit as it made to Exhibits Nos. 3 and 5.
Mr. Thompson: My attention has been directed to the fact that Exhibit No. 6 relates to the bonds of the Citizens Gas Company.
Mr. Cole: That is correct.
Mr. Thompson: And I object to it on the ground that no circular or representation made by anyone in connection with the sale of bonds of the Citizens Gas Company could have any possible bearing upon the issues involved in this case.
Mr. Sparks: I would also like to add to my previous objection the reason that any circular or any statement issued in connection with the sale or distribution of Citizens Gas Company bonds could have no bearing or be material in any way upon any issue in this case, or in either of the two cases.
Mr. O'Connell: That is No. 6?
Mr. Sparks: No. 6.
(Paper above referred to received in evidence and marked PLAINTIFFS' EXHIBIT 6, annexed hereto.)
By Mr. Cole:
Q. Going back to Exhibits 4 and 5, I observe that they bear the same symbols at the bottom. Can you tell me whether they are explicable in the same manner as the symbol that is on Exhibit 6 (handing papers to witness)?

A. They are. Exhibit 4, according to the symbol, was prepared in March, 1925. Exhibit 5, according to the symbol, was prepared in December, 1926.

Mr. Cole: I would like to substitute for the original of Exhibit 6 this photostatic copy and have this marked as the original exhibit. I observe that it does not have the symbol at the bottom, because the corner was evidently turned up. I suggest that the notary or the stenographer put the symbol on in ink so that it will be identical, subject to comparison by the notary.

Mr. Sparks: That is agreeable.

(Notary marks "2J6" on photostat substituted for original of Plaintiffs' Exhibit 6.)

Q. I show you another offering circular which relates to the First and Refunding Mortgage 5% Bonds of the Citizens Gas Company and to the First Consolidated Mortgage 5% Bonds of the Indianapolis Gas Company.

Mr. Higgins: Is that a joint circular?

Mr. Cole: They are both in the one exhibit.

Q. (Continued.) It contains data similar to that contained in Exhibit 6. I ask you if you can identify this as coming from the files of Blodget & Company (handing paper to witness).

A. Yes. This came from the files of Blodget & Company.

Mr. Cole: I offer it in evidence.

By Mr. Thompson:

Q. Is there any code symbol by which you can tell the date of this?

A. There is no code symbol which is intelligible to me. There is a code symbol there, but I do not know what it means.

Q. "ZF2" is the code symbol?

A. Yes. I do not know what it means.

Q. And this is a circular that was issued by Blodget & Company?

A. That is correct.

Q. You have no knowledge of where the information came from which Blodget & Company used in the preparation of that circular?

A. I personally have no knowledge of it.

Mr. Thompson: The defendant City of Indianapolis makes the same objection to Exhibit 7 that it made to Exhibit 4, plus the objection that this is a self-serving declaration on the part of Blodget & Company and not binding on the City of Indianapolis, in any event.

Mr. Sparks: The Citizens Gas Company makes the same objection to this exhibit as it made to Exhibit No. 6 and previous exhibits.

(Discussion off the record.)

Q. Anything on the face of any of these circulars which are offered as exhibits which are entries to identify the approximate dates on which they were prepared you may use and state what it is.

A. This circular shows capitalization as of May 1, 1922, and the text contains other dates in the year 1922, such as March 1, 1922, with respect to valuation of physical properties; May 15, 1922, as the date on which certain rate matters came up, all of which, to my mind, indicates that the circular was prepared during the latter part of the year 1922.

Mr. Sparks: May I see that a minute?

(Paper above referred to received in evidence and marked PLAINTIFFS' EXHIBIT 7, annexed hereto.)

Mr. Cole: I have here the positive of a photostat of Exhibit No. 7 which I wish to substitute for the original. Subject to comparison, I ask that the notary mark that Exhibit 7.

Mr. Thompson: Mr. Cole, we will consent, in connection with any of these exhibits, that you may use photostatic copies instead of the original and no objection will be made on that ground.

Mr. Cole: All right.

(Discussion off the record.)

By Mr. Cole:

Q. I show you another offering circular relating to the First and Refunding Mortgage 5% Bonds of Citizens Gas Company and to the First Consolidated Mortgage 5% Bonds of Indianapolis Gas Company, containing data similar to that contained in Exhibit 7, including earnings of Citizens Gas Company for the twelve months ending December 31, 1923, and ask you if you can identify that as coming from the files of Blodget & Company.

A. Yes. This came from the files of Blodget & Company.

Mr. Cole: I offer it in evidence.

By Mr. Thompson:

Q. Can you identify the date of this Exhibit No. 8?

A. April, 1924.

Q. It appears on the letter-head, or, rather, on the head of this exhibit appears "Blodget & Co., 34 Pine Street, New

York." It is a circular apparently prepared by Blodget & Company?

A. That is correct.

Mr. Thompson: The defendant City objects to the introduction in evidence of Exhibit No. 8 on the grounds stated in objecting to Exhibits Nos. 4 and 7.

Mr. Sparks: The Citizens Gas Company objects to the exhibit on the grounds stated in objections to Exhibit No. 7 and previous exhibits.

(The paper above referred to received in evidence and marked PLAINTIFFS' EXHIBIT 8, annexed hereto.)

Mr. Cole: As in the previous cases, I ask that this photostatic copy be substituted.

By Mr. Cole:

Q. I show you an offering circular relating to Indianapolis Gas Company First Mortgage 5% Gold Bonds, containing data similar to that contained in the last exhibit, including earnings of Citizens Gas Company for the year ended December 31, 1915, and ask you if you can identify that as coming from the files of Blodget & Company (handing paper to witness).

A. Yes. This came from the files of Blodget & Company.

Mr. Cole: I offer it in evidence.

By Mr. Thompson:

Q. Do you know the date of this circular? 1916?

A. I would assume from the date of the information contained in it that it was prepared in 1916.

Q. This is a circular which obviously was prepared and issued by Blodget & Company: is that correct?

A. Yes.

Mr. Thompson: The defendant City objects to the introduction in evidence of Exhibit No. 9 on the same grounds stated in its objections to Exhibits 4 and 7.

Mr. Sparks: The Citizens Gas Company objects to the introduction in evidence of this exhibit for the same reasons stated in its objections to Exhibit No. 6 and previous exhibits.

(The paper above referred to received in evidence and marked PLAINTIFFS' EXHIBIT 9, annexed hereto.)

Mr. Cole: As in the case of the previous exhibits, I wish to substitute this photostatic copy.

Mr. Sparks: I would like to change my objection to this Exhibit 9, if I may.

Mr. Cole: Surely.

Mr. Sparks: I object to it for the reasons stated in the objections to Exhibit No. 7 and previous exhibits.

By Mr. Cole:

Q. I show you another offering circular relating to the Citizens Gas Company First Mortgage Sinking Fund 5% Gold Bonds. In addition to containing data similar to that contained in the last exhibit, it also contains various other statements, including a copy of a letter addressed to Messrs. Blodget & Company, dated March 1, 1916, from J. D. Forrest, as Secretary and General Manager of Citizens Gas Company. I ask you if you can identify this as coming from the files of Blodget & Company (handing paper to witness).

A. Yes. This circular came from the files of Blodget & Company.

By Mr. Higgins:

Q. That also would be in 1916, would it?

A. Well, this contains a letter dated March 1, 1915, which would indicate that it was issued at about that time.

Mr. Cole: I offer it in evidence.

By Mr. Thompson:

Q. This also is a circular issued by Blodget & Company, this Exhibit No. 10, Mr. Witness?

A. Yes.

Mr. Thompson: May I ask counsel if the original of this letter from Mr. Forrest is in your possession?

Mr. Cole: No, it is not. We are going to explain that.

Mr. Thompson: The City of Indianapolis objects to the introduction in evidence of Exhibit No. 10 for the same reasons stated in its objections to Exhibits 4 and 7, and for the additional reason that this Exhibit No. 10 contains what purports to be a letter from J. D. Forrest, Secretary and General Manager of the Citizens Gas Company of Indianapolis, that this is not the original letter, it is not competent and is purely hearsay. In addition, this circular shows upon its face that the Citizens Gas Company was a quasi public corporation, and the fact is that the Citizens Gas Company of Indianapolis was merely the initial trustee of a public charitable trust with a fixed term or expiration of its trusteeship, that is, twenty-five years after the franchise contract of 1905 was granted, so that the Citizens Gas Company, as the initial trustee for a public charitable trust, could not estop its successor trustee, the City of Indianapolis, by any statement made by it; and, in addition, there is no showing that Mr. Forrest,

as the Secretary and General Manager of the Citizens Gas Company, had the slightest authority as such even to bind the Citizens Gas Company.

Mr. Sparks: The Citizens Gas Company objects to the introduction in evidence of this exhibit for the reasons heretofore stated in its objections to Exhibit 7 and previous exhibits; and also for the additional reasons just stated by counsel for the City of Indianapolis.

(Paper above referred to received in evidence and marked PLAINTIFFS' EXHIBIT 10, annexed hereto.)

By Mr. Cole:

Q. I show you another offering circular relating to the Citizens Gas Company First and Refunding Mortgage 5% Gold Bonds, containing various statements concerning the Citizens Gas Company and its property and the security for the bonds, including earning statements for the year ended December 31, 1918. This bears a date, July, 1919, at the bottom of the first page. I ask you whether you can identify this as coming from the files of Blodget & Company (handing paper to witness).

A. Yes. This came from the files of Blodget & Company.

Mr. Cole. I offer it in evidence.

By Mr. Thompson:

Q. Exhibit 11 is also a circular issued by Blodget & Company?

A. Yes, sir.

Q. That circular was issued in July, 1919, as appears on the first sheet of Exhibit 11?

A. That is correct.

Mr. Thompson: The defendant City objects to the introduction in evidence of Exhibit 11 on the grounds stated in our objections to Exhibits 4 and 7

Mr. Sparks: The Citizens Gas Company objects to this exhibit for the reasons stated in its objection to Exhibit No. 6.

(Paper above referred to received in evidence and marked PLAINTIFFS' EXHIBIT 11, annexed hereto.)

By Mr. Cole:

Q. I show you another offering circular relating to $1,500,000. of Citizens Gas Company General Mortgage Sinking Fund 7% Gold Bonds, containing data relating to the business of Citizens Gas Company, its management, the security of the bonds and the earnings, including a copy of a letter dated June 15, 1918, addressed to Messrs.

Blodget & Company, and signed by J. D. Forrest, Secretary and General Manager of the Citizens Gas Company, and ask you if you can identify this as coming from the files of Blodget & Company (handing paper to witness).

A. Yes. This came from the files of Blodget & Company.

Mr. Cole: I offer it in evidence.

By Mr. Higgins:

Q. At what time, Mr. Clark, was that issued; can you tell?

A. The letter inside is dated June 15, 1918. I would, therefore, say that the circular was issued shortly thereafter.

By Mr. Thompson:

Q. Exhibit No. 12 is a circular issued by Blodget & Company; is that correct?

A. That is correct.

Q. Did you find the original of the letter therein contained, the copy of the letter therein contained, signed by Mr. J. D. Forrest and addressed to Blodget & Company?

A. I made a search for such a letter and I couldn't find it.

Q. And, of course, it goes without saying that, not being able to find the letter, you know nothing about whether this is an accurate copy of it?

A. Of my own knowledge, I don't know whether it is or not.

Mr. Thompson: The City of Indianapolis objects to the introduction in evidence of Exhibit No. 12 for the reasons stated in its objection to Exhibits 4, 7 and 10, and for this additional reason: this is an offering of $1,500,000. of Citizens Gas Company General Mortgage Sinking Fund 7% Gold Bonds. Under the public charitable trust created by the franchise contract of 1905, and other relevant papers, the Citizens Gas Company of Indianapolis had no power or authority to mortgage its property, it being expressly provided by the terms of that public charitable trust that at the end of the franchise period in 1930, if the precedent obligations of that public charitable trust, that is, the stock of the Citizens Gas Company, had not been paid in full, then the Citizens Gas Company may execute a mortgage for the purpose of obtaining funds with which to pay off the precedent obligations. These mortgage bonds having been issued in violation of the public chari-

table trust, no statement made in connection with them could bind the City of Indianapolis.

Mr. Sparks: The Citizens Gas Company objects to the introduction in evidence of Exhibit No. 12 upon the same grounds stated in its objection to Exhibit No. 10 and previous objection.

(The paper above referred to received in evidence and marked PLAINTIFFS' EXHIBIT 12, annexed hereto.)

Mr. Cole: As in the case of earlier exhibits, I wish to substitute for the original exhibit this photostatic copy, subject to comparison.

By Mr. Cole:

Q. You just testified with respect to Exhibit 12 you could not find the original of the letter from Mr. Forrest, of which a copy purports to be set forth. Is that equally true of the letter which is contained in Exhibit 10?

A. That is equally true of the letter which is contained in Exhibit 10. In that connection, I might say that, to my knowledge, none of the correspondence files of Blodget & Company were taken over by Stone & Webster and Blodget, Inc. at the time of their consolidation in January, 1927, and that if such a letter were not in the statistical files, which is the case, I would not have it.

Q. Did you find any signed copies of these circulars which have been offered in evidence, bearing the signature of Mr. Forrest or any representative of the City Gas Company or Indianapolis Gas Company?

A. No, I did not.

Mr. Cole: Those are all the questions I wish to ask Mr. Clark at the moment. If you wish to cross-examine, you may, or would you rather wait?

Mr. Thompson: No; I will examine him briefly.

Cross-Examination by Mr. Thompson.

Q. Do you know where the letter files of Blodget & Company are?

A. No, sir, I do not.

Q. Did you make any inquiry to ascertain whether they were in existence?

A. Yes.

Q. Of whom?

A. Mr. Baker.

Q. Was he formerly connected with Blodget & Company?

A. He was.

Q. Now, all that you know about these Exhibits 3 to 12, inclusive, is that they are various circulars or offerings--they have been designated as "offerings"—which were found in the files of Stone & Webster and Blodget, Inc. and which came from the files of Blodget & Company, turned over to Stone & Webster and Blodget, Inc. upon the consolidation of the two companies in 1926?

A. That is correct.

Q. You have no personal knowledge of who prepared them; is that right?

A. No personal knowledge of who prepared them; that is correct.

Q. The only information that you have about them is what anyone could gather from the face of the exhibits themselves?

A. That is right.

Q. You don't know how they were used.

A. I personally do not know how they were used.

Q. You don't know where the information came from except as it appears in these exhibits themselves?

A. Yes.

Q. Do you mean that you do know?

A. I do not know.

Mr. Thompson: That is all I have to ask.

(Discussion off the record.)

Mr. Thompson: As far as we are concerned, we are perfectly willing to waive the signature.

Mr. Cole: I think we will have him sign it after it is typewritten.

Chester M. Clark.

Subscribed and sworn to before me this ..... day of ....., 1939.

JOSEPH EDWARDS BAKER, of 1220 Park Avenue, New York, N. Y., called as a witness in behalf of the plaintiff, having been duly cautioned and sworn, testified as follows:

Direct Examination by Mr. Cole.

Q. Will you state what connection you had with the firm of Blodget & Company and with Stone & Webster and Blodget, Inc., and for how long you were connected with those concerns?

A. I first became associated with Blodget & Company in 1919, shortly after I left the Army, and subsequently became a partner of that firm and, on December 31, 1926, when the firm of Blodget & Company ceased doing business, together with other partners of Blodget & Company, I became an officer, director and shareholder of Stone & Webster and Blodget, Inc., which was not a consolidation or merger, but we just agreed to quit business, the partnership remaining in existence for liquidation purposes only.

By Mr. Thompson:

Q. Is the correct name Stone & Webster and Blodget, Inc.?

A. Yes. The "and" between "Stone" and "Webster" is the "and-sign," and between "Webster" and "Blodget" it is "a-n-d."

By Mr. Cole:

Q. For what years were you a partner in Blodget & Company?

A. I became a partner of Blodget & Company January 1, 1926.

Q. What is your present occupation?

A. I am a partner of J. E. Baker & Company, investment dealers.

Q. Will you state very briefly your experience in the buying and selling of securities?

A. From the time I became associated with Blodget & Company, continuously up to the present time, my function has been largely that of a buyer, although I have done considerable selling. Most of my selling has been what you would term block selling, in larger amounts. My duties in Blodget & Company, and in Stone & Webster and Blodget, Inc., and in the firm which I organized in 1934, was almost altogether that of the buying partner. In that connection, I bought whole issues of bonds, parts of an issue, for refunding or original capital purposes; I conducted, or caused to be conducted, the investigations that were necessary prior to those purchases; at times bought preferred stocks of corporations; at other times the common stocks; in one instance bought all of the assets of the corporation, which were afterwards recapitalized. In fact, you might say that, either directly for the firms of which I was a partner or an associate, I have participated in every phase of what we generally term the investment banking field. Such purchases,

either for our own account or in association with others, or acting as agents for others, have aggregated over a billion dollars' worth of securities. The firms with which I have been associated have participated in most of the syndicates organized for the purchase and sale of public utility bonds during that period. I have also been engaged in industrial and other corporate activities as well as public utilities. During this period I have qualified and testified before Public Service Commission on matters pertaining to security issues and the rates of return, in the States of California, Ohio, South Carolina, Missouri and New York I have qualified and testified before the Federal Board of Tax Appeals and I have prepared affidavits acceptable to the U. S. Internal Revenue Department on securities and security values. Amongst miscellaneous things I have done in that period, in the State of Massachusetts, was considering the question of making public utility bonds a legal investment for the savings banks in that Commonwealth. I appeared before the General Court, I think it is termed—it is really the State Legislature—and cooperated with the committee of that General Court in preparing the law. That is, briefly, an outline of my experience.

Q. Are you familiar with the methods employed by firms you have been associated with and others in the sale of securities?

A. I am.

Q. And with the method employed in preparing offering circulars?

A. I am.

Q. While you were associated with Blodget & Company, did that firm sell any of the bonds of the Citizens Gas Company or of the Indianapolis Gas Company?

A. Yes. They sold bonds of both companies, either purchased directly from the company or purchased in the open market. We were constantly making a market on the bonds of both companies, the Citizens Gas Company, the operating company, and the Indianapolis Gas Company, which was leased by the Citizens Gas Company.

Q. Some of these bonds, both of the Citizens and of the Indianapolis, were bought by Blodget & Company from the Citizens Gas Company, were they not, during your association with that firm?

A. They were.

Q. Were you in charge of the dealings between Blodget & Company and the Citizens Gas Company?

A. Yes. During the period of the first phase of my association with Blodget & Company, I worked in close cooperation with one of the partners of the firm, Mr. Bayard F. Pope, and we were the ones who conducted the negotiations either with Mr. Forrest or Mr. Effroymson.

Q. Can you state, briefly, the nature of your contacts with these gentlemen?

Mr. Thompson: Are you calling now for conversations with them?

Mr. Cole: Anything that may have a bearing on how they happen to buy the bonds.

Mr. Thompson: The City of Indianapolis objects to any conversations between officials of the Citizens Gas Company and Mr. Baker, as the representative of Blodget & Company, for the reason that no estoppel can be predicated against a municipal corporation by the acts or conduct of officers of the initial trustee of the public charitable trust, the term of whose trusteeship was definitely fixed by the underlying papers creating the trust; that under the law of Indiana, which is controlling in this case, a municipal corporation cannot be estopped, either directly or in a quasi manner, and that these conversations or these transactions are, as against the City of Indianapolis, successor trustee of a public charitable trust, hearsay and do not prove or tend to prove any issue in the case.

Mr. Sparks: The Citizens Gas Company objects to testimony as to any conversations in the negotiations for the purchase of these bonds, or otherwise, relating to the effect or validity of the lease in question or the extent of the term or the legal effect of any of its provisions, for the reasons that this evidence cannot prove or disprove any of the issues in either case. Second, that any statement relating to the matters just mentioned must necessarily constitute a statement of a conclusion of law and not a statement of admission of fact having probative value on any issue. Any such statement as to the legal effect of any written instrument, or instrument, cannot be made the basis of an estoppel or as an admission having any probative value. Any such statement cannot create any rights not otherwise existing. Third, assuming that this evidence has any probative value, which we do not admit, which the Citizens Gas Company does not admit, it is not shown that anyone was entitled to rely upon any one statement as to the legal effect of the written instructions involved and of which, in law, every-

one is presumed to have knowledge. Fourth, it does not appear that anyone had any authority, express or implied, to make any representations or statements concerning the matters mentioned in reason No. 1. Fifth, it does not appear that any purchaser of these bonds relied upon any statements or representations made during the negotiations.

(Question repeated by stenographer.)

A. As my memory serves me, I first visited Indianapolis in the Spring of 1920 and while there called on Mr. Forrest, the Secretary and General Manager of the company, and Mr. Effroymson, Treasurer of the company, and attempted to get generally familiar with the company, its affairs, and especially to investigate the current condition of the company and its finances. While there, aside from direct visits with the company, I called on various citizens of the City of Indianapolis to get a picture of the company's public relations. I regularly received financial statements from the company and, on frequent occasions, received copies of the minutes of the Board of Directors. At least, it was indicated in the letters that they were copies of them. They were not signed or authenticated by the Secretary.

Q. I show you Plaintiffs' Exhibits 3 to 8, which are offering circulars which have been identified as having been used during the period in which you were associated with Blodget & Company, and I ask you whether you will also identify them as having been used by Blodget & Company in connection with the sale of the bonds described in the circulars (handing papers to witness).

Mr. Thompson: I want to object to the form of that question in addition to the objections already stated to the preceding question. It is a general conclusion as to whether they were used. If he has some specific instance to state, that something was done with them, I have no objection to that, but I object to his stating a conclusion that they were used by Blodget & Company.

Mr. Cole: After you have examined them, I will rephrase the question.

Mr. Sparks: You are withdrawing that question?

Mr. Cole: Yes; I will withdraw the question.

Q. Can you state, of your own knowledge, that these circulars are copies of circulars which were distributed by Blodget & Company to its customers in connection with the sales of the bonds therein described?

Mr. Thompson: Now, without the necessity of repeating our objection to each of these questions and interrupting the orderly course of the deposition, may it be understood that to each of these questions put to Mr. Baker the City makes the same objection it made to the initial question asking him for what contacts and conversations he had had with the Citizens Gas Company?

Mr. Cole: Certainly.

Mr. Sparks: And the same as to the Citizens Gas Company.

Mr. Cole: Certainly.

Mr. Thompson: With that understanding, then, we can probably save some time.

A. I do identify these exhibits as being circulars, or copies of circulars, that were used by Blodget & Company, in the sale of these bonds, either to its customers or to other dealers.

Q. Can you state the manner in which they were distributed?

A. Through the mails and by personal delivery.

Q. I call your attention to Exhibits 7 and 8. These do not relate to any particular amount of bonds, but just refer generally to the securities of the two companies. Can you state whether they were used in over-the-counter sales or in connection with an original issue?

A. That I could not definitely state without reference to the books of Blodget & Company. They could have been used for either purpose.

Q. Can you state how these circulars were prepared?

A. They were prepared under my direction from information in our files previously received from the Citizens Gas Company. When we prepared new circulars it was our custom to send a copy of such circulars to Mr. Forrest, in order that Mr. Forrest could call our attention to any discrepancies in them.

Q. Mr. Clark has testified that there are no original communications in the files of Blodget & Company relating to the information contained in these circulars. Can you explain why this is, from your association with Blodget & Company, and the manner in which the files came in the possession of Stone & Webster and Blodget, Inc.?

A. Yes. All of the partners of Blodget & Company became officers, directors and shareholders of Stone & Webster and Blodget, Inc., and in the case of the New York office, certain employees of Stone & Webster, Inc. came into the firm of Stone & Webster and Blodget,

Inc. and they occupied the quarters previously occupied by Blodget & Company, and the files of the two organizations were generally mingled, although the correspondence files belonged to the partnership, Blodget & Company, and they were located in Stone & Webster and Blodget, Inc. for a good many years until, in order to save storage space, some three or four years ago, the partners of Blodget & Company permitted their destruction. In Boston, this new firm occupied quarters previously occupied by the Securities Division of Stone & Webster, Inc., and in that case the files of Blodget & Company were moved into those quarters. To the best of my belief, exactly the same thing happened to those files eventually.

Q. In the ordinary course of marketing securities, has it been your experience that the purchasers rely on statements contained in offering circulars?

Mr. Thompson: We make a special objection to that because it does not make any difference what happens in the ordinary course of business. While it is our claim that the City of Indianapolis cannot be estopped by any conduct on the part of the initial trustee, certainly under the general rules of estoppel we cannot rely on what happens in the ordinary course of business, but it is implicit in the claim of estoppel that you have got to prove and show that representations were made to some given individual who still holds the bonds of the Indianapolis Gas Company and that he relied upon the representations so made.

Mr. Sparks: Let the record show the same objection made by the Citizens Gas Company.

(Question repeated by stenographer.)

A. Yes, they rely on the statements contained in the circulars.

Q. In the particular instance of these circulars, is it your opinion that the purchasers of the bonds described in circulars relied upon the statements?

Mr. Thompson: We object specially to the question because it asks this witness for an opinion and conclusion and not the statement of any fact, and the question of whether a particular purchaser relied could only be established by his evidence.

Mr. Sparks: Let the record show the same objection on the part of the Citizens Gas Company.

A. I would like to be sure I understand that question. I understand the question to mean, did the purchasers,

when receiving one of these circulars, consider that the facts were substantially correct.

Q. And that they relied upon those facts as being correct.

A. Relied upon them?

Q. Yes.

A. I cannot tell you the working of the minds of the buyers. I can say that in my experience I have frequently talked to purchasers of bonds and they have insisted upon receiving a circular before consummating their purchase, even though they had all sorts of published public data before them.

Q. Can you state, through your association with Blodget & Company, and in particular your association in the dealings with the Citizens Gas Company, whether Blodget & Company sold any of the bonds of the Indianapolis Gas Company and Citizens Gas Company prior to the association with the firm?

A. They did.

Q. I would now like to show you the other exhibits. That would be Exhibits 9 to 12, which have been identified as having been prepared and issued prior to your association with the firm, and ask you whether you can identify these as having been issued by Blodget & Company in connection with the sale of the bonds therein described (handing papers to witness).

Mr. Sparks: The Citizens Gas Company objects to that because it appears, from his own previous testimony, that he had no connection with Blodget & Company prior to 1919, and, due to the fact that Exhibits 9 to 12, inclusive, were prepared and issued by Blodget & Company prior to that time, he is not qualified to answer the question.

Mr. Thompson: The City makes the same objection.

A. I can identify these circulars as being circulars that were in the files of Blodget & Company when I was associated with that firm and during the period that I was a partner in the firm.

Mr. Sparks: The Citizens Gas Company moves to strike the answer as not being responsive.

Q. Does your association with Blodget & Company lead you to believe that these circulars were prepared and used in the same manner as the ones which were issued during your association with the firm?

Mr. Thompson: The City objects specially to this question on the ground that it is obvious that the witness can

have no personal knowledge. He is merely asked to express an opinion and conclusion about the matter, of which he knows personally nothing.

Mr. Sparks: The same objection on the part of the Citizens Gas Company.

(Question repeated by stenographer.)

A. All I can say on that is that when I first became identified with the firm, the partners of that firm, who had been members of the firm during this period, told me what their method was of preparing circulars, a method of going back to original sources; that in the preparation of circulars that contained letters from the corporation issuing them, that they would always have a filed copy that was signed by the officer whose name appeared in print; that they retained counsel to pass upon the legality of the proceedings and the issuance of the circulars, the title to the property, and all such legal points of that type.

Mr. Thompson: The City moves to strike out the answer on the ground it is purely hearsay.

Mr. Sparks: The same motion by the Citizens Gas Company.

Q. Referring specifically to the two letters contained in Exhibits 10 and 12, which purport to be copies of letters from Mr. Forrest, do you believe that they are true copies of the originals?

Mr. Thompson: To which the City certainly objects. The belief or opinion of this witness as to whether these are copies or not can mean nothing. If he has any personal knowledge as to whether they are correct or accurate copies, that is one thing, but his belief or opinion means nothing.

Mr. Sparks: The same objection on the part of the Citizens Gas Company.

A. Again, it is only based on belief as to their methods of operation; that I would not have found these circulars carrying Mr. Forrest's signature had they not been signed by Mr. Forrest. I might point out that in the two signed circulars shown here, that they were issued at a time when all original work was done in Boston, and if there is anything available it would be in the remainder of the Boston files.

Mr. Thompson: The City moves to strike out the answer on the ground it shows clearly that the witness has no personal knowledge as to whether the copies of the two letters purporting to have been signed by Mr. Forrest,

contained in Exhibits 10 and 12, are correct and accurate copies of anything written by him.

Mr. Sparks: Let the record show the same motion on the part of the Citizens Gas Company.

Q. Most, if not all, of these circulars contain a reference to the lease from the Indianapolis Gas Company to the Citizens Gas Company, together with the statement that it is a 99-year lease. Did you ever discuss this lease with representatives of the Citizens Gas Company?

A. I did.

Q. Can you state, briefly, the nature of your discussions?

Mr. Sparks: The defendant Citizens Gas Company objects to the witness answering the question unless he is asked specifically as to what representatives he discussed this matter with; also for the reasons heretofore stated to other questions.

Mr. Thompson: The same objection by the City of Indianapolis.

A. When I first visited the company in the Spring of 1920, as I recall the date, I questioned Mr. Forrest, the Secretary and General Manager, with respect to the lease and the location of the property under the leasehold. He showed me maps of the city, where the properties of the Indianapolis Gas Company were located. I visited the plant that had belonged to the Indianapolis Gas Company. I received statements from the company, copies of the minutes of the Board of Directors—

Mr. Higgins: Of which company now; the Citizens Gas Company?

A. (Continued.) Of the Citizens Gas Company. And balance sheets of the Citizens Gas Company, indicating plant additions to the leased property, and the balance sheet would have a statement on the asset side of bonds issued against extensions to the leased property. In fact, I had several conversations with Mr. Forrest with respect to the leasehold property.

Q. Could you be a little more specific in answering as to the nature of the conversations with respect to the leasehold?

A. About what?

Q. The nature of the conversations concerning the leasehold.

A. Oh, questions pertaining to the term of the leasehold, when it was entered into, some of the background of the leasehold property, who the shareholders were,

what the possibilities might be at some date to acquire the stock and merge the two properties.

Q. Did Mr. Forrest state to you that the lease was a 99-year lease?

Mr. Thompson: To which question the City objects because clearly any such statement would be a representation not of fact but of law, and for the additional reason that Mr. Forrest had no power or authority, merely the Secretary and General Manager of the initial trustee, to bind the successor trustee or the municipal corporation of the City of Indianapolis.

Mr. Sparks: As for the Citizens Gas Company, I assume the objections heretofore made will apply to this question and I wish to have them made specifically to this question.

(Question repeated by stenographer.)

A. He did.

Q. In selling the bonds of the Citizens Gas Company and Indianapolis Gas Company, did you consider the duration of the lease, the term of the lease?

A. Did I consider the term of the lease?

Q. Yes.

A. Yes.

Q. Was the existence of this 99-year lease one of the factors bearing upon the sale of the bonds?

A. It did have a bearing on the sale of the bonds.

Q. If you had believed the lease was for less than 99 years, would you have sold the bonds to customers?

Mr. Thompson: We object to that as a mere speculation, having no bearing on the issues involved in this case.

A. The lease running beyond 1952, as I recall it, the maturity date of the bonds, and the indications that the property of the company was useful to the Citizens Gas Company, led me to believe that the 99-year term was of value.

(At this point a recess was taken to 2:15 P. M.)

(Deposition continued at 2:15 P. M.)

Cross-Examination by Mr. Higgins.

Q. Mr. Baker, were the circulars which you have identified as Exhibits 3 to 12, both inclusive, circulars published in the newspapers in New York, or otherwise, by you, or by Blodget & Company?

A. They were printed in duplicate, or multigraphed in duplicate, some of them in New York, others in Boston.

Q. Were they inserted as advertisements in the papers of New York or Boston, if you know?

A. I couldn't tell you offhand.

Q. Now, as to each of these circulars which have been identified as Exhibits 3 to 12, both inclusive, in each instance, before their printing, was the proof sent to Mr. Forrest or some officer of the Citizens Gas Company?

A. I couldn't say that they were in each instance, no.

Q. That was the general practice, however; is that correct?

A. Well, we got out so many different circulars for different purposes. When we bought bonds direct from the company, we would get direct verification, but if we got out what we might call a routine circular in connection with market purchases, why, we would prepare a circular based on previous information we had in our files and based on the previous circulars, and immediately put it out, and then we would send a copy of it to Mr. Forrest.

Q. Was that verification received by you both orally and in writing; orally from Mr. Forrest or some other officer of the company?

A. That phase of it, with these routine circulars, was rather informal. Forrest would be writing a letter that he had received a letter and noted no errors in it, or something of that type.

Q. Were all of the letters to which you referred directed to your own personal attention?

A. Not necessarily so. In the security business, especially in a partnership where the firm name is signed "Blodget & Company," very frequently the receiver of the letter would not know just who had written it. Sometimes I would write to him and sign it personally. Pope would do the same thing.

Q. At any time, either through correspondence or in your numerous conversations which you have already testified to, with Mr. Forrest, did he at any time ever make any corrections as to the facts set out in the circulars which have been introduced in evidence here today; that you remember?

A. I don't remember any specific instances where he has called attention to an error. There may have been some, but it is going back quite a long time to trust your memory on.

Q. Now, when the bonds were delivered to you,

which you purchased directly from the Citizens Gas Company, were any of them delivered to you in person by Mr. Forrest or by any other officer of the Citizens Gas Company?

A. To me in person?

Q. To you or to Blodget & Company.

A. My guess would be that they were sent, according to usual form, in care of a bank, probably the Bankers Trust Company in their case because they had a relationship with the Bankers Trust Company.

Q. But you remember of no instances where he delivered bonds to you in person, bringing them to New York from Indianapolis?

A. Oh, no.

Q. How many visits, approximately, did you have to Indianapolis after your connection with Blodget & Company, if you remember; during the time you were marketing these bonds, both of the Indianapolis Gas Company and of the Citizens Gas Company? Just your best impression.

A. Oh, four to five times during that period.

Q. On those visits, or any one of those visits, did you meet with Mr. Henry H. Hornbrook, who was counsel for the Citizens Gas Company at that time, if you remember it?

A. I met him at lunch once.

Q. Did you meet and have any conversation with Mr. Franklin Vonnegut, who was an officer of the Citizens Gas Company at that time?

A. What is the name?

Q. Mr. Franklin Vonnegut.

A. No, I never met him.

Q. Your dealings, therefore, were primarily with Mr. Effroymson and Mr. Forrest; is that correct?

A. Yes.

Q. Now, in any conversations which you may have had with either of those gentlemen during your visit in Indianapolis in connection with the purchase of these bonds, did Mr. Forrest at any time tell you anything as to the history immediately preceding the execution of this 99-year lease between the Indianapolis Gas Company and the Citizens Gas Company?

A. I don't recall any.

Q. Do you recall that at any of those conversations when Mr. Forrest was talking about the lease that he advised you, in these words or words to this effect, that the Citizens Gas Company had induced a group of Indian-

apolis citizens to purchase the stock of the Indianapolis Gas Company from outside owners for the purpose of effecting this lease?

Mr. Sparks: The Citizens Gas Company objects to that because it does not tend to prove or disprove any issue in either case.

Mr. Thompson: The City of Indianapolis objects to it on the ground that it is, as to it, hearsay, and that if any attempt is to be made out of such conversation to build up an estoppel against the City of Indianapolis it is ineffectual for that purpose.

(Question repeated by stenographer.)

A. I don't recall that.

Q. You don't recall anything at all in conversation with either Mr. Forrest or Mr. Effroymson concerning the incidents immediately preceding the execution of the lease, so far as you remember: is that right?

A. No. I said "No" on your previous question. About the only thing I remember was that he spoke of its being an unhealthy situation, with the two companies operating in the same city. That is about all I recall in connection with it.

Q. You recall no conversation in which he stated that the merger, the execution of that lease, was brought about at the insistence of the Citizens Gas Company?

A. In what?

Q. Was brought about at the insistence or suggestion of the Citizens Gas Company.

A. No, I don't recall that.

Q. Did you ever, at any time subsequent to the printing and distribution of these circulars, have any communication from any officer of the Citizens Gas Company, either orally or in writing, advising you or stating that any of the information included in these circulars was not correct?

A. I don't recall any corrections, unless they were minor corrections.

Q. Did you ever have any correspondence or conversations in the distribution of the Indianapois Gas Company bonds from any officer of the Indianapois Gas Company?

A. We did not in my time, that I can recall.

Q. And the transactions which you had and by which you secured the Indianapolis Gas Company bonds of which you testified here today were all secured from the Citizens Gas Company; is that correct?

A. Yes.

Q. And all your dealings, then, in the purchase of those bonds were had with the Citizens Gas Company?

A. All of my personal dealings were with the Citizens Gas Company.

Q. And you had no correspondence or no relation at all during that period with any of the officers of the Indianapolis Gas Company; is that correct?

A. I have never met or had any correspondence with any of the officers of the Indianapolis Gas Company.

Q. And all the bonds which you bought were purchased from the Citizens Gas Company; is that right? I don't mean over-the-market bonds.

A. No. I cannot tell you exactly the form of the final delivery, whom the confirmation came from. Forrest negotiated the deal.

Q. Of the Indianapolis Gas bonds?

A. Yes. He negotiated the deal. Now, whether the confirmation was made to the Indianapolis Gas Company, I couldn't tell you.

Q. Have you any information available which would confirm your views on that either one way or the other?

A. I think all of our old books are in Boston. I could find out, by a short telephone call, from our old cashier, whether he had any books here or not.

Q. Well, that is not necessary. Directing your attention particularly to the Exhibit Nos. 10 and 12, which are circulars including the letter purporting to be sent from Mr. Forrest as General Manager of the Citizens Gas Company to Blodget & Company, I will ask you if those circulars, after they were proofed and before they were distributed, if those particular circulars were submitted to Mr. Forrest for his approval or disapproval.

Mr. Sparks: The Citizens Gas Company objects to that because the witness has already stated that he had no connection with Blodget & Company at that time, and so it is perfectly clear that he has no knowledge, or that he does not have sufficient knowledge, to answer this question.

Mr. Thompson: The City makes the same objection.

A. All I can say on that is that knowing of the good business practice that they followed when I became associated with them, that it would be my belief that they had not put out circulars with the names of counsel and Mr. Forrest's name printed on them without first submitting them.

Mr. Thompson: The City moves to strike out the answer on the ground that it is apparent from the answer itself it is only a belief or opinion on the part of the witness and not his personal knowledge as to what actually was done.

Mr. Sparks: The same motion on the part of the Citizens Gas Company.

Q. Can you state, if you know, Mr. Baker, when was the last purchase of bonds of the Indianapolis Gas Company purchased from the Citizens Gas Company?

A. I couldn't tell you offhand, no. I would have to go back to the books to give you the exact date.

Cross-Examination by Mr. Thompson.

Q. It has been more than ten years since Blodget & Company purchased any of the bonds of the Indianapolis Gas Company from the Citizens?

A. Oh, I am quite sure it is more than ten years.

Q. Now, the Indianapolis Gas bonds were due in 1952; is that what you said, Mr. Baker?

A. That is my recollection.

Q. Yes. I think that is right. You recall now that the lease between the Citizens Gas Company and the City of Indianapolis was executed as of September 30, 1913 Do you recall that?

A. Yes.

Q. So that these bonds that you purchased from the Citizens Gas Company were due some thirty-nine years after this lease was executed; is that right?

A. Right.

Q. And one of the things that you mainly relied upon was the fact that the Citizens Gas Company had a lease from the Indianapolis Gas Company of this property for a period of 99 years; is that correct?

A. Right.

Q. Now, did you have a copy of that lease which you examined?

A. I couldn't tell you whether I had actually examined a copy of the lease or not.

Q. Well, did your counsel examine it for you?

A. If so, it was prior to my time.

Q. Well, if you were going to rely upon the terms of the lease, wouldn't it be the most natural thing on the face of the earth that you would want to see what the lease contained?

A. Yes, but my firm had previously bought the bonds and—

Q. With an examination of the lease or without it?

A. Well, it would be reasonable for me to assume that my partners had used proper precautions.

Q. Now I direct your attention, Mr. Baker, to a portion of subdivision 32 of the lease between the Citizens Gas Company of Indianapolis and the Indianapolis Gas Company, and I ask you whether, at the time Blodget & Company made the purchases about which you have testified, you had knowledge of this provision of the lease:

"In event it should be determined by a court of final jurisdiction that the contract is ultra vires or void because of the length of the term created, and that such term is in excess of the authority of either party hereto to contract, then this lease shall nevertheless be binding upon the parties hereto for the longest term for which the parties hereto might lawfully contract."

A. Could I read that?

Q. Yes, sir. I will be very glad to have you do it. It is at the bottom of page 30 and at the top of page 31. What you have here before you is a copy of the bill of complaint of the Chase National Bank, trustee, against the Citizens Gas Company, to which this lease is attached as an exhibit.

A. All I can say on that would be that I assume that this whole lease was available to the counsel of the firm.

Q. There was a red flag of warning, wasn't there, right in that lease?

Mr. Higgins: I object to that.

Mr. Cole: I object also.

Mr. Thompson: It is cross-examination.

Q. There was a red flag of warning, wasn't there, as to the question of whether this lease was valid for a term of 99 years?

A. It would seem so to me.

Q. And I will ask you to state how, with that provision in the lease, you could rely on any representation made to you that the lease was in fact for a period of 99 years.

Mr. O'Connell: I object to the form of the question on the ground it is argumentative and calls for a conclusion of the witness.

A. That indicates a contingent possibility that the lease would not be in effect for 99 years.

Q. And you or your firm knew, presumably, of that

provision in the lease when these bonds were purchased; is that a fact?

Mr. O'Connell: I object to the form of the question on the same grounds.

Mr. Thompson: I will withdraw the question.

Q. Did you or your firm know of that provision in the lease when you purchased the bonds of the Indianapolis Gas Company?

A. I don't remember seeing the notation.

Q. In any event, you made no personal investigation of the terms of this lease before purchasing the bonds?

A. No. I found the lease and all of those things had been passed upon by counsel prior to my connection with the firm.

Q. Now, when were the bonds of the Citizens Gas Company which you purchased due; do you recall, Mr. Baker? Maybe one of these circulars will show it.

A. In 1942 or 1943.

Q. Calling your attention to Plaintiffs' Exhibit 10, do you recall now, Mr. Baker, when those were due?

A. The 5 per cent. bonds were due in 1942, as I remember it.

Q. Now, did you place any reliance, in purchasing those bonds, upon the fact that this lease existed and the Citizens Gas Company would be operating this property in 1942?

A. I knew there was a contingency with respect to who would be the owners of the Citizens Gas Company in 1942, but I did know they were a mortgage on the property.

Q. In determining whether those bonds were a mortgage on the property, did you or your firm examine the franchise of the Citizens Gas Company of Indianapolis?

A. I remember discussing the franchise on various occasions.

Q. Did you know that that franchise contained the following provision:

"When said certificate-holder shall have received, by dividends or otherwise, upon said certificates an amount equal to the face value thereof together with interest thereon at the rate of ten per centum per annum payable semi-annually, then said certificates issued to said subscribers shall be deemed fully paid and cancelled and it shall be the duty of the trustees and directors of said company to convey said gas plant and property belonging to said company to said city, to be owned and oper-

ated or leased by it, and all of the rights, title and interest of said company or its certificate-holders, stockholders, officers, directors or trustees, shall be deemed to be fully paid and extinguished, and all such certificates, whether of stock or otherwise, shall be surrendered and cancelled and said corporation shall be wound up."

A. Yes, I recall that.

Q. In other words, you knew that the length of the franchise period extended from 1905 until 1930 and that the franchise under which the Citizens Gas Company of Indianapolis was operating required it to be wound up in 1930, twelve years before these bonds became due?

A. Right.

Q. Did you know also when you relied upon the representations of the Citizens Gas Company in connection with these bonds that the franchise contract contained the following provision? I read from subdivision 22 of the franchise contract:

"If the plant and system of mains of said company shall not have become the property of said city by the cancellation of the certificates of subscribers and conveyance of such property to such city by the board of directors and trustees of said company on or before the expiration of the aforesaid period of said franchise, then said city, by and through its board of public works, upon the expiration of said franchise period, shall have the right to pay any balance remaining due said certificate holders and the plant and property of said company shall be conveyed to said city as above provided to be owned and operated, or owned and leased by it; or, at the option of said city, the board of directors of the corporate successor of the second parties"—that is the Citizens Gas Company—"shall, as heretofore provided, upon the conclusion of said franchise period, mortgage its plant and with the proceeds thereof, or with the mortgage notes issued in proper amounts, pay off and discharge the amount due certificate holders, and thereupon convey said plant to said city subject to such obligations and other legal obligations against said company."

Were you familiar with that?

A. That is as I generally remember it.

Q. Do you remember what was the authorized issue of Citizens Gas mortgage bonds?

A. The total amount authorized?

Q. Yes. Well, I will withdraw that. I don't care

about that. Did you know that on the 9th day of September, 1935, when the property which had been operated by the Citizens Gas Company as initial trustee was transferred to the City, there were outstanding in the hands of the public $2,745,000 of Citizens Gas Company bonds?

Mr. O'Connell: I object to the question on the ground it is incompetent.

A. I would have no reason to know the exact amount.

Q. Now, as a practical matter—I am asking you now because of your experience and qualifications in the bond business—if there were a mortgage outstanding of approximately $3,000,000. on the Citizens Gas Company, that company could not have procured the money to pay off these certificate holders.

Mr. O'Connell: I object to the form of the question.

A. That money could not have—

Q. What I am getting at, Mr. Baker, so that you will understand what I have in mind, is this: I have just read to you a provision from the franchise contract between the City of Indianapolis and a man named Potts and others, which was to be assigned to the Citizens Gas Company. Now, in that franchise contract there was the provision which I have read to you, that at the end of the franchise period and at the option of the Board of Public Works of the City of Indianapolis the Citizens Gas Company should mortgage its plant and property for the purpose of procuring money to pay off the certificate holders of the Citizens Gas Company?

A. I remember that.

Q. Now, what I am asking you is, as an expert bond man and investment broker, whether an outstanding mortgage of nearly $3,000,000. on that property would not have, as a practical matter, prevented compliance with that provision of the contract.

Mr. O'Connell: I object to the form of the question.

A. You have refreshed my memory on that and I remember that some time ago I expressed the opinion that the bonds, for that purpose, as I read it, could not have been sold.

Q. Right.

A. Because it would have been practically a 100 per cent. mortgage on the property.

Q. Correct. Now, in the purchase of these Citizens Gas bonds from the Citizens Gas Company, did you take into consideration that provision which I have just read

to you, which is in subdivision 22 of the franchise contract?

A. That it was a franchise contract—

Q. No. What I mean, Mr. Baker, in purchasing these bonds—I am talking now not about Indianapolis Gas bonds, but I am talking about Citizens Gas bonds—

A. All right.

Q. —you said you relied on certain information which had been furnished to you by the Citizens Gas Company. Now I am asking you did you also take into consideration, in purchasing these bonds of the Citizens Gas Company, this subdivision 22 of the franchise contract which I last read to you?

A. That permitted bonds to be sold for the purchase of the certificates?

Q. Yes. That is what I am talking about.

A. Yes. I had in mind they would be junior obligations to these bonds.

Q. Did you find any authority whatever in the franchise contract of the Citizens Gas Company to issue mortgage bonds for any purpose other than to retire these certificates?

Mr. O'Connell: I object to the form of the question on the ground it calls for a legal conclusion of the witness.

A. Well, what I know about that is that the previous original circular, this Exhibit 10, indicates its legality was passed on by eminent counsel.

Q. And you relied on their opinion?

A. I had to.

Q. As to the legality of the bond issue. Now, do you know, Mr. Baker, whether any of the persons to whom you have sold Indianapolis Gas bonds at the present time own them?

A. That I could not state

Q. You do not have any knowledge whatever as to whether any present holder of the bonds of the Indianapolis Gas Company has purchased the same from you?

A. No. I can state this, that when this litigation first came to light we recommended to our customers that they sell bonds at market, not because we did not believe in the ultimate value of them, but that there would be a period of litigation and the markets might not be so good.

Mr. Thompson: I have no further questions.

Mr. Sparks: I have no further questions.

Mr. Cole: I don't have any further questions.

By Mr. Higgins:

Q. Mr. Baker, you are not an attorney?

A. No.

Q. And so far as any conclusion which you have drawn from any of the instruments which Mr. Thompson asked you about, either the franchise or the lease, you relied solely upon your counsel's opinion of those matters, did you not?

A. Surely.

Q. You have no information as to how many of your purchasers sold their bonds which they bought from you of the Indianapolis Gas Company, have you?

A. No, I have nothing.

Q. You don't know whether they sold them or not?

A. I recall one case where I think they sold them.

Q. But so far as the others, you have no information? You don't know that they have sold them since they purchased them originally from you?

A. No.

By Mr. Thompson:

Q. And you have no knowledge as to whether they still hold them or not?

A. No.

Q. You just simply don't know anything about it one way or the other?

A. No.

(Discussion off the record.)

Mr. Thompson: It is agreed by all the parties to this cause that it shall be unnecessary for either deponent to sign his deposition and that the same may be received with the same effect as if it had actually been signed.

Mr. Cole: And may I add this further stipulation, that the depositions may be transmitted to the attorney for the plaintiff instead of directly to the court?

Mr. Thompson: Oh, no. I want these filed in court.

Subscribed and sworn to before me this ..... day of ....., 1939.

Joseph Edwards Baker.

Stenographic charges $86.25
Postage .66
Payable by Plaintiff.

(PLAINTIFFS' DEPOSITION EXHIBITS 1 AND 2.)

* * * * *

"(Stipulation and notice re taking deposition omitted in printing.)"

(Inserted pursuant to stipulation filed November 22, 1939.)

Indianapolis Gas Company

First Consolidated Mortgage Gold 5% Bonds

Dated October 1, 1902 — Due October 1, 1952

Authorized $7,500,000 — Outstanding $5,351,000

Coupon bonds, denomination $1,000

Registerable as to principal

Interest payable (April 1 and October 1) at the Equitable Trust Company in New York

TRUSTEES—EQUITABLE TRUST COMPANY, NEW YORK, AND FERDINAND WILSON, INDIANAPOLIS

LEASE The Citizens Gas Company of Indianapolis, in 1913, leased the property of the Indianapolis Gas Company for 99 years at a rental equivalent to the annual bond interest required, and 6% on the $2,000,000 stock of the latter company. This lease was executed with the approval of the Public Service Commission of Indiana.

HISTORY The Indianapolis Gas Company was formed in 1887 under the name of the Indianapolis Natural Gas Company, to supply the city of Indianapolis with natural gas. The Company enjoyed great prosperity until 1900, paying dividends at the rate of 12%, when the supply of natural gas gave out. From 1900 until 1913, when the Company was leased to the Citizens Gas Company, all surplus earnings went toward the completing of an artificial gas plant and the extension of the distributing system. The Citizens Gas Company of Indianapolis was formed in 1906 to acquire the mains of the Consumers Gas Trust Company, a natural gas concern, which was forced to liquidate through the failure of the natural gas supply. The shares of the Citizens Gas Company were originally sold by popular subscription at par with no allowance for promotion expenses. Over 4,000 citizens of Indianapolis are now holders of this stock. From the time this company was organized in 1906 until 1913 it operated in competition with the Indianapolis Gas Company. The organization of the Indiana Public Service Commission made possible the consolidation of these two companies which was consummated by the lease above described to the advantage of both.

PROPERTY These bonds are secured by a direct first mortgage on all the property owned by the Company, consisting of a modern by-product coke oven plant, a large water gas plant, shops, and mains aggregating 375 miles, valued in excess of $8,000,000.

BUSINESS The business of the Indianapolis Gas Company and of the Citizens Gas Company, lessee of the property of the former, are operated as a unit and the operations of the plants of the two companies are not separately considered in any of the statements of operation made by the Citizens Gas Company. The Citizens Gas Company supplies without competition the entire city of Indianapolis and adjacent communities, serving a population of over 314,000. On September 1, 1921, it had 66,052 customers. For many years the Citizens Gas Company sold its gas at 55 cents per thousand cubic feet, the cheapest rate in the United States. An increase to 60 cents was authorized by the Public Service Commission in 1919, and recently that Commission has authorized an increase to 90 cents per thousand cubic feet. It is estimated that this will increase the revenue of the Citizens Gas Company by more than $900,000 per year, yet this rate still remains one of the lowest artificial gas rates in the country. In the past a large proportion of the Citizens Gas earnings have been derived from the sale of coke and its by-products. Earnings in 1921, owing to industrial conditions affecting the coke market, did not make an exhibit comparable to the record of the previous six years. The Company, however, has been able to finance itself very satisfactorily through the sale of preferred stock to its own customers, thus placing a considerable additional equity behind the underlying bonds.

MANAGEMENT The stock of the Citizens Gas Company is perpetually trusted to an honorary board of five representative citizens. These trustees elect the directors and are, therefore, responsible for the management of the Company. This form of control insures a local management at all times.

FRANCHISE The Company operates under an indeterminate permit granted by the Public Service Commission under which the Commission has control of rates and will not allow competition.

EARNINGS Under the terms of the lease the interest on the Indianapolis Gas 5's and 6% on the common stock of the Company is a charge against gross earnings of the Citizens Gas Company before the determination of net earnings applicable to interest charges on the funded debt of that Company.

CAPITALIZATION

	Authorized	Outstanding
CAPITAL STOCK—Common	$2,000,000	$2,000,000
Preferred 7% Cumulative	2,000,000	1,000,000
BONDS—First and Refunding Mortgage 5%	10,000,000	2,738,500
General Mortgage 7%	1,500,000	1,302,000

EARNINGS

	1916	1917	1918	1919	1920
Gross Operating Earnings	$3,327,136	$4,707,004	[illegible]	[illegible]	[illegible]

Plaintiff's Depos

HISTORY The Indianapolis Gas Company was formed in 1887 under the name of the Indianapolis Natural Gas Company, to supply the city of Indianapolis with natural gas. The Company enjoyed great prosperity until 1900, paying dividends at the rate of 12%, when the supply of natural gas gave out. From 1900 until 1913, when the Company was leased to the Citizens Gas Company, all surplus earnings went toward the completing of an artificial gas plant and the extension of the distributing system. The Citizens Gas Company of Indianapolis was formed in 1906 to acquire the mains of the Consumers Gas Trust Company, a natural gas concern, which was forced to liquidate through the failure of the natural gas supply. The shares of the Citizens Gas Company were originally sold by popular subscription at par with no allowance for promotion expenses. Over 4,000 citizens of Indianapolis are now holders of this stock. From the time this company was organized in 1906 until 1913 it operated in competition with the Indianapolis Gas Company. The organization of the Indiana Public Service Commission made possible the consolidation of these two companies which was consummated by the lease above described to the advantage of both.

PROPERTY These bonds are secured by a direct first mortgage on all the property owned by the Company, consisting of a modern by-product coke oven plant, a large water gas plant, shops, and mains aggregating 375 miles, valued in excess of $8,000,000.

BUSINESS The business of the Indianapolis Gas Company and of the Citizens Gas Company, lessee of the property of the former, are operated as a unit and the operations of the plants of the two companies are not separately considered in any of the statements of operation made by the Citizens Gas Company. The Citizens Gas Company supplies without competition the entire city of Indianapolis and adjacent communities, serving a population of over 314,000. On September 1, 1921, it had 66,052 customers. For many years the Citizens Gas Company sold its gas at 35 cents per thousand cubic feet, the cheapest rate in the United States. An increase to 60 cents was authorized by the Public Service Commission in 1919, and recently that Commission has authorized an increase to 90 cents per thousand cubic feet. It is estimated that this will increase the revenue of the Citizens Gas Company by more than $900,000 per year, yet this rate still remains one of the lowest artificial gas rates in the country. In the past a large proportion of the Citizens Gas earnings have been derived from the sale of coke and its by-products. Earnings in 1921, owing to industrial conditions affecting the coke market, did not make an exhibit comparable to the record of the previous six years. The Company, however, has been able to finance itself very satisfactorily through the sale of preferred stock to its own customers, thus placing a considerable additional equity behind the underlying bonds.

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Preferred 7% Cumulative	2,000,000	1,000,000
BONDS—First and Refunding Mortgage 5%	10,000,000	2,738,500
General Mortgage 7%	1,500,000	1,302,000

EARNINGS

	1916	1917	1918	1919	1920
Gross Operating Earnings	$3,327,136	$4,297,994	$5,291,185	$5,519,080	$8,520,596
Operating Expenses	2,584,850	3,668,198	4,404,335	4,545,430	7,315,430
Net Operating Revenue	$742,286	$629,796	$886,850	$973,650	$1,205,166
Taxes	105,388	115,134	148,746	258,135	314,875
Net Operating Income	$636,898	$514,662	$738,104	$715,515	$890,290
Net Non-Operating Income	336,716	275,156	152,259	241,268	206,610
Gross Earnings	$973,614	$789,818	$890,363	$956,783	$1,096,900
Leasehold Rental	375,402	376,892	382,936	391,357	401,405
Net Earnings	$598,212	$412,926	$507,427	$565,426	$695,495
Interest and Amortization	114,949	122,771	151,151	293,499	280,518
Surplus available for Reserves, Sinking Fund and Dividends	$483,263	$290,155	$356,276	$271,927	$414,977

Plaintiff's Deposition Exhibit 3

PLAINTIFFS' DEPOSITION EXHIBIT 4.

Blodget & Co.
34 Pine Street, New York
Telephone John 6310
60 State Street, Boston — Connecticut Mutual Bldg., Hartford
First National Bank Bldg., Chicago

$250,000
Indianapolis Gas Company
First Consolidated Mortgage 5% Gold Bonds

Dated October 1, 1902 — Due October 1, 1952

Authorized: $7,500,000 — Outstanding: $5,855,000

Coupon bonds in $1,000 denomination, registerable as to principal. Interest payable April and October 1 in New York.

Guaranteed by the Citizens Gas Company of Indianapolis as to interest and refunding of principal.

The Citizens Gas Company, which leases the property of the Indianapolis Gas Company, supplies gas without competition to the entire city of Indianapolis and surrounding communities, serving a population of about 335,000. The Company operates under an indeterminate permit of the Public Service Commission of Indiana. The property of the Indianapolis Gas Company is leased for 99 years from 1913 for a sum equal to the interest on the outstanding bonds, and 6% on the $2,000,000 stock of the Indianapolis Gas Company.

Properties consist of by-product coke oven gas plants and adequate distribution systems, as well as water gas plants which are operated in conjunction with the coke oven gas plant as conditions of the coke market and demand for gas require. The properties of the companies are operated as a unit and serve over 69,500 customers.

These bonds are secured by a first mortgage on all the property of the Indianapolis Gas Company now owned or hereafter acquired, consisting of coke ovens and water gas set, with distribution system. This property is valued at a sum in excess of $8,000,000. The bonds are followed by $2,000,000 capital stock having a present market value of $2,140,000 and they are the guaranteed obligations of the Citizens Gas Company whose outstanding preferred and

common stocks have an aggregate market value of $3,600,000.

Earnings
(Citizens Gas Company)
for year ended December 31, 1924

Gross Earnings	$5,798,436
Operating Expenses & Taxes	4,179,824
Net Revenue	$1,618,612
*Leasehold Rental	418,330
Net Income	$1,200,282
Bond Interest	263,300

Net earnings, after operating expenses and taxes, are nearly four times the leasehold rental of the Indianapolis Gas Company properties, while earnings after payment of such leasehold rental are over 4½ times interest charges on the funded debt of the Citizens Gas Co.

Price 98½ to yield 5.10% to maturity.

2C5

The Information Contained Herein Has Been Obtained from Sources Which We Consider Reliable But Its Accuracy Is Not Guaranteed.

PLAINTIFFS' DEPOSITION EXHIBIT 5.

(Letterhead—Blodget & Co.)

Boston Chicago Hartford New York

Indianapolis Gas Company
First Consolidated Mortgage 5% Gold Bonds

Dated October 1, 1902 Due October 1, 1952

Interest payable April 1 and October 1 in New York. Coupon bonds in the denomination of $1,000; registerable as to principal. Equitable Trust Co., New York, and Ferdinand Winter, Indianapolis, Trustees.

Guaranteed by Citizens Gas Company of Indianapolis as to Interest and Refunding of Principal.

The Indianapolis Gas Company was incorporated in 1890 to supply artificial gas to the city of Indianapolis and

*Leasehold rental includes interest on bonds of Indianapolis Gas Company, as described above, and 6% dividends guaranteed on its $2,000,000 capital stock.

vicinity. The property of the company is leased for 99 years from October 1913 to the Citizens Gas Company of Indianapolis which now controls the entire gas business of the city of Indianapolis and surrounding communities, serving a population of about 375,000. The Citizens Gas Company operates under an indeterminate permit of the Public Service Commission of Indiana.

The properties consist of by-product coke oven gas plants and adequate distribution systems, as well as water gas plants which are operated in conjunction with the coke oven gas plant as conditions of the coke market and demand for gas require. The properties of the companies are operated as a unit and serve over 69,500 customers.

These bonds, outstanding in the amount of $6,203,000, are secured by a first mortgage on all the property of the Indianapolis Gas Company now owned or hereafter acquired. The property of the company is valued at a sum in excess of $8,900,000. These bonds are also guaranteed by the Citizens Gas Company under the terms of the lease which provides for the payment of interest and refunding of the bonds at maturity.

Earnings of Citizens Gas Company of Indianapolis for

	Years Ended December 31	
	1925	1924
Gross Earnings	$6,504,153	$5,798,436
Operating Expenses and Taxes	4,571,549	4,179,824
Net Revenue	$1,932,604	$1,618,612
*Leasehold Rental	418,835	418,330
Bond Interest	$ 212,853	$ 260,999
Balance	$1,300,916	$ 939,283

Price on Application.

2L6

The Information Contained Herein Has Been Obtained from Sources Which We Consider Reliable But Its Accuracy Is Not Guaranteed.

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*Leasehold rental includes interest on bonds of Indianapolis Gas Company, as described above and 6% dividends guaranteed on its $2,000,000 of Capital Stock.

PLAINTIFFS' DEPOSITION EXHIBIT 6.

(Letterhead—Blodget & Co.)

Boston Chicago Providence Hartford New York

Citizens Gas Company
(Of Indianapolis)

First and Refunding (now First) Mortgage Gold 5s

Dated July 1, 1912 Due July 1, 1942

Callable at 108 on any interest date.

The Citizens Gas Company, which was incorporated in 1907, supplies gas without competition to the entire City of Indianapolis and surrounding communities, serving a population of about 375,000. The Company operates under an indeterminate permit of the Public Service Commission of Indiana.

The Company owns and operates a modern by-product coke oven gas plant, and adequate distribution system. In addition, it has water gas plants which are operated in conjunction with the coke oven plant as conditions of the coke market and demand for gas require. The plant and distribution system of the Indianapolis Gas Company, which are similar to those of the Citizens Gas Company, are leased by the latter and the two systems operated as a unit.

The First and Refunding Mortgage 5% Bonds of the Citizens Gas Company, due July 1, 1942, are a direct obligation of that company secured by a first mortgage on all the property, leases, and franchises now owned or hereafter acquired, valued at approximately $9,000,000. Additional bonds are issuable only under carefully guarded restrictions.

Capitalization.

Citizens Gas Company	Outstanding
First & Ref. 5's of 1942 (Authorized $10,000,000)	$3,861,000[1]
Preferred Stock	1,000,000
Common Stock	2,000,000

As rental for the properties of the Indianapolis Gas Company, the Citizens Gas Company guarantees the inter-

[1] Including $514,500 in Sinking Fund.

est on bonds of that company, and also guarantees 6% dividends on its $2,000,000 Capital Stock.

	Earnings for years ended June 30, 1926	1925	1924
Gross Earnings	$7,014,579	$5,837,324	$6,332,282
Oper. Exp. & Taxes	5,040,668	4,045,268	4,692,581
	1,973,911	1,792,056	1,639,701
Leasehold Rentals	418,825	418,656	417,975
Net Earnings	1,555,086	1,373,400	1,221,726
Present Bond Interest	193,050		
Times earned	8.06	7.11	6.33

PLAINTIFFS' DEPOSITION EXHIBIT 7.

Citizens Gas Company of Indianapolis Indianapolis Gas Company

The Citizens Gas Company was incorporated in 1967. It operated in competition with the Indianapolis Gas Company until 1913, when it leased for 99 years the plant and distributing system of that company. Since then the two properties have been operated as a unit. The company, operating under an indeterminate permit of the Public Service Commission of Indiana, supplies gas without competition to the entire city of Indianapolis and surrounding communities, serving a population of about 335,000.

Property

The reproduction value of the physical properties of both the Citizens Gas Company and Indianapolis Gas Company as established January 1, 1921, by the engineer of the Public Service Commission of Indiana, plus the cost of subsequent additions, was on March 1, 1922, $17,680,000. The total outstanding bonded debt of both companies as of May 1, 1922, was only $10,152,500.

Capitalization
May 1, 1922

Citizens Gas Company	Outstanding
First & Refunding Mortgage 5% Bonds, 1942 (authorized $10,000,000)	$3,641,500*
General Mortgage 7% Bonds, 1923	550,000
General & Refunding Mortgage 7% Bonds, 1927	450,000
7% Preferred Stock	1,000,000
Common Stock	2,000,000
Indianapolis Gas Company	
First Consolidated Mortgage 5% Bonds, 1952 (authorized $7,500,000)	5,511,000
Common Stock	2,000,000

As rental for the properties of the Indianapolis Gas Company, the Citizens Gas Company guarantees the interest on the bonds of that company and also guarantees 6% dividends on its $2,000,000 capital stock.

Earnings

Net earnings, after leasehold rentals, for the last ten years have averaged $378,911, and for the last six years $454,911. Interest on all the present outstanding Citizens Gas Company bonds amounts to less than $250,000.

Besides the increased rate for gas which the company is now enjoying, the improvement in general business is having an appreciable effect. The company is now rapidly liquidating its large stock of coke, an important by-product for which in the past year there was very little market.

Rates

Until May, 1921, the company received only 60c per thousand cubic feet for its gas, which was approximately the cheapest manufactured gas sold in the country. Due to increased cost of labor and supplies, and the industrial depression, the company in the winter of 1920-21 was operating at a loss and in May, 1921, was granted an increase to 90c per M.C.F. On May 15, 1922, the company was granted a temporary injunction by the Federal Court authorizing it to charge $1.20 per M.C.F. The company states that if this rate, which is fairly comparable to the rates in

* Including present offering.

other cities, had been in effect in 1921, they would have shown a substantial surplus instead of a deficit for that year.

Stock

The common stock was sold at a material premium and is held by about 3,000 citizens of Indianapolis. It is now quoted in Indianapolis at 88%. All the stock is perpetually trusteed to a board of five representative citizens. These trustees elect the directors and are therefore responsible for the management of the company. This form of control insures a local management at all times.

The First & Refunding Mortgage 5% bonds of the Citizens Gas Company, due July 1, 1942, are a direct obligation of that company secured by a first mortgage on all the property, leases, and franchises now owned or hereafter acquired, valued at approximately $9,000,000. $3,641,500 in bonds are outstanding. Additional bonds are issuable only under carefully guarded restrictions.

The First Consolidated Mortgage 5% Bonds of the Indianapolis Gas Company, due October 1, 1952, are secured by a direct first mortgage on all the property of that company. They are further secured by the guarantee of the Citizens Gas Company as to interest and as to refunding at maturity. Additional bonds are issuable only under carefully guarded restrictions.

Blodget & Co.

60 State Street, Boston — 34 Pine Street, New York

327 Connecticut Mutual Building, Hartford

705 Widener Building, Philadelphia

First National Bank Building, Chicago

The information and these statistics are not guaranteed, but have been obtained from sources we believe to be accurate.

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PLAINTIFFS' DEPOSITION EXHIBIT NO. 8.

Blodgett & Co.
34 Pine Street, New York
Telephone John 6310
Connecticut Mutual Bldg., Hartford
Widener Building, Philadelphia
60 State Street, Boston
First National Bank Bldg., Chicago
Citizens Gas Company (of Indianapolis)
Indianapolis Gas Company

The Citizens Gas Company was incorporated in 1907. In 1913 it leased the plant and distributing system of the Indianapolis Gas Co., since which time the two properties have been operated as a unit. The company, operating under an indeterminate permit of the Public Service Commission of Indiana, supplies gas without competition to the entire city of Indianapolis and surrounding communities, serving a population of about 335,000.

Capitalization.

	Outstanding.
Citizens Gas Company	
First & Ref. 5s of 1942 (Authorized $10,000,000)	$3,848,000 (1)
Gen. & Ref. Mortgage 7% Bonds of 1927	1,000,000
Preferred Stock	1,000,000
Common Stock	2,000,000
Indianapolis Gas Co.	
First Consolidated 5s of 1952 (Authorized $7,500,000)	$5,511,000
Common Stock	2,000,000

As rental for the properties of the Indianapolis Gas Co., the Citizens Gas Company guarantees the interest on bonds of that company and also guarantees 6% dividends on its $2,000,000 capital stock.

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(1) Including $340,000 in Sinking Fund.

Earnings—12 Months ended December 31, 1923.

Gross Earnings		$6,651,765
Operating Expenses		4,921,282
Net Revenue		$1,730,483
Leasehold Rental		417,767
Net Income		$1,312,716
Bond Interest		263,300
Balance		$1,049,416
Depreciation	$237,500	
Other Int. and Amortization	61,721	299,221
Surplus for the year		$ 750,195

Net Earnings five times interest charges.

The common stock of the company was sold at a material premium and is held chiefly by citizens of Indianapolis. All the stock is perpetually trusteed to a board of representative citizens. These trustees elect the directors and are therefore responsible for the management of the company. This form of control insures a local management at all times.

The First & Refunding Mortgage 5% bonds of the Citizens Gas. Co., due July 1, 1942, are a direct obligation of that company secured by a first mortgage on all the property, leases, and franchises now owned or hereafter acquired, valued at approximately $9,000,000, over 2.3 times the amount of these bonds outstanding. Additional bonds are issuable only under carefully guarded restrictions.

Price 91 and interest, to yield 5.75%.

The First Consolidated Mortgage 5% bonds of the Indianapolis Gas Co., due Oct. 1, 1952, are secured by a direct first mortgage on all the property of that company. They are further secured by the guarantee of the Citizens Gas Co. as to interest and as to refunding at maturity. Additional bonds are issuable only under carefully guarded restrictions.

Price 90 and interest, to yield 5.72%.

The information contained herein has been obtained from sources which we consider reliable but its accuracy is not guaranteed.

2D4

Under the Massachusetts new Tax Law of 1916 these bonds are no longer subject to taxation as to principal. The income only is taxable. This amounts to but $3.00 on each $1,000 bond.

INDIANAPOLIS GAS COMPANY

FIRST MORTGAGE 5% GOLD BONDS

Dated October 1, 1902 — Due October 1, 1952

EQUITABLE TRUST COMPANY OF NEW YORK, Trustee

Guaranteed by Citizens Gas Company of Indianapolis

CAPITALIZATION

	Authorized	Issued
First Mortgage 5% Gold Bonds, due 1952	$7,500,000	$5,073,000
Capital Stock (6% dividends guaranteed under lease)	2,000,000	2,000,000

These bonds are a first mortgage upon the entire property of the Company. The Indianapolis Gas Company was incorporated in 1890. In October, 1913, with the consent of the Public Service Commission of Indiana, the Indianapolis Gas Company was leased to the Citizens Gas Company for 99 years, whereby the latter company controls the entire gas business of Indianapolis. As a part of the lease, the Citizens Gas Company guaranteed the interest on the Indianapolis Gas Company' bonds, their refunding at maturity and 6% dividends on its $2,000,000 capital stock. This stock is selling in the market at 120, at which it yields about 5%. We are advised that over $8,000,000 has been put into the Indianapolis Gas Company.

The Company sells gas at 55c per thousand cubic feet, the lowest price for manufactured gas in the United States. The Company makes the best coke, and also makes a good profit from the sale of tar and ammonia. About a year ago a plant was installed to recover benzol, and the first four months the plant paid for itself and is now showing a very handsome profit each month. It is anticipated that within six months this profit will be much increased.

The Company has just completed the installation of a plant to extract cyanide, which is the last by-product in the manufacture of gas, and they have a very profitable long time contract for the sale of all the cyanide which they can manufacture.

The Indianapolis Gas Company's plant is located on one side of the city and the Citizens Gas Company about eight miles away on the other side. The Indianapolis Gas Company has a system of mains amounting to about 375 miles, and a complete new coke oven plant, as well as a water gas and producer gas plant.

EARNINGS

The Citizens Gas Company reports the following earnings for the year ended December 31, 1915:

Gross Earnings		$3,061,641.16
Operating Expenses, Taxes, Depreciation, etc.	$2,319,169.35	
Interest on Indianapolis Gas Co. Bonds	251,737.50	
Dividends on Indianapolis Gas Co. Stock	120,000.00	
Miscellaneous	1,761.12	2,692,667.98
Net Earnings		$368,973.18
Bond Interest		96,049.17

For the first ten months of 1916 the Citizens Gas Company showed net earnings, after deducting [illegible] of $618,390.55, against $601,160.17 for the same period last year.

Plaintiff'

These bonds are a first mortgage upon the entire property of the Company. The Indianapolis Gas Company was incorporated in 1890. In October, 1913, with the consent of the Public Service Commission of Indiana, the Indianapolis Gas Company was leased to the Citizens Gas Company for 99 years, whereby the latter company controls the entire gas business of Indianapolis. As a part of the lease, the Citizens Gas Company guaranteed the interest on the Indianapolis Gas Company bonds, their refunding at maturity and 6% dividends on its $2,000,000 capital stock. This stock is selling in the market at 120, at which it yields about 5%. We are advised that over $8,000,000 has been put into the Indianapolis Gas Company.

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Miscellaneous	1,761.12	2,692.667.98
Net Earnings		$368,973.18
Bond Interest		96,049.17

For the first ten months of 1916 the Citizens Gas Company showed net earnings, after deducting operating costs and taxes of $818,380.55, against $601,460.47 for the same period last year.

The first charge which the Company makes against these net earnings is the interest on the Indianapolis Gas Company bonds, which amounted to $211,375 for the same period.

The Citizens Gas Company has $2,044,000 bonds outstanding and $1,250,000 capital stock, which is selling from 170 to 180 a share, and is held by over 3,000 stockholders in Indianapolis.

Under the terms of merger all directors and trustees of both companies must always be citizens of Indianapolis, therefore insuring local management.

Price 100 and interest, yielding 5%

While we do not guarantee the foregoing statements we believe them to be accurate and have relied on them in purchasing the bonds for our own account.

BLODGET & CO.

60 State Street, Boston

34 Pine Street, New York

Plaintiff's Deposition Exhibit 9

PLAINTIFF'S DEPOSITION EXHIBIT NO. 10.

Blodget & Co.
60 State Street, Boston
30 Pine Street, New York

Citizens Gas Company of Indianapolis

First Mortgage Sinking Fund Gold 5's

Dated July 1, 1912 Due July 1, 1942

Denomination, $500 and $1,000

Principal and semi-annual interest (January 1 and July 1) payable at the office of the Bankers Trust Company, New York. Principal only can be registered.

Callable at 108 and interest on any interest date.

Sinking Fund of ¼ of 1% in 1915 and 1916 and ½ of 1% thereafter.

Bankers Trust Co. of New York and
Union Trust Co. of Indianapolis, Trustees.

Full details as to capitalization, earnings, property and business will be found in the accompanying letter of Mr. J. D. Forrest, Secretary and General Manager of the Company, in which the following points may be noted:

First Mortgage on all the property owned by the company, conservatively estimated to have a reproduction value of about three times the par value of the bonds outstanding. Additional bonds can be issued only when the net earnings for the preceding 12 months shall have been equal to twice the interest charges on the bonds outstanding and those proposed to be issued.

Sinking Fund is to be used in purchasing, or calling bonds at 108, and the bonds so purchased are kept alive and draw interest for the fund.

Management. The stock of the company is perpetually trusteed with a board of five representative citizens, one appointed by the Mayor and the balance of the board is self perpetuating. They elect the directors and serve without compensation. Because of the quasi public character of the organization a number of leading citizens freely contributed their time to the promotion of the company and the sale of the original issue of stock which was all placed

locally in small amounts to about three thousand investors. The stock is now quoted at about 150%.

Franchise. Company's 25 year franchise can be exchanged at any time for indeterminate permit granted by the Public Service Commission. Lease of the Indianapolis Gas Co. by the Citizens Gas Co. was approved by the Public Service Commission in September, 1913.

Earnings. Net earnings for 1914 more than twice the interest charges on the First Mortgage bonds outstanding for the year and also the $500,000 to be issued.

Business. The plant is the most modern and efficient in this country. Gas is supplied to the consumer at 55c. per 1000 cubic feet, the lowest price for manufactured gas in the United States, and with one exception the lowest in the world. Its Coke product is of the finest grade and especially adapted for blast furnaces. Coke is shipped as far west as Denver and Anaconda.

Legality approved by Messrs. Spooner & Cotton of New York City and Messrs. Smith, Remster, Hornbrook & Smith of Indianapolis.

Application will be made to list these bonds on the New York Stock Exchange.

Price 96 and interest, yielding 5¼%.

Blodget & Co.

60 State Street, Boston — 30 Pine Street, New York

The Company pays the coupons without deduction for the normal U. S. Income Tax.

March 1, 1915.

Messrs. Blodget & Co.,
60 State Street,
Boston, Mass.

Dear Sirs:

Referring to the recent sale to you of $500,000 of First and Refunding Mortgage Sinking Fund Gold Bonds of the Citizens Gas Company of Indianapolis, I beg to submit the following information in regard to the property:

The Citizens Gas Company was organized in 1906 for the purpose of buying the mains of the Consumers' Gas Trust Company, a natural gas company which was placed in liquidation by order of court. In return for the agreement of the company to supply the people of Indianapolis with gas at the rate of sixty cents per thousand cubic feet, the city assigned to the company its rights under the

franchise of the Consumers' Gas Trust Company, to acquire the mains of that company. After prolonged litigation in the State and Federal Courts, this system of 133 miles of mains and about 14,000 service pipes was purchased for the sum of $409,061. A conservative estimate of the reproduction value of this system, lying as it did chiefly under paved streets, was placed at $1,250,000. The system was found to be in excellent condition and the cost of putting the same into commission was only about $50,000. Such value as this distribution system had in excess of the cost to the company, has never been placed in the books. The company was financed by selling its stock to the citizens of Indianapolis by popular subscription at par with no payment whatever for promotion expenses. Over three thousand persons purchased the original issue consisting of $1,000,000 of stock. Since the company has been in operation it has sold $250,000 additional stock at an aggregate premium of $104,354.71, which is carried in the surplus of the company and cannot be distributed in dividends. In 1908 $500,000 of 6% bonds were sold to local interests at 95 and accrued interest, and thereafter $75,000 additional of these bonds were sold at prices in excess of the original syndicate price. These bonds were called and retired January 1st, 1913. The present First and Refunding Mortgage Sinking Fund Bonds, of which we have sold $500,000 to you, were authorized as of July 1st, 1912. In July of that year $420,000 of the new bonds were sold to local interests at 95 and accrued interest, and subsequently during that year $600,000 additional bonds of the same issue were sold for the purpose of refunding the original First Mortgage Bonds. These were sold at prices ranging from 95 to 98 and accrued interest, the greater portion of them being sold at the latter figure. Of the remaining $510,000 of bonds of the First and Refunding issue, $450,000 were sold at 95 and accrued interest during the year 1913 and $60,000 were sold at par prior to January 1st, 1914. All of the proceeds from the sale of the securities of the company as outlined above have gone into the property, there having been no promotion costs whatever.

In order to induce the people of Indianapolis to invest their savings in the securities of this company, the city agreed in its franchise, that the company should be permitted to pay its stockholders ten per cent dividends, computing the same from the date of issue of the certificate of stock; and further agreed that in the event it should

take over the property, as it is permitted to do under the franchise, it should pay to the stockholders the par value of their stock together with ten per cent cumulative dividends from the date of issue of the certificates. The stock is perpetually Trusteed with a Board of five representative citizens, one of whom is appointed by the Mayor (but only when vacancies occur by death or resignation of the original appointee), and the balance of the Board is self-perpetuating. Because of the quasi public character of the organization, a number of leading citizens freely contributed their time to the promotion of the company and the sale of the original issue of stock. Subscriptions were made to the stock by persons who were to become customers of the company, with a view to securing at once an investment and a low price on gas for their own consumption. The spirit of these stockholders and the popularity of the company assured it a good business from the start, which was made in April 1909. By reason of the low price fixed for gas by the franchise, it was necessary for the company to adopt the most economical process of manufacture that could be obtained. This was found to be the by-product coke oven. Fifty such ovens were constructed in the original installation, and were put into commission at the end of November 1909. In 1913 fifty additional ovens were constructed and put into commission. Since the company was organized as a permanent institution in the city, all construction work has always been done in the best possible manner, and the operating results of the company have justified the wisdom of the management in its plans.

By reason of the popular support of the company which secured for it a satisfactory and growing gas business, and by reason of the economical method of production which was employed the company has shown gratifying earnings from the begininng of its operation, and finally, at the beginning of 1913, found itself in a position to acquire the plant and property of The Indianapolis Gas Company, its large and long established competitor. This company had been forced by competition finally to begin the construction of by-product coke ovens. The merger of the two companies was accomplished after prolonged investigation, with the approval of the Public Service Commission on October 1st, 1913. The Citizens Company then took over all of the operating property and business of The Indianapolis Gas Company under a ninety-nine year lease, under which the former agreed to pay as rental the

interest on the First Consolidated Mortgage Bonds of the latter, the amount then outstanding being $4,833,000, and also to pay six per cent on the $2,000,000 of Capital Stock of the The Indianapolis Company. This latter payment may increase to a maximum of six and three-quarters per cent, on an ascending slide scale with a decrease in the maximum price of gas to the consumer. The amount of bonds of The Indianapolis Company outstanding has been increased by $77,000 issued to the treasury of the Indianapolis Gas Company on account of betterments made between the date of the contract for merger and the consummation of the same; and the Citizens Gas Company has in its treasury $142,000 (to be increased presently to $163,000) taken down under the terms of the lease and the mortgage on account of betterments made by it to the leased property.

The earnings of the company for the year 1914 and its condition as of December 31st, 1914, are shown on the following Profit and Loss Statement and Balance Sheet:

Income Account—Year 1914.

Gross Income	$2,575,025.56
Operating Expenses	1,929,987.18
Taxes	59,271.44
Net Revenue	$ 585,766.94
Interest on Indianapolis Gas Co. 1st 5's	244,537.50
Interest on Indianapolis Gas Co. Stock	120,000.00
Indianapolis Gas Co. Organization Payment and Federal Tax	652.06
Net Earnings	$ 220,577.38
First Mortgage Bond Interest	76,478.89

Condensed Balance Sheet—December 31, 1914.

Assets.

Property	$2,991,677.04
Indianapolis Gas Co. Construction	39,293.18
Indianapolis Gas Co. Treasury Bonds	142,000.00
Inventories—Raw Materials and Supplies	322,567.96
Cash, Notes and Accounts Receivable, Contingent, Prepaid and Suspended Accts.	419,102.85
	$3,914,641.03

Liabilities.

Capital Stock authorized		$2,000,000.00
Less Treas. Stock		750,000.00
		$1,250,000.00
1st Mtge. 5% Bonds	$2,025,000	
Less Treas. Bonds	495,000	1,530,000.00
Five Year Debentures		83,000.00
Notes Payable		300,000.00
Accounts Payable including Taxes, Interest, Leasehold Rental, Contingent, Accrued and Suspended Accounts		280,626.93
Indianapolis Gas Co. Inventory Leasehold Acct.		126,900.43
Surplus and Reserves		344,113.67
		$3,914,641.03

The best evidence of the substantial strength of the company is to be found in the earnings for the year 1914, in the face of the remarkably bad conditions of that year, both for business in general and also for this company to a peculiar degree. The net earnings of $220,577.38 are more than twice the interest charges on the bonds outstanding at the beginning of the year and also on those which we have just sold to you. The year was one of unusual difficulty for this company. The new by-product coke ovens of the leased plant were not ready for use until the middle of February and were not fully in service until March. Meanwhile the old coal gas plant on the leased property was becoming less and less efficient until finally gas produced from it actually cost more than the company was receiving for gas at the consumer's burner. It was necessary to operate the old plant and also to make a very large amount of water gas in order to supply the city during the period of construction of the by-product coke ovens. Thus for a period of about two months fully one-half of the gas sold in the city was sold at an actual loss. Furthermore the serious business depression set in soon after the operation under the merger began. As a condition to its approval of the merger, the Public Service Commission demanded of the company a reduction of five cents per thousand cubic feet in the price for gas. While this reduction may ultimately lead to a considerable expansion of con-

sumption, it requires some time to bring such a development about, and the business conditions of 1914 were unfavorable to any new development in the industrial uses of gas. The total consumption in 1914 was 2,055,849,500 cubic feet, while the consumption of the combined companies for the calendar year 1913 amounted to 1,928,931,700 cubic feet. Under normal conditions with the growth that has been going on in the city of Indianapolis and with the low price at which gas has been sold, it has been possible to count on an increase in gas sales amounting to over ten per cent per year, but the depression in 1914 made it impossible to maintain that average growth, even with the reduction in price. Therefore the reduction in the price of gas meant a falling off in income of $102,792 from what the company would have had under the sixty cent rate. This handicap can be overcome in time by the expansion of the business, but the past year was an unfavorable one for any such expansion. At the same time that the loss of income was suffered on account of the terms under which the merger was permitted, the wide-spread general depression, made much more acute by the European War, caused a serious falling off in the demand for coke for metallurgical purposes. The result of this was that the average price at which the company sold its coke during the year 1914 was 51.7 cents per ton less than the price which was obtained in the year 1913. Since the sales for the year amounted to 307,124 tons, this shrinkage in price meant a diminuation in revenue of $158,783. It is with gratification that I may report that there has been a marked improvement in the coke demand and in the average selling price since the beginning of the present year. All things considered, I feel safe in stating that the normal net earnings of the company under such average business conditions as prevailed between 1907 and 1914 should be at least $250,000 greater than they were in the year 1914. Having obtained reasonably safe earnings under these very unfavorable conditions, the position of the company may be taken as well assured.

The following statement shows the business of the company for a period of five years ending December 31st, last:

Comparative Earnings.

	1914	*1913	1912	1911	1910
Gross Income.	$2,575,025.56	$1,265,182.48	$815,422.96	$704,286.38	$525,583.74
Operating Expenses & Taxes	1,989,258.62	972,185.74	647,910.31	569,037.31	433,570.12
Leasehold Rental	365,189.56	90,412.50			
Net Earnings.	$ 220,577.38	$ 202,584.24	$167,512.65	$135,249.07	$ 92,013.62

While the exceptionally unfavorable conditions existing during the year 1914 caused a falling off in the net profits available for reserves and dividends, the circumstances above related indicate that the company may anticipate increasingly more favorable returns from its operation. Many large economies have been made possible as the result of the merger, and the company is now in possession of two plants of by-product coke ovens capable of producing sufficient gas to supply the city, while it has well equipped water gas plants which are capable of producing fully as much additional gas as can be obtained from the by-product coke ovens. The company has the entire gas business in a city of 275,000 population, and is well established in its natural markets for coke and by-products. The amalgamation of the working forces of the two companies has been completed, and it is believed that few corporations have more efficient organizations than this one has at the present time. The city is a rapidly growing one and has shown ability and disposition to respond to the low price at which gas is sold.

The bonds of which you have purchased $500,000 are secured by a mortgage to the Bankers Trust Company as Trustee, under which a maximum of $10,000,000 is authorized. These bonds were authenticated by the Trustee on account of eighty per cent of the cost of betterments actually made, and only under such conditions may bonds be taken down. They bear interest at the rate of five per cent, payable semi-annually in January and July at the office of the Bankers Trust Company in New York; and during the years 1915 and 1916 a sinking fund of one-quarter of one per cent is operative, increasing to one-half of one per cent thereafter. The sinking fund is to be used in

* From October 1, 1913 the Company operated the Indianapolis Gas Co.'s property as well as its own, and controlled the entire gas business of the city.

purchasing or calling bonds, and the bonds so purchased for the sinking fund shall be kept alive and draw interest for the sinking fund. The bonds mature July 1st, 1942, and may be called, after due notice, on any interest paying date at 108. Bonds are authenticated by the Trustee only when the net earnings for the preceding period of twelve months shall have been equal to twice the interest charges on the bonds outstanding and the new ones for which application is made. These bonds are now a first lien on all the property owned by the company, conservatively estimated to have a reproduction value about three times as great as the par value of the bonds outstanding and those now sold to you.

The franchise from the City of Indianapolis under which the company is operating runs until 1930, and may be surrendered in exchange for an indeterminate permit from the Public Service Commission. However, some special safe-guards of the franchise are deemed sufficient reason for continuing to operate under it instead of the indeterminate permit.

The legal status of the company and the validity of these bonds have been examined and approved by Messrs. Spooner & Cotton of New York, and Messrs. Smith, Remster, Hornbrook & Smith of Indianapolis.

Very truly yours,

J. D. Forrest,
Secretary and General Manager.
Citizens Gas Company of Indianapolis.

* * * * * *

(Plaintiffs' Deposition Exhibits 11 and 12 omitted pursuant to stipulation filed Nov. 22, 1939.)

1063 (Further Entry for November 16, 1939.)

For satisfactory reasons appearing to the Court the time for filing the record in this case with the Circuit Court of Appeals for the Seventh Circuit and for docketing the action there, pursuant to the appeal sued out, is extended to and including the 5th day of December, 1939.

1064 PLAINTIFFS' EXHIBIT 1.

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Consolidated Caption—1844 and 1950.) * *

STIPULATION.

It is hereby stipulated by all the parties to these two causes that for the purposes of the trial of these causes the following facts are true, that this Stipulation, when introduced in evidence, may be received and accepted as establishing the facts stipulated, and that each of the exhibits herein referred to may be received in evidence as if duly proved, without objection to the fact that the original has not been produced or offered, and without proof of its execution or authenticity.

The right is reserved to any party to this Stipulation at the trial of these causes:

1065 (a) To object to the admission in evidence of any part of this Stipulation or any exhibit hereto attached or referred to herein on any ground other than that such exhibit or such part of this Stipulation is not the best evidence or is otherwise not properly or sufficiently proved.

(b) To introduce such further evidence, not contradictory of facts herein stipulated, as such party may desire, this Stipulation not being intended to include all of the evidence in either of these causes.

(c) To introduce any evidence explaining or supplementing the facts herein agreed to which is competent, relevant, and material.

1. (a) Plaintiff (in cause 1844), The Chase National Bank of the City of New York, is a corporation established and existing under and by virtue of the banking laws of the United States, with its principal place of business located in the City of New York in the State of New York, and is engaged in and authorized to engage in a general banking

and trust business. It is a resident and citizen of the State of New York.

(b) In cause 1950: Plaintiff Massachusetts Mutual Life Insurance Company is a corporation duly created and existing under and by virtue of the laws of the Commonwealth of Massachusetts, is a resident and citizen of the Commonwealth of Massachusetts, and has its principal place of business in Springfield, Massachusetts. Plaintiff New England Mutual Life Insurance Company is a corporation duly created and existing under and by virtue of the laws of the Commonwealth of Massachusetts, is a resident and citizen of the Commonwealth of Massachusetts,
1066 and has its principal place of business in Boston, Massachusetts. Plaintiff The Savings Bank of Baltimore is a corporation duly created and existing under and by virtue of the laws of the State of Maryland, is a resident and citizen of the State of Maryland, and has its principal place of business in Baltimore, Maryland.

(c) Each of the defendants The Indianapolis Gas Company (hereinafter called "Indianapolis Gas") and Citizens Gas Company of Indianapolis (hereinafter called "Citizens Gas") is a corporation duly created and existing under the laws of the State of Indiana, with its principal place of business in the City of Indianapolis, State of Indiana, and is a citizen and resident of the State of Indiana.

(d) Defendant City of Indianapolis (hereinafter sometimes called the "City") is a municipal corporation existing under and by virtue of the laws of the State of Indiana and is located in the Southern United States Judicial District of Indiana, Indianapolis Division.

(e) Defendants Thomas D. Sheerin, A. Dallas Hitz, ..., Edward W. Harris, and Charles S. Rauh, are members of the Board of Trustees for Utilities of the City of Indianapolis, and each of them, both individually and as a member of said Board, is a resident of the City of Indianapolis and a resident and citizen of the State of Indiana.

(f) Defendants Henry L. Dithmer, Brodehurst Elsey, Roy Sahm, Donald J. Angus, Isaac E. Woodard, LeRoy J. Keach, and John E. Ohleyer are members of the Board of Directors for Utilities of the City of Indianapolis, and each of them, both individually and as a member of said Board, is a resident of the City of Indianapolis and a resident and citizens of the State of Indiana.

1067 (g) Defendant (in cause 1950) The Indiana National Bank of Indianapolis is a corporation estab-

lished and existing under and by virtue of the banking laws of the United States, with its principal place of business located in the City of Indianapolis, State of Indiana, and is a resident and citizen of the State of Indiana and of the Southern United States Judicial District of the State of Indiana, Indianapolis Division.

2. The amount in controversy in each of these causes exceeds, exclusive of interest and costs, the sum or value of $3,000.

3. (a) There are now issued and outstanding in the hands of the public "First Consolidated Mortgage Five Per Cent Gold Bonds" of Indianapolis Gas (hereinafter called the "Bonds"), secured by the Mortgage hereinafter described, in the aggregate principal amount of $6,881,000 (which includes the $120,000 principal amount and the $18,000 principal amount of Bonds held by Indianapolis Gas and the City, respectively, as hereinafter more fully set forth). Each of said Bonds and the coupons attached thereto are in the form set forth in the Mortgage, a copy of which, marked "Exhibit A", is attached to the Bill of Complaint in each of these causes. Of said Bonds in the aggregate principal amount of $6,881,000, Indianapolis Gas now holds $120,000 principal amount and the City now holds $18,000 principal amount.

(b) Said Bonds in the principal amount of $120,000 held by Indianapolis Gas were acquired as follows:

1068 By agreement between Citizens Gas and Indianapolis Gas $77,000 principal amount of Bonds, authenticated by the Trustee on June 22, 1914, were given to Indianapolis Gas on August 25, 1914, in payment for certain capital improvements made by Indianapolis Gas to said Indianapolis Gas property between March 1, 1913, and September 30, 1913, all upon petition to and order of the Public Service Commission of Indiana made and entered on August 25, 1914. Indianapolis Gas sold $22,000 principal amount of said Bonds but has retained the balance of $55,000.

Bonds in the principal amount of $50,000 were purchased by Indianapolis Gas on February 15, 1916, at a cost of $47,075.

Bonds in the principal amount of $15,000 were purchased by Indianapolis Gas on September 18, 1919, at a cost of $13,350.

Said Bonds have been held by Indianapolis Gas continuously since the respective dates of such acquisition and bear the following serial numbers: 17, 18, 23, 24, 204, 708,

709, 748, 911, 1046, 1047, 1494, 1783, 2014 to 2038, both inclusive, 2080 to 2089, both inclusive, 2508, 2852 to 2856, both inclusive, 3867, 3868, 3869, 3897, 3898, 4104, 4105, 4106, 4345, 4379, 4818, 5094 to 5148, both inclusive. Said Bonds are now pledged with The Indiana National Bank of Indianapolis as collateral to secure the payment of certain indebtedness of Indianapolis Gas to it in the sum of $28,700. All interest coupons on the above Bonds payable subsequently to the time said Bonds were so acquired by Indianapolis Gas and up to and including those payable April 1, 1935, were paid directly to Indianapolis Gas by Citizens Gas. No interest has been paid on said Bonds since April 1, 1936.

1069 (c) Said Bonds in the principal amount of $18,000 now held by the City of Indianapolis were acquired by Citizens Gas in March, 1932. Said Bonds were held continuously by Citizens Gas until their transfer to the City of Indianapolis on September 9, 1935, and said Bonds are now held by the City and bear serial numbers 6864 to 6881, both inclusive.

(d) The plaintiffs (in cause 1950) Massachusetts Mutual Life Insurance Company, New England Mutual Life Insurance Company, and The Savings Bank of Baltimore are the owners and holders of the following amounts, respectively, of Bonds, together with all interest coupons for October 1, 1936, and thereafter, attached, viz: $265,000, $150,000, and $163,000.

(e) Plaintiff, Massachusetts Mutual Life Insurance Company, purchased $100,000 principal amount of Bonds on March 13, 1925, at a price of $980 per $1,000 Bond, and purchased $165,000 principal amount of Bonds during the months of March and May, 1931, at prices ranging from $1,020 to $1,025 per $1,000 Bond. All of said Bonds have been held continuously by Massachusetts Mutual Life Insurance Company since the time of purchase, are now held by it, and have the following serial numbers: 548, 781, 782, 1001, 1007, 1038, 1151, 1171, 1385, 1401, 1402, 1451, 1618, 2043/7, 2150/2, 2317, 2409, 2486, 2620, 2621, 2726, 2727, 2780/3, 2827, 2955, 3012, 3013, 3019/29, 3076, 3113/15, 3130, 3131, 3473, 3474, 3861, 4039, 4097, 4276, 4301/3, 4399, 4521, 4552, 4553, 4557, 4607, 4691, 4692, 4725, 4726, 4788, 4830, 4899, 4900, 4906, 4907, 4935, 4976, 5153, 5172, 5188,
1070 5281, 5477/80, 5482/84, 5544, 5545, 5559, 5570/3, 5607, 5608, 6285/300, 6310/21, 6324/6, 6385/415, 6466/84, 6545/59, 6676/97, 6701/34, 6793/805. Plaintiff, New England Mutual Life Insurance Company, purchased $100,-

000 principal amount of Bonds on July 14, 1916, at a price of $970 per $1,000 Bond and purchased $50,000 principal amount of Bonds during August, 1931, at a price of $1,027.50 per $1,000 Bond. All of said Bonds have been continuously held by New England Mutual Life Insurance Company since the time of purchase, are now held by it, and have the following serial numbers: 1008/20, 1136/50, 1299/1314, 1317/22, 1323/36, 1445/50, 1551/4, 2487, 2875/8, 3205/17, 3782/9, 4381/3, 4439, 4485/90, 4873/6, 4917, 5178/87, 6255/79. Plaintiff, The Savings Bank of Baltimore, purchased $163,000 principal amount of Bonds during the years 1924, 1925, 1927 and 1928, at a total cost of $163,205.00. All of said Bonds have been continuously held by The Savings Bank of Baltimore since the time of purchase, are now held by it, and have the following serial numbers: 452, 470, 550/4, 561, 809, 810, 872/5, 961, 1061, 1082, 1059/9, 1111, 1121, 1154, 1163, 1386/7, 1394, 1400, 1411, 1413, 1465, 1490/2, 1614, 1767, 2008/9, 2112/3, 2490/1, 2529/32, 2535, 2557/76, 2768, 2869, 3036/8, 3074, 3096, 3105/9, 3259/60, 3317, 3337, 3467/8, 3726/7, 3870, 3880/2, 4154, 4159, 4185/9, 4444/5, 4527/8, 4573/4, 4609/10, 4646/8, 4734/8, 4997/5020, 5024/5, 5051, 5076, 5274, 5292, 5459, 5461/2, 5466, 5513/7, 5519/21, 5561, 5588, 5621 and 5826/7.

1071 (f) The last coupons attached to said Bonds which have been paid were those falling due on April 1, 1936. When said coupons due April 1, 1936, were paid coupons were presented for payment by and payment was made to more than 940 individual bondholders and 210 corporate bondholders. The bondholders so presenting said coupons resided in 30 different states, in the District of Columbia, and in 5 foreign countries. The coupons so presented by said 940 individual and 210 corporate bondholders did not include all of the coupons due April 1, 1936, on the outstanding 6,881 Bonds, and coupons due April 1, 1936, in the total sum of $775, have not yet been presented for payment.

4. (a) On or about the 1st day of October, 1902, Indianapolis Gas executed its certain Mortgage Deed of Trust (referred to herein as the "Mortgage") to The Trust Company of America, a banking corporation then existing and doing business in the City of New York, and one Ferdinand Winter, a citizen of the City of Indianapolis, Indiana, as trustees to secure the payment of the principal and interest of the Bonds, which were authorized to be issued in the total principal amount of $7,500,000. Said Mortgage was duly recorded.

(b) The Trust Company of America at the time of the execution of the Mortgage and at all times thereafter up to and including February 24, 1912, was duly authorized
1072 and empowered to hold in trust the property transferred and conveyed in trust to it and to execute the trusts thereby created and was until February 24, 1912, the duly acting and qualified corporate trustee under said Mortgage. On February 24, 1912, the Trust Company of America was duly merged, pursuant to the laws of New York with The Equitable Trust Company of New York. Said The Equitable Trust Company of New York was on February 24, 1912, and at all times thereafter up to and including May 31, 1930, duly authorized and empowered to hold in trust the property transferred and conveyed in trust to it and to execute the trusts created by said Mortgage and became and was until May 31, 1930, the duly acting and qualified corporate trustee under said Mortgage. On May 31, 1930, The Equitable Trust Company of New York was duly consolidated with The Chase National Bank of the City of New York (plaintiff in cause 1844), which was on May 31, 1930, and has been at all times thereafter duly authorized and empowered to hold in trust the property transferred and conveyed in trust to it and to execute the trusts created by said Mortgage and was on May 31, 1930, and has been at all times thereafter the duly qualified and acting corporate trustee under said Mortgage.

(c) Said Ferdinand Winter died in March, 1935, and since his death plaintiff (in cause 1844) The Chase National Bank of the City of New York (hereinafter referred to as the "Trustee") has been continually and is now the sole trustee under said Mortgage. A correct copy of said Mortgage, marked "Exhibit A", is attached to the Bill of Complaint in each of these causes.

1073 5. (a) On September 30, 1913, Indianapolis Gas executed and delivered to Citizens Gas a certain written instrument of lease (hereinafter called the "Lease"). A correct copy of said Lease, marked "Exhibit B", is attached to the Bill of Complaint in each of these causes. All the property leased by Indianapolis Gas to Citizens Gas by said Lease of September 30, 1913, (Exhibit B) was covered by and included in the Mortgage.

(b) On September 30, 1913, the property of Indianapolis Gas included a plant for making and distributing gas to consumers in the City of Indianapolis, including about 375 miles of mains located in the streets and alleys of the City, which mains were connected with the meters of more than 41,000 customers who were served thereby.

6. (a) Citizens Gas was organized in 1906 under the general laws of Indiana providing for the incorporation of manufacturing and mining companies. Certain instruments pertaining to the creation and operations of Citizens Gas are as follows:

(I) A certain franchise contract, and all amendments thereto, signed and entered into on August 25, 1905, and finally approved by the City on August 30, 1905, by and between the City and Alfred F. Potts, Frank D. Stalnaker, and Lorenz Schmidt. On May 24, 1906, said franchise contract was duly assigned by the grantees therein named to Citizens Gas. Amendments to said franchise con-
1074 tract were approved by the Common Council of the City of Indianapolis on May 22, 1912. Correct copies of said franchise contract, the assignment thereof, and all amendments thereto, are attached to the Bill of Complaint in cause 1844 as part of Exhibit C and in cause 1950 as Exhibit C.

(II) The Articles of Incorporation of Citizens Gas and all amendments thereto. Correct copies of said Articles of Incorporation, and all amendments thereto, are attached to the Bill of Complaint in cause 1844 as part of Exhibit C and in cause 1950 as Exhibit D.

(III) The By-Laws of Citizens Gas and all amendments thereto. A correct copy of said By-laws, and all amendments thereto, is attached to the Bill of Complaint in cause 1844 as part of Exhibit C.

(b) Citizens Gas operated under the terms of said franchise contract, and the amendments thereto, from the date of the assignments thereof until August 27, 1921, at which time, pursuant to the terms of an Indiana statute authorizing it to do so, it filed with the Public Service Commission of Indiana its declaration of surrender of said franchise and accepted an indeterminate permit, with the result that from August 27, 1921, until September 9, 1935, it operated as a public utility under an indeterminate permit. Said surrender and the acceptance of said indeterminate permit did not have the effect of modifying or rendering nugatory the terms of said franchise contract in so far as they created a public charitable trust and defined the terms and conditions thereof and the rights, duties, and liabilities of Citizens Gas as original trustee, of the City as successor trustee and of the inhabitants of Indianapolis as the beneficiaries of said trust.

1075 (c) On September 9, 1935, Citizens Gas transferred its gas producing and distributing plant and system to the City and since then the City has operated said gas

producing and distributing plant and system. Since September 9, 1935, Citizens Gas has not been engaged in any business of any nature whatsoever.

7. (a) On or about May 21, 1913, Indianapolis Gas, lessor, and Citizens Gas, lessee, jointly submitted a tentative form of lease to the Public Service Commission of the State of Indiana and jointly petitioned said Commission to adopt and approve the terms and conditions set forth in said form of lease and to authorize them to enter into and execute said lease. Subsequently, one Frank S. Fishback filed with said Public Service Commission an intervening petition in which he objected to the granting of said joint petition of said gas companies.

(b) A correct copy of the Finding and Order of said Commission with respect to said Lease of September 30, 1913, is attached to the Bill of Complaint in each of these causes, marked "Exhibit D" in cause 1844 and "Exhibit E" in cause 1950.

(c) The proposed lease was so changed and modified as to comply with the provisions and conditions required by the Finding and Order of the Public Service Commission (Exhibit D in cause 1844 and Exhibit E in cause 1950), and thereafter the proposed Lease as so changed and modified was submitted to a meeting of the stockholders of Indianapolis Gas and at said meeting, which was attended by the holders of more than three-fourths of the outstanding capital stock of said company, the execution of said modified Lease was unanimously authorized and approved.

(d) At a meeting of the Board of Directors of Citizens Gas, duly called and held on February 26, 1913, certain 1076 actions were taken by said Board, as shown by the minutes of said meeting, a correct copy of which is attached to this Stipulation marked "Exhibit 5". On the same date and following said meeting of the Board of Directors a meeting of the Board of Trustees of Citizens Gas was duly called and held. The action of said Board of Trustees is shown by the minutes of said meeting, a correct copy of which is attached to this Stipulation marked "Exhibit 6".

(e) At a meeting of the Board of Trustees of Citizens Gas, duly called and held, the execution of said modified Lease was unanimously authorized and approved by said Trustees. The respective Boards of Directors of Indianapolis Gas and Citizens Gas also duly authorized and approved the execution of said modified Lease. Correct copies of the minutes of the meetings of the Board of Trustees of Citizens Gas, of the Board of Directors of Citizens

Gas, and of the Board of Directors of Indianapolis Gas, approving the execution of said modified Lease, marked "Exhibit 7", "Exhibit 8" and "Exhibit 9", respectively, are attached to this Stipulation. Thereupon said Lease as thus changed and modified was executed by the respective officers of said companies and was submitted to the Public Service Commission, which Commission as part of said Finding and Order (Exhibit D in cause 1844 and Exhibit E in cause 1950) approved said Lease as thus changed and modified and ordered that it be spread upon the records of the Commission. Said Lease as so modified and executed is the same Lease hereinbefore referred to,
1077 a copy of which, marked "Exhibit B", is attached to the Bill of Complaint in each of these two causes. The parties to said Lease have complied with all the provisions and conditions set forth in said Finding and Order of the Public Service Commission which were conditions precedent to the approval of said Lease by the Commission.

(f) On or shortly after September 30, 1913, said Lease was recorded in the office of the Recorder of Marion County, Indiana, in Volume 78, page 257 and following, of the Miscellaneous Records of said office.

8. (a) Immediately after November 28, 1913, Citizens Gas took possession and control of the gas plant and system and all the other property of Indianapolis Gas described in said Lease, all of which property was and is covered by said Mortgage. Citizens Gas thereafter and until September 9, 1935, continued to operate the plant of Indianapolis Gas and to supply with gas the customers whose meters were connected with the mains of Indianapolis Gas.

9. (a) On November 28, 1913, the aforesaid Frank S. Fishback, who was a resident freeholder of the City of Indianapolis and a stockholder of Citizens Gas, commenced a suit in equity in the Circuit Court of Marion County, Indiana, against the Public Service Commission of Indiana, Citizens Gas and Indianapolis Gas, in which suit the City of Indianapolis was subsequently made a party defendant. Attached hereto is a correct copy of the first paragraph of complaint in said suit, omitting the parts stricken out on motion of some of the defendants, identified as "Exhibit 13" to this Stipulation. The plaintiff in said suit filed nine additional paragraphs of complaint, designated respectively as the amended second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth para-

graphs of complaint. Each of said amended second to tenth paragraphs of complaint, inclusive, was sub-
1078 stantially identical with said first paragraph of complaint (Exhibit 13), except that each of said amended second to tenth paragraphs of complaint, inclusive, contained in addition to the allegations of the first paragraph of complaint the respective additional allegations set forth in Exhibit 14 to this Stipulation. Said suit was transferred to the Superior Court of Marion County, Indiana, for determination. All the defendants therein were served with process and appeared generally in said suit.

(b) Three of the defendants in said cause, viz.: Public Service Commission of Indiana, Indianapolis Gas and Citizens Gas, filed a demurrer to each of the amended second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth paragraphs of the plaintiff's complaint. Said demurrer of the Public Service Commission of Indiana, Indianapolis Gas and Citizens Gas was sustained by the court.

(c) The City did not file a demurrer to any paragraph of the complaint or amended complaint in said cause, but filed an answer of general denial to all paragraphs thereof. Three of the defendants in said cause, viz., Public Service Commission of Indiana, Indianapolis Gas and Citizens Gas, filed a joint amended answer to the complaint (first paragraph). The plaintiff demurred to said amended answer on the ground that said amended answer did not state facts sufficient to constitute a defense to plaintiff's complaint, which demurrer was overruled.

(d) Before said action in equity brought by said Frank S. Fishback came on to be heard, the City, through its Board of Public Works, required extensions to be made in the lines and mains of Indianapolis Gas, as provided in said Finding and Order of the Public Service Commission (Exhibit D in case 1844 and Exhibit E in case 1950) and in subsection 6 of Section 27½ of said Lease.

1079 (e) On February 15, 1921, the Superior Court of Marion County, Indiana, entered final judgment in said action which judgment was in the words and figures following:

"Come now the parties and the plaintiff now dismisses this action as against the defendant, City of Indianapolis, upon which dismissal the court now renders judgment for costs against the plaintiff.

"And the demurrer of the plaintiff to the amended answer of the defendants, Public Service Commission of In-

diana, Citizens Gas Company and Indianapolis Gas Company, having been overruled, and the demurrer of said defendants to the amended second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth paragraphs of complaint having been sustained and the plaintiff failing and refusing to plead further either by way of reply to such amended answer, or amendment to his complaint, but elects to stand upon such complaint and abide the ruling of the court upon such demurrers, judgment is now rendered in favor of the defendants, Public Service Commission of Indiana, Citizens Gas Company, and Indianapolis Gas Company, upon the demurrer of plaintiff to their amended answer and upon their demurrer to the amended second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth paragraphs of complaint.

"It Is Therefore Ordered, Adjudged, and Decreed by the Court that the plaintiff take nothing by this action, and that the defendants recover of and from plaintiff their costs herein laid out and expended in the sum of $, to which judgment the plaintiff at the time objects and excepts."

(f) After the City had been dismissed as a party defendant in said cause it was not again made a party thereto.

(g) Neither the Trustee nor any predecessor trustee under the Mortgage, nor any bondholder of said Indianapolis Gas was a party plaintiff, party defendant or intervener in said cause of Frank S. Fishback *vs.* Public Service Commission, et al. The only persons or corporations who were parties to said cause are those hereinbefore named in this subdivision of this Stipulation.

(h) Thereafter the plaintiff in said cause, Frank S. Fishback, prayed an appeal to the Supreme Court of Indiana. Said appeal was dismissed by said Supreme
1080 Court on March 8, 1923, and a rehearing was denied the appellant therein on May 31, 1923. The opinion of the Supreme Court in dismissing said appeal is reported in *Fishback* v. *Public Service Commission, et al.*, 193 Ind. 282, 138 N. E. 346, and the opinion of the Supreme Court in denying a rehearing is reported in *Fishback* v. *Public Service Commission, et al.*, 193 Ind. 282, 139 N. E. 449.

(i) The final judgment of the Superior Court of Marion County, Indiana, in said case of Frank S. Fishback *vs.* Public Service Commission, et al., has never been modified, reversed, vacated or set aside, but said judgment is now in full force and effect.

(j) The pleadings referred to and described in this subdivision of this Stipulation in said cause of Frank S. Fishback *vs.* Public Service Commission of Indiana, et al., were the only pleadings filed in said cause.

10. (a) At the date of the execution and delivery of the Lease $4,833,000 total face amount of Bonds were outstanding—which Bonds bore serial numbers One (1) to Four Thousand Eight Hundred and Thirty-three (4,833) both inclusive. From time to time between June 22, 1914, and February 11, 1932, upon the request of Indianapolis Gas, the Mortgage trustee authenticated and delivered to Indianapolis Gas additional Bonds in the total principal amount of $2,048,000 which Bonds bore serial numbers Four Thousand Eight Hundred Thirty-four (4,834) to Six Thousand Eight Hundred Eighty-one (6,881) both inclusive. Pursuant to the provisions of the Lease, Indianapolis Gas in turn delivered $1,971,000 principal amount of said additional Bonds to Citizens Gas for the purpose of reimbursing Citizens Gas for ninety per cent (90%) of its capital expenditures on account of extensions and betterments to the plant and system of Indianapolis Gas made and paid for by Citizens Gas. As a result of
1081 such expenditures for extensions and betterments and the reimbursement by issuance of Bonds as just stated, Citizens Gas has expended for additions and betterments to the plant of Indianapolis Gas approximately $200,000 for which it has received no reimburseme[illegible] All additions and betterments to the plant of Indianap[illegible] Gas for which Bonds were issued were made with its [illegible]nt, and under the terms of said Lease all said addit[illegible] and betterments became and are the property of Indi[illegible]polis Gas. All of said Bonds in the principal amount of $1,971,000 were sold by Citizens Gas, except the Bonds in the principal amount of $18,000 referred to in subdivision 3 (c) of this Stipulation, and the proceeds were retained by it.

11. (a) Citizens Gas operated the plant and property of Indianapolis Gas under said Lease continuously from and after November 28, 1913, until September 9, 1935. During the period from October 2, 1913, until September 9, 1935, Citizens Gas from time to time duly paid the interest on the outstanding Bonds by making payment thereof to the holders of Bonds, either at the office of the Mortgage trustee or directly to the holders of Bonds themselves. During said period Citizens Gas paid all the rentals payable in cash under the terms of the Lease, and also

paid all the taxes required to be paid by the lessee under the terms of the Lease.

(b) The total payments made by Citizens Gas as interest on Bonds of Indianapolis Gas, dividends on stock of Indianapolis Gas, taxes due from Indianapolis Gas and corporate organization maintenance fees to Indianapolis Gas, during the period from October 1, 1913, to September 9, 1935, are shown by Exhibit 20 attached to this Stipulation.

(c) During the period from its organization in 1906 to June 30, 1935, Citizens Gas paid dividends to the holders of its common stock at the rate of 10% per annum. On September 9, 1935, when Citizens Gas conveyed, transferred and assigned its property to the City, it turned over $410,929.64 in cash or current funds to the City.

12. (a) On March 20, 1929, the City of Indianapolis, through its Board of Public Works, adopted a resolution, a correct copy of which, marked "Exhibit 22", is attached to this Stipulation.

(b) On April 3, 1929, the Board of Directors of Citizens Gas, after receiving the resolution of the City above referred to (Exhibit 22), unanimously adopted two resolutions, true copies of which, marked "Exhibit 23", and "Exhibit 24", respectively, are attached to this Stipulation. On April 3, 1929, the Board of Trustees of Citizens Gas unanimously adopted a resolution approving each of said resolutions of the Board of Directors (Exhibits 23 and 24).

13. (a) On April 30, 1929, one Newton Todd, a stockholder of Citizens Gas, commenced an action in the United States District Court for the Southern District of Indiana, Indianapolis Division, being cause 1191 in Equity on the dockets of said Court, seeking to enjoin Citizens Gas from transferring its property to the City. A correct copy of the bill of complaint in said cause, marked "Exhibit 30", is attached to this Stipulation. All the defendants in said cause were duly served with process, appeared generally, and filed their answers to plaintiff's bill of complaint.

(b) A correct copy of the separate and several answer to plaintiff's bill of complaint in said cause of the following named defendants, viz: City of Indianapolis; L. Ert 1083 Slack, as Mayor of said City; William A. Boyce, Jr., as City Clerk of said City; and Theodore H. Dammeyer, John C. McCloskey and Emsley W. Johnson, as and constituting the Board of Public Works of said City; marked "Exhibit 31", is attached to this Stipulation.

(c) The following defendants in said cause, viz: Citizens Gas; Gustav A. Schnull, Robert Lieber, Lucius B. Swift, Thomas L. Sullivan, and Henry Kahn, individually, and as voting trustees of the common stock of Citizens Gas; John R. Welch, Gustav A. Efroymson, Henry H. Hornbrook, William H. Insley, Clarence L. Kirk, James H. Rooker, Franklin Vonnegut, James I. Dissette, and Edgar H. Evans, filed their separate and several answer to plaintiff's bill of complaint, which answer was substantially identical with the answer of the City of Indianapolis, et al. (Exhibit 31).

(d) Plaintiff in said equity cause No. 1191 filed an amended motion to strike out portions of said answer of the City, et al. (Exhibit 31). A correct copy of said amended motion, marked "Exhibit 32", is attached to this Stipulation. Said plaintiff also filed an amended motion to strike out portions of said answer of Citizens Gas, et al., which amended motion was substantially identical with the amended motion to strike out portions of the answer of the City, et al. (Exhibit 32). Said amended motions were overruled by the District Court of the United States for the Southern District of Indiana on February 26, 1930.

(e) During the pendency of said cause certain of the defendants named in plaintiff's bill of complaint died and certain of the other defendants ceased to occupy their respective official positions as officers of the City. On the 5th day of May, 1930, the following substitution of parties was made:

1084 Henry O. Goett, as City Clerk of the City of Indianapolis, in lieu of William A. Boyce, Jr.; E. Kirk McKinney, Louis G. Brandt and Charles O. Britton, as and constituting the Board of Public Works of said City, in lieu of Theodore H. Dammeyer, John C. McCloskey and Emsley W. Johnson; Frank C. Dailey, and Otto Lieber, individually and as voting trustees of Citizens Gas, in lieu of Lucius B. Swift and Robert Lieber; and Reginald H. Sullivan, as Mayor of the City of Indianapolis, in lieu of L. Ert Slack. Said substituted parties adopted as and for their respective answers in said cause the answers theretofore filed by the persons for whom they were substituted as defendants.

(f) On April 19, 1930, plaintiff filed a supplemental and anciliary bill of complaint in said cause making Allen G. Williams, William V. Rooker, Seth S. Ward and John F. Robbins parties defendant therein. No answer was filed by said defendants but on April 30, 1930, a stipulation was entered into by all the parties to said cause, including

said defendants, by the terms of which stipulation it was agreed in open court that a certain action then pending in the Superior Court of Marion County, Indiana, (which action is more fully described in subdivision 14 of this Stipulation) would not be prosecuted or any further steps taken therein until the final determination of said equity cause No. 1191. Said Allen G. Williams was the same Allen G. Williams who was plaintiff in said action then pending in the Superior Court of Marion County and the other defendants to said supplemental and ancillary bill of complaint were attorneys for said Allen G. Williams in said action.

(g) The pleadings hereinbefore identified are all of the pleadings which were filed in said equity cause 1191. Neither Indianapolis Gas, the Trustee, nor any predecessor trustee under said Mortgage, nor any bondholder of
1085 Indianapolis Gas was a party plaintiff, party defendant or intervenor in said equity cause No. 1191. The only persons or corporations who were parties to said cause are those hereinbefore referred to in this Stipulation.

(h) Said cause was tried to the court and evidence and arguments of counsel were heard. Thereafter, on May 29, 1930, the following decree was entered in said cause:

"It is Ordered, Adjudged and Decreed that the plaintiff's bill of complaint be and it is hereby dismissed for want of equity, to which ruling of the Court the plaintiff at the time excepts."

(i) Said Newton Todd took an appeal from said decree of the District Court to the Circuit Court of Appeals for the Seventh Circuit. Said decree of the District Court was affirmed by the Circuit Court of Appeals for the Seventh Circuit, its decision in said cause being reported in *Newton Todd* v. *Citizens Gas Company, et al.*, 46 F. (2d) 855.

(j) Said Newton Todd filed a petition in the United States Supreme Court for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit to review its affirmance of said decree of the District Court, which petition was denied by the United States Supreme Court on May 18, 1931, its decision being reported in *Newton Todd* v. *Citizens Gas Company, et al.*, 283 U. S. 852, 75 L. Ed. 1459.

(k) Said final decree of the United States District Court for the Southern District of Indiana, Indianapolis Division, in said cause No. 1191 has never been modified, reversed, vacated or set aside, but said decree is now in full force and effect.

14. (a) On the 12th day of March, 1930, Allen G.

Williams and Harold L. Bartholomew, as residents and taxpayers of the City of Indianapolis, suing on behalf of themselves and all other residents and taxpayers of said
1086 City similarly situated, commenced an action in the Superior Court of Marion County, Indiana. A correct copy of the complaint in said action, marked "Exhibit 35", is attached to this Stipulation. Subsequently said Harold L. Bartholomew withdrew as a plaintiff in said cause. Thereafter, on May 21, 1931, said Allen G. Williams filed a supplemental complaint in said cause, a copy of which, marked "Exhibit 36", is attached to this Stipulation. All of the defendants in said cause were served with process and appeared in said cause.

(b) On June 2, 1931, the following named defendants in said cause, Citizens Gas, Henry Kahn, Otto R Lieber, Gustav A. Schnull, Thomas L. Sullivan, Frank C. Dailey, James I. Dissette, Gustav A. Efroymson, Edgar H. Evans, James H. Hooker, Henry H. Hornbrook, William H. Insley, Clarence L. Kirk, Franklin Vonnegut, John R. Welsh, Frederick G. Rastenburg, Paul E. Crosier; City of Indianapolis in the State of Indiana, a Municipal Corporation; Reginald H. Sullivan, as Mayor of said City of Indianapolis; Henry O. Goett, as City Clerk of said City of Indianapolis, E. Kirk McKinney, Louis C. Brandt, Charles O. Britton, as the Board of Public Works of said City of Indianapolis; Sterling R. Holt, Thomas C. Howe, George J. Marott, A. Dallas Hitz, William J. Mooney, as the Board of Trustees for Utilities of said City of Indianapolis; Edward H. Kahn, Henry L. Dithmer, Eli Lilly, Brodehurst Elsey, Almus G. Ruddell and Guy A. Wainwright, as the Board of Directors for Utilities of said City of Indianapolis, filed their separate motion to strike out portions of the complaint in said cause. A correct copy of said motion, marked "Exhibit 37", is attached to this Stipulation.

(c) On November 5, 1931, the Superior Court of Marion County, Indiana, sustained the specification of said motion (Exhibit 37) which sought to strike out the following portion of plaintiffs' complaint:

1087 "That thereupon it was designed by said confederates that a public service commission should be created in and by the State of Indiana with plenary powers to circumvent the Constitutional restrictions of the state and by those means destroy said Public Charitable Trust and substitute in its place and stead a plan and method whereby said Citizens Gas Company should be required to bear the burden of replacing said Indian-

apolis Gas Company as a going concern, invested with modern and efficient methods, all to the end that upon the termination of an alliance between said Citizens Gas Company and said Indianapolis Gas Company, the latter company would be in exclusive control of the territory of Indianapolis for all purposes of gas production and sale, and all without cost and expense to said conspirators, but wholly at the cost and expense of the inhabitants and taxpayers of said City of Indianapolis."

At the same time said court overruled all other specifications of said motion.

(d) After said motion to strike had been ruled upon by the court and on November 5, 1931, all the defendants in said cause, except Indianapolis Gas, Trust Company of America and Ferdinand Winter, as trustees under the Mortgage, and the individuals who were members of the Public Service Commission of Indiana, filed a demurrer together with their memorandum stating the grounds upon which they claimed said demurrer should be sustained. A correct copy of said demurrer, together with said memorandum, marked "Exhibit 38," is attached to this Stipulation.

(e) After said motion to strike had been ruled upon by the court and on November 5, 1931, the defendants, Indianapolis Gas, and Ferdinand Winter and Trust Company of America, as trustees under the Mortgage, filed a demurrer, together with their memorandum stating the grounds upon which they claimed said demurrer should be sustained. A correct copy of said demurrer, together with said memorandum, marked "Exhibit 39," is attached to this Stipulation.

(f) After said motion to strike had been ruled upon by the court and on November 5, 1931, the defendants, John W. McCardle, Francis T. Singleton, Howell Ellis, Harry K. Cuthbertson and Jere West, as members of the Public Service Commission of Indiana, filed a demurrer to plaintiffs' complaint, together with their memorandum stating the grounds upon which they claimed said demurrer should be sustained. A correct copy of said demurrer, together with said memorandum, marked "Exhibit 40," is attached to this Stipulation.

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(g) The only persons or corporations who were parties to said cause are those named in the complaint therein (Exhibit 35). The pleadings hereinbefore identified are all of the pleadings in said cause.

(h) The Superior Court of Marion County, Indiana,

sustained each of said demurrers to the plaintiffs' complaint, and plaintiffs refused to plead further. On December 10, 1931, the following final judgment was entered in said cause:

"It is, therefore, considered, adjudged, decreed and ordered by the Court that the plaintiff take nothing by his complaint herein and that the defendants recover their costs herein laid out and expended, taxed at ..... dollars, to all of which the plaintiff at the time excepts."

(i) Thereafter said Allen G. Williams, as a plaintiff in said cause, took an appeal from said judgment to the Supreme Court of Indiana. On December 22, 1933, said judgment was affirmed by the Supreme Court of Indiana, its decision in that case being reported in *Williams v. Citizens Gas Company, et al.*, 206 Ind. 448, 188 N. E. 212. Thereafter said Allen G. Williams filed a petition for a rehearing of said cause in the Supreme Court of Indiana, which rehearing was denied by the Supreme Court of Indiana on the 17th day of April, 1934.

(j) Said final judgment of the Superior Court of Marion County, Indiana, has never been modified, 1089 reversed or set aside, but is now in full force and effect.

15. (a) In pursuance of a resolution adopted on May 7, 1935, by the Board of Directors for Utilities of the City of Indianapolis, a public offering for the sale of $8,000,000 aggregate principal amount of City of Indianapolis Gas Plant Revenue 4½% Bonds (hereinafter called "Revenue Bonds") was made on May 28, 1935. A correct copy of said resolution adopted May 7, 1935, marked "Exhibit 47," is attached to this Stipulation. A correct copy of the notice published by the City Controller of the City of Indianapolis pursuant to said resolution (Exhibit 47), marked "Exhibit A," is attached to the Answer and Counterclaim of defendants, the City of Indianapolis and its Trustees and Directors for Utilities, in each of these causes. Resolutions similar to that of May 7, 1935 (Exhibit 47), were adopted by the Board of Directors for Utilities of the City of Indianapolis on April 5, April 10 and April 12, 1935, and advertisements were published in pursuance of said resolutions on April 8, April 12 and April 18, 1935, respectively. Said resolutions were substantially identical with Exhibit 47. Said advertisements were substantially identical with Exhibit A to the Answer and Counterclaim of defendants, the City of Indianapolis and its Trustees and Directors for

Utilities in each of these causes. No bid resulting from said advertisements of April 8, April 12, and April 18th, 1935, was accepted by the City.

(b) The joint bid of Halsey, Stuart & Company, of Chicago, Illinois, and Otis & Company, of Cleveland, Ohio, for said Revenue Bonds was accepted by the Department of Utilities and the City on May 29, 1935. The proceeds of the sale of said Revenue Bonds were received June 27, 1935.

(c) The purchasers of said Revenue Bonds issued an advertising circular, a correct copy of which, marked "Exhibit B," is attached to the Answer and Counter-
1090 claim of defendants, the City of Indianapolis and its Trustees and Directors for Utilities, in each of these causes.

16. (a) The City caused the sum of $2,500,000 to be paid on or about July 1, 1935 for the retirement of all the Citizens Gas common stock, in full satisfaction of the common stockholders' interest in the property and assets of said company. Said $2,500,000 included $2,000,000 as the par value of said common stock and $500,000 as dividends on said common stock at the rate of 10% per annum from January 1, 1933 to June 30, 1935. The City also caused the sum of $1,050,000 to be paid on or about September 1, 1935, for the redemption of all the Citizens Gas preferred stock, in full satisfaction of the preferred stockholders' interest in the property and assets of said company. Said $1,050,000 included $1,000,000 as the par value of said preferred stock and $50,000 as the premium of 5% on the redemption thereof required by the terms of said preferred stock. Citizens Gas paid all the dividends on said preferred stock up to the time of said redemption. All of said common stock was retired and all of said preferred stock was redeemed.

(b) On August 9, 1935, the Board of Directors for Utilities of the City of Indianapolis adopted a resolution with respect to the payment of the First and Refunding Mortgage Bonds of Citizens Gas Company of Indianapolis dated July 1, 1912, a copy of which resolution is attached hereto marked "Exhibit 48". In pursuance of said resolution (Exhibit 48) the City on August 10, 1935, published a notice, a copy of which, marked "Exhibit 49" is attached to this Stipulation, and in September, 1935 published a notice, a copy of which marked "Exhibit 50" is attached to this Stipulation. The principal amount of said bonds outstanding on August 12, 1935, was $2,745,600. All of said bonds have been paid and surrendered

pursuant to said offer, except bonds aggregating the principal amount of $32,000.

1091 17. (a) On September 9, 1935, Citizens Gas executed and transmitted to the City an Instrument of Transfer and Assignment of Personal Property, a correct copy of which is attached to the Bill of Complaint in each of these causes, marked "Exhibit E", in cause 1844 and "Exhibit F", in cause 1950.

(b) On September 9, 1935, Citizens Gas executed and transmitted to the City an Assignment of Lease assigning the aforesaid Lease, a correct copy of which Assignment of Lease is attached to the Bill of Complaint in each of these causes, marked "Exhibit F" in cause 1844 and "Exhibit G" in cause 1950.

(c) On September 9, 1935, Citizens Gas executed and transmitted to the City a Deed of Conveyance of Real Estate, a correct copy of which, marked "Exhibit 55", is attached to this Stipulation.

(d) On September 9, 1935, Citizens Gas executed and transmitted to the City a certain Assignment of Lease assigning a lease to part of the Majestic Building in the City of Indianapolis, a correct copy of which Assignment of Lease, marked "Exhibit 56", is attached to this Stipulation.

(e) The descriptions contained in the above instruments of transfer described in this subdivision 17 of this Stipulation embraced all of the property of every kind or description owned by Citizens Gas immediately prior to the delivery of said instruments on September 9, 1935.

(f) Prior to the execution and transmittal of said instruments of transfer and conveyance described in this subdivision 17 of this Stipulation, neither the City nor its Department of Utilities gave any notice to the Trustee or any formal notice to any holder of Bonds of Indianapolis Gas that said transfer and conveyance was to be made.

1092 18. Attached to this Stipulation are true and correct copies of certain correspondence (which correspondence was in each instance received by the addressee on or soon after the date thereof), as follows:

(I) Letter dated July 23, 1935, from counsel for the Department of Utilities to Indianapolis Gas, identified as "Exhibit 58" to this Stipulation.

(II) Letter from counsel for the Department of Utilities to Arthur V. Brown and Louis B. Ewbank dated August 31, 1935, identified as "Exhibit 59" to this Stipulation. At the date of said letter said Arthur V. Brown

was the Vice President and Treasurer and said Louis B. Ewbank was the attorney for Indianapolis Gas.

(III) Letter dated September 9, 1935, from counsel for the Department of Utilities to Indianapolis Gas, identified as "Exhibit 60" to this Stipulation.

(IV) Letter dated September 24, 1935, from Department of Utilities to Indianapolis Gas, identified as "Exhibit 61" to this Stipulation.

(V) Another letter dated September 24, 1935, from Department of Utilities to Indianapolis Gas, identified as "Exhibit 62" to this Stipulation.

(VI) Letter dated September 27, 1935, from the Department of Utilities to Indianapolis Gas identified as "Exhibit 63" to this Stipulation.

(VII) Letter dated September 30, 1935, from the Department of Utilities to Indianapolis Gas, identified
1093 as "Exhibit 64" to this Stipulation.

(VIII) Letter dated September 30, 1935, from Indianapolis Gas to Department of Utilities, identified as "Exhibit 65" to this Stipulation.

(IX) Letter dated September 30, 1935, from Indianapolis Gas to Thompson, Rabb & Stevenson, identified as "Exhibit 66" to this Stipulation. Thompson, Rabb & Stevenson were, during the entire year 1935, attorneys for the Department of Utilities of the City of Indianapolis.

(X) Another letter dated September 30, 1935, from the Department of Utilities to Indianapolis Gas, identified as "Exhibit 67" to this Stipulation.

(XI) Letter dated October 10, 1935, from counsel for the Department of Utilities to Indianapolis Gas, identified as "Exhibit 68" to this Stipulation.

(XII) Letter dated January 6, 1936, from the Department of Utilities to Indianapolis Gas, identified as "Exhibit 69" to this Stipulation. A correct copy of the resolution of the Board of Directors for Utilities of the City of Indianapolis, adopted by said Board on January 3, 1936, referred to in the above letter, is marked "Exhibit 70" and attached to this Stipulation.

(XIII) Letter dated February 8, 1936, from In-
1094 dianapolis Gas to the Department of Illinois, identified as "Exhibit 75" to this Stipulation.

(XIV) Written proposal dated February 10, 1936, from Department of Utilities to Indianapolis Gas, identified as "Exhibit 76" to this Stipulation.

(XV) Letter dated February 10, 1936, from W. H. Thompson, one of the attorneys for the Department of

Utilities, to Louis B. Ewbank, attorney for Indianapolis Gas, identified as "Exhibit 77" to this Stipulation.

(XVI) Letter dated March 20, 1936, from the Department of Utilities to Indianapolis Gas, identified as "Exhibit 78" to this Stipulation.

(XVII) Letter dated April 6, 1936, from Indianapolis Gas to Thompson, Rabb & Stevenson, attorneys for the Department of Utilities, identified as "Exhibit 79" to this Stipulation.

(XVIII) Letter dated April 8, 1936, from the Department of Utilities to Indianapolis Gas, identified as "Exhibit 80" to this Stipulation.

(XIX) Letter dated May 12, 1936, from Indianapolis Gas to Thompson, Rabb & Stevenson, attorneys for the Department of Utilities, identified as "Exhibit 81" to this Stipulation.

(XX) Letter dated May 23, 1936, from Thompson, Rabb & Stevenson, attorneys for the Department of
1095 Utilities, to Indianapolis Gas, identified as "Exhibit 82" to this Stipulation.

(XXI) Letter dated May 25, 1936, from Indianapolis Gas to Thompson, Rabb & Stevenson, attorneys for the Department of Utilities, identified as "Exhibit 83" to this Stipulation.

(XXII) Letter dated June 3, 1936, from Indianapolis Gas to Thompson, Rabb & Stevenson, attorneys for the Department of Utilities, identified as "Exhibit 84" to this Stipulation.

(XXIII) Letter dated September 30, 1936, from the Department of Utilities to Indianapolis Gas, identified as "Exhibit 85" to this Stipulation.

19. (a) On March 2, 1936, the City and Indianpolis Gas entered into a written agreement, a correct copy of which is attached to the Bill of Complaint in each of these causes, marked "Exhibit H" in cause 1844 and "Exhibit I" in cause 1950. Said agreement has never been modified or supplemented in any respect.

(b) No settlement agreement as provided in said agreement of March 2, 1936 has ever been agreed upon between the City and Indianapolis Gas. Since said agreement was signed neither of said defendants has taken any steps to obtain a judicial determination of the validity of the Lease, except that (1) on October 1, 1936, the City filed a counterclaim in cause 1844; (2) on October 28, 1938, the City filed a counterclaim in cause 1950; and (3) on December 24, 1937, the City commenced an action to
1096 obtain a judicial determination of the validity of

the Lease, which action is now pending as cause No. 13873 in the Circuit Court of Boone County, Indiana.

(c) Indianapolis Gas did not pay any of the interest coupons due on October 1, 1936, April 1, 1937, October 1, 1397, April 1, 1938, and October 1, 1938, on any of the Bonds, and all of said interest coupons remain unpaid.

20. (a) The City, pursuant to the terms of the Agreement of March 2, 1936, (Exhibit H in cause 1844 and Exhibit I in 1950), has to December 31, 1938, deposited with defendant, The Indiana National Bank of Indianapolis, as escrow agent, the sum of $1,217,875, which is now held by said bank. Said bank has never at any time paid out any of the sums so deposited with it. All the sums so deposited with said bank have been derived from and are part of the proceeds of the City's operation of the property transferred, conveyed and assigned to it by Citizens Gas and the property of Indianapolis Gas covered by the Lease.

21. (a) On September 9, 1935, the Board of Directors of Citizens Gas adopted a resolution, a correct copy of which, marked "Exhibit 86" is attached to this Stipulation. On the same day the Board of Trustees of Citizens Gas, meeting separately, adopted a resolution, a correct copy of which, marked "Exhibit 87", is attached to this Stipulation.

(b) Pursuant to the requirement contained in each of said resolutions (Exhibits 86 and 87), the City, acting by its Board of Directors for Utilities, on September 9, 1935, executed and delivered to Citiezns Gas an Indemnity Agreement, a correct copy of which, marked "Ex-
1097 hibit J", is attached to the Second Amendment and Supplement to Plaintiff's Bill of Complaint in cause 1844 and to the Amendment and Supplement to Plaintiffs' Bill of Complaint in cause 1950.

22. (a) Prior to the commencement of these actions, neither the Trustee nor any of the bondholders who are plaintiffs in cause 1950 made any request of or demand upon Indianapolis Gas that it commence or prosecute an action in a court of competent jurisdiction to obtain a determination or declaration of the validity of said Lease.

23. The City of Indianapolis has been a first-class city within the meaning of the Indiana statutes continuously since January 1, 1910. No other city of Indiana has been a first-class city during any of said period. The City of Indianapolis has had a population exceeding 300,000 continuously since January 1, 1920, as shown by the United States census made in 1920 and 1930, and no other city

of Indiana has had a population of 300,000 during any of said period.

24. It is the contention of the City and the individual members of the Board of Trustees and Board of Directors for Utilities that certain actions taken by the City were taken in its capacity as trustee of a public charitable trust and not in its capacity as a municipal corporation. Nothing in this Stipulation shall constitute an agreement as to the capacity in which the City acted in any particular instance.

25. In the preparation of this Stipulation Exhibit numbers ranging from 1 to 87 have been employed, but no exhibits are identified in this Stipulation bearing any of the following numbers: 1 to 4 inclusive, 10, 11, 12, 15 to 19 inclusive, 21, 25 to 29 inclsuive, 33, 34, 41 to 46 inclusive, 51 to 54 inclusive, 57, 71 to 74 inclusive.

February 15th, 1939.

Wm. L. Taylor,
Howard F. Burns,
Solicitors for Plaintiffs (in cause 1844), The Chase National Bank of the City of New York, Trustee.

1098

Howard F. Burns,
Harvey J. Elam,
Solicitors for Plaintiffs in Cause 1950.
Edward H. Knight, by W. H. T.,
Corporation Counsel of Indianapolis.
Michael B. Redding, by W. H. T.,
City Attorney of Indianapolis.
William H. Thompson,
Albert L. Rabb,
Solicitors for the City of Indianapolis and the individual defendants who are members of the Board of Trustees or of the Board of Directors for Utilities of the City of Indianapolis.
Wm. R. Higgins,
Louis B. Ewbank,
Solicitors for defendant, The Indianapolis Gas Company.
Paul Y. Davis,
William G. Sparks,
Solicitors for defendant, Citizens Gas Company of Indianapolis.
Louis B. Ewbank,
Solicitor for defendant (in cause 1950), The Indiana National Bank of Indianapolis.

1099 PLAINTIFFS' STIPULATION EXHIBIT 5.

Minutes of Meeting of Board of Directors of Citizens Gas Company, February 26, ~~1915~~. 1913

"An Adjourned Meeting of the Board of Directors of the Citizens Gas Company of Indianapolis Was Held at the University Club at 12:15 P. M. February 26, 1913.

"The following members were present within ten minutes of the beginning of the meeting:

"Messrs. Bachman, Forrest, Hooker, Lieber, Schmidt, Vonnegut, Welch. Messrs. Potts and Mooney were absent.

"On motion of Mr. Lieber, seconded by Mr. Hooker, it was ordered that First and Refunding Mortgage bonds be sold to a syndicate headed by Gavin L. Payne & Company, at a price of 95 and interest, on the following dates and in the following quantities:

May 1	$ 50,000
June 1	50,000
July 1	100,000
August 1	100,000
September 1	50,000
October 1	100,000.

"Mr. H. H. Hornbrook of counsel was invited into the meeting and read a certain proposed contract with Volney T. Malott and Associates, providing as follows:

" 'This Agreement made and entered into this 27th day of February 1913, by and between Volney T. Malott for himself and Associates, party of the first part, and The Citizens Gas Company of Indianapolis, Indiana, party of the second part, Witnesseth:

" 'Whereas, the party of the first part, on behalf of himself and associates, has been in negotiations for more than one-half of the capital stock of the Indianapolis Gas Company and expects to acquire sufficient of such stock to insure, so far as the acts of the Indianapolis Gas Company and of its stockholders are concerned, the power to execute a valid lease of that company's operating plant and system in the City of Indianapolis, and whereas the consummation of such purchase will be materially affected in its details if said Malott and associates shall before completing it know to a certainty that a lease, such as hereinafter mentioned, will be made by said Indianapolis

Gas Company to said Citizens Gas Company, subject only to the approval of the Public Utilities Commission of the State of Indiana.

1100 "'And Whereas, the Citizens Gas Company is desirous, upon proper terms and conditions, of securing a lease of such part of the plant and system of the Indianapolis Gas Company as may be used by it and useful to it in manufacturing and distributing gas.

"'Now Therefore It Is Agreed: That in the event the party of the first part and his associates shall complete the purchase of sufficient of the stock of said Indianapolis Gas Company of the State of Indiana, to execute a valid lease to the second party hereto of the plant and system of said Indianapolis Gas Company, in the form of the contract of lease hereto attached and marked 'Exhibit A', that the second party hereto will promptly upon the completion of the purchase of such stock by the first party enter into the contract of lease, a copy of which is attached hereto, and upon the same being duly executed by said Indianapolis Gas Company, the same shall be a binding and effective contract of lease between said companies, subject only to the approval of the Public Utilities Commission of the State of Indiana. And the first party agrees that upon securing control of such stock, it will cause said lease to be executed by said Indianapolis Gas Company, so far as it legally may do so, provided if said lease is not fully closed by October 1, 1913, then neither party shall be further bound by any obligation hereof.

"'The parties mutually agree that they will use all reasonable effort in securing the approval of said lease by said Public Utilities Commission, such lease being, as it appears to them, in all respects a fair lease and contract.

"'In event any extensions or betterments are made after this date by the Indianapolis Gas Company to its plant and system (other than those embraced in the contract of the Semet Solvay Company) for which said Gas Company is entitled to draw down bonds under its existing mortgage, it shall be permitted to do so, and in addition thereto it shall be permitted as between it and the second party to draw down bonds on account of the work being done under the Semet Solvay Company contract in such amount as when added to the bonds drawn down on account of extensions and betterments not covered by said contract, will produce if sold at 85 per cent of par the

total cost of such additional extensions or betterments, other than those covered by the Semet Solvay Company hereafter made; and the bonds thus drawn down shall remain the property of said Gas Company to use as it sees fit and such amount of bonds shall be added to the total of $4,833,000 now outstanding as the total outstanding bonds on which the said Citizens Gas Company shall pay interest as a part of its rental under said lease. Except as herein provided escrow bonds shall not be drawn down on account of the Semet Solvay contract or on account of any betterments heretofore made.

1101 "'After control of said stock is acquired by the first party the merchandise and supply account of the Indianapolis Gas Company shall be kept up to substantially the same value as to the several items thereof as existed on February 1, 1913, to the end that when said lease goes into effect there shall be on hand usual and customary quantities of such supplies and merchandise as said Indianapolis Gas Company would probably have on hand were no lease in contemplation. Any variation from the total value of the supplies and merchandise on hand February 1st, 1913, shall be adjusted by a cash payment one way or the other as the case may be, provided Lessee shall not be required to take over supplies and merchandise in excess of $75,000.

"'The parties hereto shall mutually cooperate to limit the total cost of the work done under the Semet Solvay Company contract to a total of not to exceed $600,000.'"

"Mr. H. H. Hornbrook of counsel then read the proposed contract of lease provided for in the foregoing, as follows:

* * * * * *

"(Here is inserted the proposed 'Agreement of Lease'. Said Agreement of Lease is substantially identical with the Lease finally executed between the parties, a copy of which is attached to the bill of complaint as Exhibit B thereto I R. 51-80), with the following exceptions:

"(a) The proposed 'Agreement of Lease' did not contain:

"(I) The metes and bounds description of the Indianapolis Gas property as it appears in the 4th to 9th grammatical paragraphs, inclusive, of the executed Lease (I R. 52-4).

"(II) The 13th grammatical paragraph of the executed Lease (I R. 55).

"(III) The 3rd grammatical paragraph of Subdivision 6 of the executed Lease (I R. 58).

"(IV) The last grammatical paragraph of Subdivision 7 of the executed Lease (I R. 60).

"(V) The next to the last grammatical paragraph of Subdivision 15 of the executed Lease (I R. 66).

"(VI) All of Subdivision 16 of the executed Lease, except the first sentence thereof (I R. 66-7).

"(VII) Subdivisions 26, 27 and 27½ (containing 19 grammatical paragraphs) of the executed Lease (I R. 73-77).

"(VIII) Subdivision 31 of the executed Lease (I R. 79).

"(b) In place of the 3rd, 4th, and 5th grammatical paragraphs of Subdivision 21 of the Lease as executed (I R. 70, lines 8-43), the proposed Agreement of Lease contained the following provisions:

" '2. The Lessee will pay to the Lessor as additional rental for the demised property:

" 'On the 31st day of December, 1913, the sum of ..... thousand Dollars, being at the rate of One Hundred and Twenty Thousand Dollars per year for the period from the beginning of this lease to the 1st day of January 1914.

" 'On the 30th day of June and the 31st day of December, 1914, and thereafter semi-annually on the last days of June and December of each year, the sum of Seventy Thousand Dollars, provided however when the dividends paid on the capital stock of the Lessee Company shall in any calendar year equal eight per cent of the par value thereof, thereupon in the calendar year following the semi-annual rental to be paid the Lessor shall be Eighty Thousand Dollars and being thus once fixed shall, except as hereafter provided, remain at such sum during the remainder of the term created by this lease; provided if in any calendar year during the running of this lease after the rental hereunder has reached the sum of $160,000 a year, the earnings of the Lessee available for dividends to its stockholders shall not be sufficient to enable a dividend of eight per cent to be paid to the Lessee's stockholders (whether or not in fact such dividend be actually declared and paid), then the rental to be paid to the Lessor under this paragraph of the lease for the succeeding calendar year shall be only One Hundred and forty thousand dollars ($140,000), payable in

two equal semi-annual payments, as hereinbefore provided. For any fractional six months period immediately preceding the termination of the lease, the rental shall be at the same rate as that paid for the preceding six months period.'

"(c) In place of Subdivision 22 of the Lease as executed (I R. 72), the proposed Agreement of Lease contained Subdivisions 22 and 23, reading as follows:

"'22. The Lessee covenants to perform and observe all the covenants and agreements of the Lessor, except those as to the payment of the principal of the bonds, contained in its mortgage to the Trust Company of America, dated October 1st, 1902, securing an issue of bonds in the sum of Seven Million Five Hundred Thousand Dollars ($7,500,000) hereinabove referred to; and also all covenants and agreements of the Lessor, except those as to the payment of the principal of the bonds contained in any refunding or renewal mortgage executed pursuant to the provisions of Article 7 of this lease.

"'As between the parties hereto it is agreed that the Lessee may at any time invest its funds in the outstanding bonds of the Lessor, but its acquirement thereof shall not be deemed a cancellation or retirement thereof unless the Lessee expressly elects to have the same cancelled or retired.

"'23. The Lessee covenants that it will upon the original or other maturity of any of the obligations secured by the aforesaid mortgage of the Lessor, or by any mortgage or mortgages taking its place, refinance such debts with new bonds secured by mortgage on the leased property, or with other obligations of the Lessor, in such manner and form as the Lessee shall deem advisable and the Lessor in writing approves, and the Lessor covenants to do such acts as may be reasonably required of it to carry out such refinancing.')".

1118 "Mr. Lorenz Schmidt offered the following resolution and moved its adoption.

"'Whereas Volney T. Malott for himself and associates at the suggestion of persons connected with the management of this Company has been in negotiations for the purchase of a control of the Indianapolis Gas Company with the sole object of bringing the plants and gas system of said Company under the control of the Citizens Gas Company, and such negotiations have now reached a point where the said Volney T. Malott must close or abandon

the same, and he is unwilling to close the same except upon proper assurances that if he acquires such control a proper lease will be entered into by the Citizens Gas Company, for the taking over of such property.

"'Now therefore be it resolved by the Board of Directors of the Citizens Gas Company of Indianapolis 1119 that the President and Secretary of the Company be and they are hereby authorized to execute on behalf of the Company the contract with V. T. Malott this day read at the meeting of the Board, and in event said V. T. Malott and his associates shall acquire control of the Indianapolis Gas Company so as to authorize the execution of the form of lease accompanying said contract, that then the President and Secretary of this Company be and they are hereby authorized to enter into said contract of lease on behalf of this Company, and in connection therewith to consent to any changes in form in said lease which in their judgment do not vary the material rights acquired and obligations incurred by this Company.

"'A copy of said contract and lease shall be set out in the minutes of this meeting.'"

"Which motion was seconded by Mr. Bachman.

"After full discussion by all the Directors present, which was participated in by the Trustees present, the motion was amended with the consent of Mr. Schmidt and Mr. Bachman by adding to said resolution the following provision:

"'Provided however that to the rental clause in the lease as read to the meeting the following be added—"provided if in any calendar year during the running of this lease after the rental hereunder has reached the sum of $160,000 a year, the earnings of the Lessee available for dividends to its stockholders shall not be sufficient to enable a dividend of eight per cent to be paid to the Lessee's stockholders (whether or not in fact such dividend be actually declared and paid) then the rental to be paid to the Lessor under this paragraph of the lease for the succeeding calendar year shall be only One Hundred and Forty Thousand Dollars, payable in two equal semi-annual payments as hereinabove provided."'"

"The resolution as thus amended was put to a vote and all the Directors present voted aye, except Mr. Lieber, who voted no.

"On motion, duly seconded, the Board adjourned, all

members who were present at the beginning of the meeting being present at the adjournment of same."

(Sgd.) Franklin Vonnegut,
President."

J. D. Forrest,
Secretary.

(Pages 1-15, inclusive, of Minute Book)

1120 PLAINTIFFS' STIPULATION EXHIBIT 6.

Minutes of Meeting of Board of Trustees of Citizens Gas Company, February 26, 1913.

"A Special Meeting, Duly Called, of the Board of Trustees of the Citizens Gas Company of Indianapolis Was Held at the University Club at 12:30 O'clock P. M. February 26, 1913.

"Present: Messrs. Sullivan and Swift, Mr. Schnull consenting to be counted presented over the telephone while the meeting was in session, and voting aye on the adoption of the following resolution:

"'Resolved by the Trustees of Citizens Gas Company that full consent, ratification and approval is hereby given to the action of the Board of Directors of this Company taken at their meeting this day with reference to the execution of a contract with V. T. Malott touching a proposed lease by this Company of certain property of the Indianapolis Gas Company, and that the Trustees will hereafter take such further formal action as may be hereafter found necessary to authorize the execution of said lease, if the conditions shall arise which enable such lease to be executed by the Indianapolis Gas Company.'"

"Messrs. Sullivan and Swift also voted aye.

"Whereupon the meeting adjourned.

"J. D. Forrest (Sgd.) *Secretary.* Thomas L. Sullivan (Sgd.) *President."*

"Note on Above Special Meeting of the Board of Trustees of the Citizens Gas Company of Indianapolis.

"At 11 A. M. March 4, 1913, H. H. Hornbrook of counsel of Company, and J. D. Forrest, Secretary, called on Henry Kahn, Trustee, at Mr. Kahn's office in the City of New York, and explained to him the action of the Direc-

tors and Trustees of the Company as set forth in the records of the respective meetings of Feb. 26, 1913. Mr. Kahn expressed his full approval of all actions so taken."

(Page 15 of *Minute Book*)

1121 PLAINTIFFS' STIPULATION EXHIBIT 7.

Minutes of Meeting of Board of Trustees of Citizens Gas Company, September 30, 1913.

"On Adjournment of the Board of Directors of the Citizens Gas Company of Indianapolis as Above Recorded, Messrs. Sullivan, Spann, Swift and Kahn of the Board of Trustees Met and Waived Notice of Special Meeting for the Consideration of Matters Pertaining to the Proposed Lease by the Citizens Gas Company of the Plant and Property of the Indianapolis Gas Company, Whereupon the Trustees Adjourned to Meet at the Office of Messrs. Smith, Hornbrook & Smith at 2 O'clock P. M. September 30, 1913.

"J. D. Forrest (Sgd.) *Secretary.* Thomas L. Sullivan (Sgd.) *President.*"

"The Board of Trustees of the Citizens Gas Company of Indianapolis Met in An Adjourned Session Conjointly With the Meeting of the Board of Directors, at the Office of Messrs. Smith, Hornbrook & Smith at 2 O'clock P. M., September 30, 1913.

"Present: Messrs. Sullivan, Spann, Swift, Kahn.

"The Secretary laid before the Board of Trustees a communication from Mr. G. A. Schnull of said Board waiving notice of any meetings to be held during his absence from the city, said waiver being as follows:

"'As I expect to leave on Wednesday, June 11th, for an extended trip to Europe, I hereby wish to waive notice of any meeting of the Trustees of the Citizens Gas Co., which may be held during my absence from the City. My address will be C/o American Express Company, 11 Rue Scribe, Paris, France. All letters and cablegrams will be forwarded to me by this Company.'"

1122 "On motion of Mr. Spann, seconded by Mr. Kahn, all prior action of the Board of Trustees of the Citizens Gas Company of Indianapolis relating to the

proposed lease of the property of The Indianapolis Gas Company was rescinded.

"After discussion as to the proposed lease of the property of The Indianapolis Gas Company, and a consideration of the modifications therein required by the Public Service Commission of Indiana, Mr. Kahn offered the following resolution and moved its adoption.

"'Resolved, That the Trustees of Citizens Gas Company of Indianapolis upon consideration of the proposed lease of the plant and property of the Indianapolis Gas Company by the Citizens Gas Company of Indianapolis, embodying the modifications therein required by the Public Service Commission of the State of Indiana, do hereby consent to and approve the execution thereof, and do vote all the stock of said company in favor of the approval of such lease.'

"Which motion was seconded by Mr. Swift, and being put upon its passage, was unanimously adopted.

"On motion duly seconded the Board adjourned.

"J. D. Forrest (Sgd.) *Secretary.* Thomas L. Sullivan (Sgd.) *President.*"

(Pages 48 and 69 of the Minute Book)

* * * * * *

1128 PLAINTIFFS' STIPULATION EXHIBIT 13.

Fishback *vs.* Public Service Commission of Indiana, *et al.*

First Paragraph of Complaint.

Omitting the parts stricken out on motion of some of the defendants, the caption, the signatures and the verification, the first paragraph of complaint in Fishback *vs.* Public Service Commission of Indiana, *et al.* (cause No. 23,231 in the Circuit Court of Marion County, Indiana; No. 101,192 in the Superior Court of Marion County, Indiana; and No. 23,943 in the Supreme Court of Indiana) was as follows:

"The plaintiff, Frank S. Fishback, by way of complaint against the defendants, Public Service Commission of Indiana, Citizens Gas Company of Indianapolis, and Indianapolis Gas Company, alleges the following facts:

"The plaintiff is now and for many years last past has been a resident freeholder and taxpayer in the city

of Indianapolis; that he was one of the incorporators of the defendant, Citizens' Gas Company, and is now and since its organization has been the owner of eight shares of its capital stock. He holds a certificate of such stock duly issued by the company, which reads as follows:

"Trustee's Certificate

Citizens Gas Company of Indianapolis

Number 3006 Shares—8

This certifies that Frank S. Fishback is entitled to eight shares of the par value of $25.00 each, of the capital stock of the Citizens Gas Company of Indianapolis, which, together with all other outstanding stock of said company, have, with the consent and agreement of the aforesaid owner been issued to a board of five trustees as provided in the articles of incorporation of said company and in the gas franchise granted to it by city of Indianapolis, August 25, 1905; and said capital stock shall be and remain under the exclusive and irrevocable control of said board of five trustees and their successors, with full, complete, exclusive and irrevocable power in said board of trustees to hold said stock and vote the same during the continuance of the Citizens Gas Company of Indianapolis as a corporation, for all uses and purposes in the articles of incorporation of said company mentioned, set forth and described. The aforesaid holder of this certificate shall receive all dividends declared from the earnings of said Citizens Gas Company of Indianapolis by the directors thereof; and when said certificate holder shall have received, by dividend or otherwise, upon said certificate an amount equal to the face value thereof, together with interest thereon at the rate of ten per centum per annum, payable semi-annually, then this
1129 certificate shall be deemed fully paid and canceled and the interest of said holder in said company and its assets shall thereupon cease, and the property of said company shall be disposed of as provided in said articles of incorporation. This certificate is transferable only on the books of the company by holder thereof in person or by attorney, on surrender of this certificate properly endorsed.

In Witness Whereof, This certificate is signed by the president of the board of trustees, attested by the presi-

dent and secretary of the board of directors, and sealed with the seal of said company, this 11th day of August, A. D. 1908.

Thomas L. Sullivan,
President Board of Trustees.

Attest:

Franklin Vonnegut,
President Board of Directors.
J. D. Forrest,
Secretary Board of Directors."

"The plaintiff brings this action as such stock and certificate holder, and as such resident of the city of Indianapolis, for the protection of his rights as such stock and certificate holder and such resident, and for the protection of all others similarly interested.

"The defendant, Citizens Gas Company of Indianapolis, is a corporation organized under the laws of the state of Indiana, the articles under which it was incorporated having been filed in the office of the secretary of state of the state of Indiana on the 23d day of May, 1906, and which read as follows:"

(The Articles of Incorporation of Citizens Gas Company of Indianapolis were copied here. A copy of said Articles of Incorporation is attached to the Bill of Complaint in cause 1844 as part of Exhibit C and in cause 1950 as part of Exhibit D.)

"On the 30th day of August, 1905, the City of Indianapolis entered into a franchise contract with Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, by the terms of which the grantees were given the right to enter upon, and lay, construct, maintain and operate a system of pipes in and along the streets, alleys, and other places in the city of Indianapolis for the distribution and sale of gas. By the terms of such contract, the grantees were given permission to, and thereafter on the ..... day of ....., 1906, they did, assign such contract to the defendant, Citizens Gas Company, and that company entered into and became possessed of all the rights of the original grantees of such contract. It took over, constructed and laid a system of mains, pipes, machinery, and tools, and from that date until the present time the defendant has been operating such a system under the contract originally granted to Potts, Stalnaker and Schmidt, which contract reads as follows:"

(The Franchise Contract by and between the City of Indianapolis and Alfred F. Potts, and others, and the amendments thereto were copied here. A copy of said Franchise Contract and the amendments thereto is attached to the Bill of Complaint in cause 1844 as part of Exhibit C and in cause 1950 as part of Exhibit C.)

1130 "The defendant, the Indianapolis Gas Company, is a corporation existing under the laws of the State of Indiana, now and for many years heretofore owning and operating a plant in the city of Indianapolis through which it supplied artificial gas to the residents of Indianapolis. At the time of the filing of the petition for leave to lease the plant of this company by the Citizens Gas Company, such plant included about 375 miles of mains and pipes of various sizes laid in the streets and alleys of the city, together with certain coal gas and water gas plants, used in the manufacture of the artificial gas sold by the Indianapolis Gas Company. A large part of the mains are old, much having been in the ground for twenty years and more, and large portions of them are in bad repair, rotten, weakened by having been buried in the ground for such a length of time and by electrolysis. The coal and water gas plants are obsolete and incapable of providing gas at a cost that would enable the producer to sell it at a profit in competition with a plant manufacturing and selling gas produced by modern methods, and within the price fixed by the laws of the State of Indiana. The condition of the system of the Indianapolis Gas Company, and the obsolete character of its plants and machinery are and have been such that it has not been able to do a profitable business for many years, has not been able to pay any dividends to its stockholders for twenty years, and has been compelled to borrow money to pay the interest on its bonds and other fixed liabilities. Prior to and at the time of the filing of the petition by the defendants as hereinafter referred to, the Indianapolis Gas Company was practically insolvent. The capital stock of such company is $2,000,000, and its bonded indebtedness $4,833,000, which capitalization is much beyond the actual value of the combined property of said company.

"On the 21st day of May, 1913, the defendant, Citizens Gas Company, filed with the defendant Public Service Commission, a petition asking for permission

to take over and lease the property of the Indianapolis Gas Company for a term of 99 years, which petition reads thus:

"Indianapolis, Ind., May 21, 1913.

To the Public Service Commission of the State of Indiana:

Gentlemen:

The undersigned, Citizens Gas Company of Indianapolis, and The Indianapolis Gas Company, respectfully show:

1. That each of the undersigned companies is a corporation duly organized under the laws of the State of Indiana, authorizing the formation of mining and manufacturing companies, and is now actively engaged in the manufacture and sale of gas for heating and lighting purposes in the City of Indianapolis.

2. That said companies are both furnishing gas to consumers in the City of Indianapolis at a maximum rate of sixty cents per thousand feet; and at lower rates upon a sliding scale to large consumers; that the rates for gas in the City of Indianapolis are at least fifteen per cent lower than now exist in any other city in the United States and are at least twenty-five per cent below the average rates of cities of equal or larger size.

3. That said companies have at all times since the completion of the plant of the Citizens Gas Company been active and aggressive competitors, the result
1131 of which has been, not only a duplication of pipe lines in many parts of the city, which would have never occurred had there been a unification of service, but also a wastage in current expense as the direct result of dual operation amounting to a great many thousand dollars annually.

4. That the interests of the public generally and of the stockholders of the undersigned companies require that said plants shall be put under a single management, the wastage of further duplicate service and dual operation terminated, if the same can be done on proper terms and conditions.

5. That as will be seen from the accompanying copy of its charter, by-laws and franchise from the City of Indianapolis under which it operates, the Citizens Gas Company of Indianapolis is largely a co-operative institution

organized for the purpose of affording to the public the benefits of cheap gas with limited dividends to the stockholders, and providing for an ultimate transfer of the property on certain conditions to the City of Indianapolis for the benefit of the entire public; and it is believed that the lease now proposed will promote the realization of the purposes of the organization of said company.

6. That one of the occasions of the passage of the law creating this commission was the growing feeling throughout the country that there should be vested in some public agency the authority to regulate the affairs of public utilities and as an important phase of such regulation to save to the public the expense of maintaining duplicated service when the same can properly be done.

The foregoing facts being considered, the undersigned have prepared a tentative form of lease, under the terms of which the undersigned, The Indianapolis Gas Company, leases unto the undersigned Citizens Gas Company of Indianapolis all its operating plant and system in the City of Indianapolis, which it submits to this commission for its consideration.

And they now respectfully request the commission to make due inquiry in the premises and if thereupon they shall deem the same proper and for the interests of the public, as well as the stockholders of the undersigned companies, that they shall adopt and approve the terms and conditions in said form of lease set forth and thereupon authorize the undersigned companies to enter into and execute the same in such manner and upon such conditions as may be by law required or by the commission prescribed.

Respectfully submitted,

Citizens Gas Company of Indianapolis,

By .....

The Indianapolis Gas Company,

By ....."

"The plaintiff, Fishback, desiring to oppose the execution of such a lease as was described in the petition, filed with the defendant, the Public Service Commission, an intervening petition by way of remonstrance, which read as follows:

"STATE OF INDIANA,

BEFORE THE PUBLIC SERVICE COMMISSION OF INDIANA.

In the Matter of a Petition of the Citizens Gas Company for Permission to Lease Property of the Indianapolis Gas Company.

Objections of Frank S. Fishback.

Comes now Frank S. Fishback and respectfully shows that he was one of the incorporators of the Citizens Gas Company, and is now a stockholder therein, and that he is a resident free holder of the city of Indianapolis;
1132 that as such stockholder and as such resident of said city he objects to the granting of the petition filed in this matter by the Citizens Gas Company on the following ground:

First. The physical valuation and the earning capacity of the Indianapolis Gas Company are not such as to warrant the payment to it of the rental proposed to be charged the Citizens Company.

What evidence is there before the commission of the real value of the Indianapolis Company's property? Mr. Forrest guessed it at five million dollars and that is the best evidence offered. Mr. Malott stated he thought the Gas building was worth $350,000, but I have no recollection that he placed a valuation on the plant. Upon such evidence the commission is asked to hold that $..... is a fair annual rental for the property proposed to be leased.

It was made plain that no dividends had been earned by the Indianapolis Company for twenty years. The plan suggested now is that the Citizens Company shall take over the system, guarantee seven per cent dividends on the two million dollars of stock and interest on the several million dollars of bonds and at the same time pay ten per cent interest to its own stockholders and the interest on its own issue of bonds. That is a stupendous task Mr. Forrest seems willing to undertake, but I doubt if the commission is convinced that the interests of the stockholders of the Citizens Company will be as well protected as those of Mr. Malott and his associate philanthropists.

On the question of valuation I submit as a part of this protest a copy of a statement in writing made and filed by L. C. Boyd, vice-president of the Indianapolis Gas Company, on May 12, 1913, with the assessor of Marion county. Mr. Boyd is Mr. Malott's associate in the syndicate, and

probably has had more to do with the transaction than anyone else. His estimate of the value of the assets of the company is official, made after due consideration, and should carry much weight with the commission.

Mr. Boyd places a total valuation on all of the property of the company, real and personal, of $1,223,250. Deducting from this $350,000, the valuation of the office building as fixed by Mr. Malott, leaves a balance of $873,250. That, according to the vice-president of the company, is the actual value of the property now proposed to be leased to the City of Indianapolis for a period of seventy-four years from 1931 for an annual rental of over $370,000.

Mr. Forrest stated that Citizens Gas stock was now worth one hundred sixty-five on the market. That, he stated, was because of the guaranteed dividends and the record of the company. In answer to Mr. Murphy's question he stated his belief that Indianapolis Gas stock would advance if the lease were made but would not reach one hundred and sixty-five.

The dividend guaranteed under the lease is seven per cent or more. I figure that the stock will be worth at least 145-1/2, basing the estimate on Mr. Forrest's statement. If Mr. Malott and his friends paid ninety, being the experienced financiers that they are, they could easily and evidently did assume that the profit to them would be large, certain and quick.

I submit that a stock paying a guaranteed dividend of 7 or 8 per cent for ninety-nine years bought at 90 is a better investment than a stock paying 10 per cent bought at 1133 165 guaranteed for 18 years. If Mr. Malott et al. are sincere in their protestations of friendliness to the Citizens Company, why have they not offered to base the 7 per cent rental on what the stock cost them.

Second. The Indianapolis Gas Company is without power to enter into the lease proposed for the following reasons:

A. The statutes under which it and its predecessors were organized give it no power.

B. It has no charter or franchise from the city to use the streets. It is there at the sufferance of the city. Under no contract that it could make with the Citizens Company would the latter acquire any right to use the streets in the operation of the system of the Indianapolis Company. If the latter has no right in the streets the permission of this commission to make the lease as petitioned would not create any rights. (Section 95, Acts 1913, page 198.)

Before it be permitted to make the lease proposed in any event I suggest to the commission that the Indianapolis Company must do one of two things, i. e., either show it has a right to the use of the streets occupied by its mains, under a charter; or admit it has no charter and ask for an indeterminate permit under conditions to be fixed by the commission.

In this connection it is pointed out that this is not an application by the Citizens Company for permission to purchase the plant of the other company, make it a part of its own plant and operate under the Citizens Company charter. The two systems are to be kept separate.

Third. Under section 95-1/2 of the Public Utilities Act (Acts 1913, page 169), no public utility may lease the plant of any other like public utility without the consent of the holders of three-fourths of the capital stock outstanding of the proposed lessee.

It may be assumed that the petitioner offers as a reason for the non-application of the above act to the case in hand, the provision in the charter of the Citizens Company that the board of trustees of the company shall have full, complete, exclusive and irrevocable power to hold its stock and vote the same as fully and completely as if they were the owners of the capital stock, and that the trustees have voted in favor of the leasehold arrangement.

A voting trusteeship of the kind created would not deprive the owners of the stock of the right created by section 95-1/2. It is not a question of how the stock shall be voted by the trustees. The trustees may vote as a unit in favor of the proposition but that will not take the place of the required consent of the stockholders. That consent has not been asked or given and in its absence I submit the application should be denied.

Fourth. The Citizens Company has no power to make a lease covering a period longer than the term of its existence. If not before, by dividends and interests, then at the end of 25 years the certificates of stock are to be canceled and the corporation wound up.

A fair interpretation of the charter means that the city now owns the Citizens Company's plant and business, and that the company is to have the use of them until it has paid the shareholders the money they advanced to pay 1134 for its building, with 10 per cent interest on that money. If the money with the interest is repaid at any time within 25 years, the company must surrender the plant to the city; if not paid before, then at the end of 25

years the plant must be surrendered to the city subject to the lien of the mortgage that may be given to pay the shareholders the balance due on their original loan with the 10 per cent.

I contend that the Citizens Gas Company is without power to make lease binding on the city of Indianapolis for a period of 74 years after the company goes out of existence.

I attach to this protest clippings from the Daily Reporter, a commercial paper published in Indianapolis, showing quotations on the Indianapolis exchange on Indianapolis Gas stock. These show that in 1911 the stock was down to fifteen cents and that after public intimation was made of the proposed lease the stock has risen to almost par. It seems to me this justifies the foresight of Mr. Malott and the other gentlemen."

"State of Indiana }
Marion County }

Personally appeared before the undersigned a Notary Public in and for said county and state Frank S. Fishback, who being duly sworn upon his oath, says that the facts stated in the foregoing protest are true as he verily believes.

Further affiant saith not.

Subscribed and sworn to before me this 28th day of May, 1913.

Notary Public.

My Commission expires Sept. 17, 1916."

"Indianapolis, Indiana, May 12, 1913.

Mr. W. P. Manion,
Marion County Assessor,
Indianapolis, Indiana.

Dear Sir:

We enclose herewith our statement of property returned for taxation as of March 1, 1913, showing a total of $1,223,250.00 as compared with $1,187,390.00 for 1912. The return is divided as follows:

Real Estate	Lots	Improvements	Total
As per 1912 assessement..	$87,800.00	$504,600.00	$592,400.00
Less Lots Sold.....	1,170.00	600.00	1,770.00
	$86,630.00	$504,000.00	$593,010.00
Add Lots Purchased.....	2,380.00		2,380.00
	$89,010.00	$504,000.00	$597,630.00

Personal	City	Wayne	Warren	Washington	
As Per 1912.....	$558,490.00	$17,000.00	$16,500.00	$3,000.00	
				TOTAL	594.99
23.5 mains added at $1,500.00	31,250.00				35.25
	$593,749.00	$17,000.00	$16,500.00	$3,000.00	630.24

Total Real Estate	$593,010.00
Total Personal	630,240.00
Total Return	$1,223,250.00

Trusting that the information given herewith is what is required, we are,

Yours very truly,
The Indianapolis Gas Company,
Vice President."

"The Public Service Commission heard evidence upon the petition of the Citizens Gas Company and the Indianapolis Gas Company and upon the remonstrance of the plaintiff, and made a record of its decisions, including a finding of various facts, and an order permitting the execution of the lease referred to in the petition aforesaid, a copy of which lease is hereafter referred to.

"The finding and order of the Commission were duly entered as of October 1, 1913, and read as follows:"

(The Finding and Order of the Public Service Commission of Indiana was copied here. A copy of said Finding and Order is attached to the Bill of Complaint in cause 1844 as Exhibit D and in cause 1950 as Exhibit E.)

"Following the provisions of the order as set out above, the Indianapolis Gas Company filed with the Public Service Commission and with the clerk of the city of Indianapolis a notice of its intention to surrender its franchise rights to occupy the streets of the city of Indianapolis; the defendant Citizens Gas Company has not surrendered its franchise contract with said city and on the ..... day of ....., 1913, said Indianapolis Gas Company and the defendant Citizens Gas Company executed a lease in conformity with the provisions of the order of the

Public Service Commission, and referred to in the order as above set out, the lease reading as follows:"

(The Lease of September 30, 1913, was copied here. A copy of said Lease is attached to the Bill of Complaint in each of these causes as Exhibit B thereto.)

"That after the entry of the order of the Public Service Commission granting authority to execute the lease mentioned, the plaintiff Fishback filed a petition for a rehearing before said Public Service Commission, which reads as follows:"

"STATE OF INDIANA.

BEFORE THE PUBLIC SERVICE COMMISSION OF INDIANA.

In the matter of the Petition of the Citizens Gas Company of Indianapolis, and the Indianapolis Gas Company for authority to execute lease.

Petition of Frank S. Fishback for Rehearing."

The petitioner, Frank S. Fishbank, one of the par-
1136 ties of record to this proceeding, respectfully petitions the Commission for a rehearing in the above entitled cause on the following grounds:

1. The Public Service Commission was without power or authority to order or permit the Citizens Gas Company to enter into the lease described under the terms and conditions of the order as entered and of the lease.

2. The Public Service Commission fixed the rental charge to be paid by the Citizens Gas Company under the lease described in the order without fixing or finding the value of the plant and property to be leased, and without regard to the value of such plant and property.

3. The rental ordered and permitted to be paid by the terms of the order and lease, is unreasonable and unlawful, and will result in a waste and misapplication of the funds, earnings, and property of the Citizens Gas Company, and an irreparable injury to its stockholders and certificate holders.

4. The terms and conditions of the order and of the lease are unreasonable and unlawful, and prejudicial and injurious to the interests and rights of the plaintiff as a stock and certificate holder, and of all others holding shares or certificates of stock in the Citizens Gas Company. They impair the obligation of the contract existing between the company and this petitioner and all other certificate and stock holders.

5. The order of the Commission is unlawful and unreasonable for the reason that the Citizens Gas Company is without power or authority under the law to enter into the lease under the terms and conditions as set forth therein and in the order, for the following reasons:

a. The consent of three-fourths of the holders of the capital stock of the Citizens Company outstanding never has been obtained or given to the making of the lease.

b. The trustee and directors and officers of the Citizens Gas Company are not authorized by law or otherwise to enter into such a lease for a period of ninety-nine years.

c. Such trustees, directors and officers are not authorized by law or otherwise to surrender their power to fix and determine the rates at which gas manufactured by such company hereafter shall be sold, as specified in item 7 of the order of the Commission.

6. The fulfillment of the terms and conditions of the lease and order will render impossible the fulfillment of its contract with the city of Indianapolis, and such order and lease impairs the obligation of the contract between the company and said city as it relates to the taking over and ownership of the property and plant of the Citizens Gas Company by the city.

7. The city of Indianapolis has not given its consent to such lease and has granted no right to the Citizens Gas Company to operate the plant and system of the Indianapolis Gas Company within the city of Indianapolis.

8. The finding and order of the Commission are not sustained by sufficient evidence.

9. The finding and order of the Commission are contrary to law.'

1137 "That on the 28th day of November, 1913, the Public Service Commission of Indiana, overruled said petition for a rehearing and entered an order relating thereto as follows:

"STATE OF INDIANA.

PUBLIC SERVICE COMMISSION OF INDIANA.

In re Petition of Citizens Gas Company of Indianapolis and the Indianapolis Gas Company for authority to make lease."

"The Commission having under consideration the motion of Frank Fishback for a new trial in the above entitled cause, and being fully advised in the premises,

It Is Ordered by the Public Service Commission of

Indiana, That said motion be, and the same is now here overruled.

"On the day the order of the Public Service Commission was entered as described, the Citizens Gas Company took possession and control of the plant and system, and all other property of the Indianapolis Gas Company described in said lease, and since then has been and now is operating the same in connection with the system theretofore owned and operated by it.

"The plaintiff alleges that the order of the Public Service Commission granting permission and authority to the defendants, Citizens Gas Company and Indianapolis Gas Company, to execute the lease described upon the terms and conditions of the finding and order of said Commission and upon the terms and conditions specified in the lease, should be set aside and vacated, and the defendants enjoined from carrying out the terms and conditions of such order and lease on the following grounds:

"1. The defendant, Public Service Commission of Indiana was without power or authority under the law to order or permit the Citizens Gas Company to enter into the lease described under the terms and conditions of the order granting such permission and under the terms and conditions of the lease.

"3. The defendant, Public Service Commission of Indiana, fixed the rental charge to be paid by the Citizens Gas Company without regard to the value of the plant and property to be leased, contrary to the provisions of the Shively-Spencer Utility Commission Act, and to the evidence adduced in the hearing of this matter before said Commission.

"4. The rental and fixed charges to be paid as part of the rental ordered and permitted to be paid by the terms of the lease and order, are unreasonable and unlawful, and their payment will result in a waste and misapplication of the funds, earnings and property of the Citizens Gas Company, and an irreparable injury to its stock and certificate holders, including plaintiff.

"7. The order of the Public Service Commission is unlawful and unreasonable, for the reason that the Citizens Gas Company is without power or authority under the law to enter into the lease upon the terms and conditions of the order and lease for the following reasons:

1138 "(a) The consent of the holders of three-fourths (3/4) of the capital stock of the Citizens Gas Company outstanding never has been obtained or given to the mak-

ing of the lease as required by the provisions of the Shively-Spencer Utility Commission Act.

"8. The city of Indianapolis has not given its consent to such lease, and has granted no right to the Citizens Gas Company and that company has no right to operate the plant and system of the Indianapolis Gas Company within the city.

"9. The finding and order of the Commission are not sustained by sufficient evidence.

"10. The finding and order of the Commission are contrary to law.

"Wherefore, for the reasons above stated the plaintiff prays that the finding and order of the Public Service Commission entered as hereinbefore set out, shall be vacated and set aside; that the lease executed by the defendant, Indianapolis Gas Company and Citizens Gas Company, be declared null and void, and that such Commission and such gas companies be restrained and enjoined from carrying out the provisions of such order, finding, and lease; and for all other proper relief."

1139 PLAINTIFFS' STIPULATION EXHIBIT 14.

Fishback *vs.* Public Service Commission of Indiana, *et al.*

Amended Second to Tenth Paragraph of Complaint, Inclusive.

Each of the amended second to tenth paragraphs of complaint, inclusive, was substantially identical with the first paragraph of complaint (Exhibit 13 to this Stipulation), with the exception of the omission of the nine grammatical paragraphs of said first paragraph of complaint immediately preceding the prayer thereof, and the addition of the respective additional allegations set forth below.

Amended Second Paragraph of Complaint.

The additional allegations in the amended second paragraph of complaint were as follows:

"The plaintiff avers that the order of the Public Service Commission granting permission and authority to the defendants, Citizens Gas Company and Indianapolis Gas Company, to execute the lease described, upon the terms and conditions therein set out, is unlawful and unreason-

able and should be set aside and vacated and the lease executed thereunder declared invalid and void, and the defendants, Citizens Gas Company and Indianapolis Gas Company, enjoined from carrying out the terms and conditions of such order and lease for the following reasons:

"The trustees, directors and officers of the Citizens Gas Company were not authorized by law or otherwise to enter into the agreement to permit the Public Service Commission of Indiana during the term of said lease to fix and determine the rates and charges at which gas produced, transmitted, or sold by the Citizens Gas Company through the properties operated by it or by the Indianapolis Gas Company, should be sold, as fully and completely as if the said Citizens Gas Company had surrendered its license, permit or franchise and received an indeterminate permit as provided in the Shively-Spencer Utility Commission Act."

1140 Amended Third Paragraph of Complaint.

The additional allegations in the amended third paragraph of complaint were as follows:

"The plaintiff avers that the order of the Public Service Commission granting permission and authority to the defendants, Citizens Gas Company and Indianapolis Gas Company, to execute the lease described, upon the terms and conditions therein set out, is unlawful and unreasonable and should be set aside and vacated and the lease executed thereunder declared invalid and void, and the defendants, Citizens Gas Company and Indianapolis Gas Company, enjoined from carrying out the terms and conditions of such order and lease for the following reasons:

"The Citizens Gas Company is indebted to its stockholders in dividends provided to be paid them under the provisions of its articles of incorporation, by-laws and certificates of stock to an amount equal to 40 per cent of its capital stock; that said defendant can make the payment of the rental and other charges required by the order and lease hereinbefore referred to, only as operating expenses out of the earnings of said company that should be first applied to the payment of said accumulated dividends and accruing dividends; that if such rental charges are so first paid from the earnings of such company, the company will be unable to pay such accumulated unpaid dividends and accruing dividends due and to become due this plaintiff and other stockholders in said company.

"Plaintiff avers that said company will so divert and misapply the earnings of said company, by applying them to the payment of such rental charges and will not pay dividends now owing and that will hereafter accrue and be owing plaintiff and other stockholders in said company, to plaintiff's irreparable injury, unless the order and lease are canceled and set aside by this court and the defendants enjoined from carrying out the provisions thereof."

Amended Fourth Paragraph of Complaint.

The additional allegations in the amended fourth paragraph of complaint were as follows:

"The plaintiff avers that at the time the petition for leave to lease the plant of the Indianapolis Gas Com-
1141 pany was granted, such plant included about 375 miles of mains and pipes of various sizes laid in the streets and alleys of the city, together with certain coal gas and water gas plants, used in the manufacture and distribution of artificial gas sold by such gas company. A large part of the mains were old, having been in the ground for twenty years and more, and large portions of them were in bad repair, rotten, weakened by having been buried in the ground for such length of time and by electrolysis. The coal and water gas plants were obsolete and incapable of producing gas at a cost that would enable the producer to sell it at a profit in competition with a plant manufacturing and selling gas produced by modern methods, and within the price fixed by the laws of the State of Indiana.

"The condition of the system of the Indianapolis Gas Company, and the obsolete character of its plants and machinery were such that it has not been able to do a profitable business for many years, has not been able to pay any dividends to its stockholders for twenty years, and has been compelled to borrow money to pay the interest on its bonds and other fixed liabilities.

"Prior to and at the time of the filing of the petition by the defendants as hereafter referred to, the Indianapolis Gas Company was practically insolvent. The capital stock of such company is $2,000,000, and its bonded indebtedness $4,833,000, which capitalization is much beyond the actual value of the combined property of said company.

"The plaintiff alleges that a fair, reasonable value of the property taken under the lease by the Citizens Gas Company was and is less than $4,000,000 and that a fair and reasonable and lawful rental therefor would not exceed

$240,000 per annum as a maximum; that the defendant, Public Service Commission, fixed a rental charge in said order and lease to be paid by the Citizens Gas Company, amounting to over $360,000 per year as a minimum.

"Plaintiff alleges that the rental and fixed charges ordered and required to be paid by the terms of the lease and order as hereinbefore set forth are unreasonable and unlawful and their payment will result in a waste and misapplication of the funds, earnings and property of the Citizens Gas Company and irreparable injury to its stock and certificate holders, including plaintiff."

1142 Amended Fifth Paragraph of Complaint.

The additional allegations in the amended fifth paragraph of complaint were as follows:

"Plaintiff alleges that the City of Indianapolis did not assent to or join in the execution of the lease between the two defendant gas companies or approve or assent to the order permitting such lease; that said city has not granted to the Indianapolis Gas Company or the Citizens Gas Company any right to operate the plant and system of the Indianapolis Gas Company in the streets of said city since the surrender by said Indianapolis Gas Company of its franchise rights in said streets, and neither company has any right to so operate such plant and system; that the operation of the plant of the Indianapolis Gas Company in the streets of said city by the Citizens Gas Company is merely at the sufferance of the City of Indianapolis and may be discontinued by said city at any time."

Amended Sixth Paragraph of Complaint.

The additional allegations in the amended sixth paragraph of complaint were as follows:

"The plaintiff avers that the obligation taken on by the Citizens Gas Company under said order and lease, to pay the interest on the bonds and dividends on the stock of the Indianapolis Gas Company for a period of ninety-nine years, impairs the obligation of the contract existing between the Citizens Gas Company and this plaintiff and other stockholders, and between the company and the City of Indianapolis, in the following particulars:

"1. It constitutes such a lien and incumbrance upon the property and earnings of said company, that the company at the end of twenty-five years from the date of its

franchise, can not mortgage such property for the purpose of raising funds from which to pay the stockholders of said company, including this plaintiff, the par value of the stock held by them and the balance of the unpaid accumulated ten per cent annual dividends.

"2. It constitutes such lien and incumbrance upon the property and earnings of said company that the city can not at the end of twenty-five years from the date of the franchise of the company take over the plant and system of the company as provided in section 22 of the franchise of said company, as shown in Exhibit No. 2 hereto attached."

1143 Amended Seventh Paragraph of Complaint.

The additional allegations in the amended seventh paragraph of complaint were as follows:

"The plaintiff avers that the order of the Public Service Commission granting permission and authority to the defendants, Citizens Gas Company and, Indianapolis Gas Company, to execute the lease described, upon the terms and conditions therein set out, is unlawful and unreasonable and should be set aside and vacated and the lease executed thereunder declared void and invalid, and the defendants, Citizens Gas Company and Indianapolis Gas Company, enjoined from carrying out the terms and conditions of such order and lease for the following reasons:

"The defendant, Public Service Commission, was without power or authority under the law to order or permit the Citizens Gas Company to enter into the lease described under the terms and conditions of the order granting such permission and under the terms and conditions of the lease."

Amended Eighth Paragraph of Complaint.

The additional allegations in the amended eighth paragraph of complaint were as follows:

"The plaintiff avers that the order of the Public Service Commission granting permission and authority to the defendants, Citizens Gas Company and Indianapolis Gas Company, to execute the lease described, upon the terms and conditions therein set out, is unlawful and unreasonable and should be set aside and vacated and the lease executed thereunder declared invalid and void, and the defendants, Citizens Gas Company and Indianapolis Gas

Company, enjoined from carrying out the terms and conditions of such order and lease for the following reasons:

"The defendant, Public Service Commission of Indiana, fixed the rental charge to be paid by the Citizens Gas Company without regard to the value of the plant and property to be leased contrary to the provisions of the Shively-Spencer Utility Commission Act, and to the evidence adduced in the hearing of this matter before said Commission."

Amended Ninth Paragraph of Complaint.

The additional allegations in the amended ninth paragraph of complaint were as follows:

1144 "Plaintiff avers that after the lease hereinbefore referred to was modified to meet the conditions set forth in the order of the defendant, Public Service Commission, as above referred to, the same was submitted to a meeting of the stockholders of the Indianapolis Gas Company and at a meeting attended by the holders of more than three-fourth of the outstanding capital stock of said company, the execution of such lease as amended and modified was authorized and approved.

"Plaintiff avers that during all the time hereinbefore referred to, the entire capital stock of the Citizens Gas Company was held by and stood in the names of Thomas L. Sullivan, Lucius B. Swift, Thomas H. Spann, Gustav A. Schnull and Henry Kahn, trustees, who held such stock with the powers and subject to all provisions of the Articles of Association of said Citizens Gas Company. That on September 30, 1913, at 2 o'clock p. m., a meeting of said trustees was held, which was attended by Thomas L. Sullivan, Thomas H. Spann, Lucius B. Swift and Henry Kahn. That at such meeting said Henry Kahn introduced and moved the adoption of the following resolution:

'Resolved, That the trustees of Citizens Gas Company of Indianapolis upon consideration of the proposed lease of the plant and property of the Indianapolis Gas Company by the Citizens Gas Company of Indianapolis embodying the modifications therein required by the Public Service Commission of the State of Indiana, do hereby consent to and approve the execution thereof, and do vote all the stock of said company in favor of such lease.'

"Which motion was seconded by Lucius B. Swift and unanimously adopted.

"That thereafter the respective boards of directors of said Indianapolis Gas Company and said Citizens Gas

Company also duly authorized and ratified the execution of said lease.

"That thereupon said lease as thus modified and amended was executed by the respective officers of the defendant gas companies and presented to the Public Service Commission of Indiana, which Commission had thereupon confirmed and approved the same as shown by its order hereinbefore set out.

"Plaintiff avers that the consent of the holders of three-fourths of the capital stock of the Citizens Gas Company outstanding, including this plaintiff, was not obtained or given to the making of the lease."

1145 Amended Tenth Paragraph of Complaint.

The additional allegations in the amended tenth paragraph of complaint were as follows:

"The plaintiff avers that the order of the Public Service Commission granting permission and authority to the defendants, Citizens Gas Company and Indianapolis Gas Company to execute the lease described, upon the terms and conditions therein set out is unlawful and unreasonable and should be set aside and vacated and the lease executed thereunder declared invalid and void, and the defendants, Citizens Gas Company and Indianapolis Gas Company, enjoined from carrying out the terms and conditions of such order and lease for the following reason:

"The trustees, directors and officers of the Citizens Gas Company were not and are not by law or otherwise authorized to enter into such a lease as hereinbefore referred to for a period of 99 years."

1146 PLAINTIFFS' STIPULATION EXHIBIT 20.

Citizens Gas Co., Lessee—Indianapolis Gas Co., Lessor Summarized Statement of Sums Paid by Citizens Gas to or for the Benefit of Indianapolis Gas

Period		1. Bond Interest	2. Stock Dividends	3. All Taxes	4. Corporate Organization Maint. Fee
10-1/13 to 12-31/13		.....	$ 30,000.00	$ 40,545.96	$ 75.00
Calendar Year	1914—	$ 243,375.00	120,000.00	52,962.33	300.00
	1915—	252,075.00	120,000.00	58,113.44	300.00
	1916—	253,650.00	120,000.00	71,232.44	300.00
	1917—	253,650.00	120,000.00	72,634.30	300.00
	1918—	253,650.00	120,000.00	79,064.35	300.00
	1919—	255,525.00	120,000.00	124,121.61	300.00
	1920—	267,550.00	120,000.00	150,735.25	300.00
	1921—	267,542.50	120,000.00	118,583.46	300.00
	1922—	274,952.50	120,000.00	121,951.07	300.00
	1923—	280,800.00	120,000.00	141,182.03	300.00
	1924—	280,946.81	120,000.00	154,627.30	300.00
	1925—	281,400.00	120,000.00	167,139.49	300.00
	1926—	281,906.77	120,000.00	160,523.16	300.00
	1927—	311,674.18	120,000.00	162,527.33	300.00
	1928—	311,700.00	120,000.00	165,306.70	300.00
	1929—	311,700.00	120,000.00	170,239.74	300.00
	1930—	311,700.00	120,000.00	175,461.47	300.00
	1931—	338,091.93	120,000.00	156,789.81	300.00
	1932—	343,150.00	120,000.00	155,326.48	300.00
	1933—	343,150.00	120,000.00	138,075.28	300.00
	1934—	343,150.00	120,000.00	120,777.11	300.00
	1935—	171,575.00	60,000.00	61,484.88	.....
Total		$6,233,204.48	$2,610,000.00	$2,819,405.29	$6,375.00

Summary of Costs

1. Bond interest	$ 6,233,204.48
2. Stock dividends	2,610,000.00
3. All taxes	2,819,405.29
4. Corporate maintenance fee	6,375.00
Total	$11,668,984.77

1147 PLAINTIFFS' STIPULATION EXHIBIT 22.

Resolution of the Board of Public Works Dated March 20, 1929

"Be It Resolved by the Board of Public Works of the City of Indianapolis, Indiana, that the Citizens Gas Company of Indianapolis, and the officers, directors and board of trustees thereof, be notified that said City, by and through this Board, hereby asserts, claims and demands all rights, title, interests and ownership, of whatever nature or character granted, reserved, transferred or vested in and to said City in and to the gas plant, mains and property of said Citizens Gas Company by virtue of—

"1. A certain contract entered into on the 25th day of August, 1905, between the City of Indianapolis, by and through its Board of Public Works, and Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, which said contract was ratified, confirmed and approved by a certain ordinance passed on August 25, 1905, by the Common Council of said City and known as General Ordinance No. 72, 1905, approved by the Mayor of said City on August 30, 1905, and which said contract was assigned by said Alfred F. Potts, Frank D. Stalnaker, and Lorenz Schmidt to the Citizens Gas Company of Indianapolis on May 24, 1906.

"2. The articles of incorporation of the Citizens Gas Company of Indianapolis, and of all amendments to such articles, and all provisions, conditions and agreements in said original articles and amendments.

"3. The certificates issued to the subscribers of the common stock of said Citizens Gas Company, and all provisions, conditions and agreements therein.

"4. All Statutes of this state and other laws relating to the subject matter hereof,

and demand be and is hereby made upon said Citizens Gas Company and its officers, directors, and Board of Trustees, that in accordance with the provisions, terms and conditions of said contract, articles of incorporation, certificates, and statutes or other laws relating to the subject matter, and each thereof, said company and its officers and directors use and apply any and all earnings and/or other money or funds available therefor to the payment, retirement, and cancellation of the certificates issued to subscribers of the common stock of said company and to

secure the cancelation of such certificates, as well as the preferred stock thereof, and that the plant, property and assets of said company be conveyed to said City of Indianapolis in accordance with the premises and further that if on August 30, 1930, as provided in said contract and in said articles and in each of them, the amount due or payable to the holders and owners of said certificates and to the holders and owners of the preferred stock of said company has not been paid, and said certificates and preferred stock have not been fully paid and retired,
1148 then the board directors of said company shall mortgage its gas plant and property for such sum as to enable it to pay the holders of the certificates representing the common stock an amount which with what has already been paid, will equal the full amount of such stock with dividends estimated at the rate of ten per centum per annum thereon, together with the amount necessary to reduce any outstanding preferred stock, and with the proceeds thereof, after redeeming any outstanding preferred stock, or with the mortgage notes so issued in proper amounts, pay off and discharge the amounts due such holders of the certificates representing its common stock and convey said plant and property to said City, subject to such mortgage and other legal obligations against said company, said mortgage to bear not to exceed six per cent interest per annum and be payable on or before ten years from its date; and further that said Citizens Gas Company and its officers and directors do and perform all other acts and things necessary and proper to be done and performed to convey said plant, property and assets of said company to said City of Indianapolis in accordance with the premises; and further that nothing herein contained shall be taken or construed as a waiver of the right of said City or of the Department of Public Utilities of said City or of the Utility District of said City, for and on behalf of said City, to furnish and advance to said company funds with which to pay off and discharge any balance due or payable to said certificate holders and holders and owners of preferred stock, but said City hereby expressly reserves the right to furnish and advance such funds for said purpose.

"That a copy of this resolution shall be made, transmitted and delivered to the said Citizens Gas Company of Indianapolis, Indiana, and to its president, general manager, and to each of the directors of said corporation, and also to the Board of Trustees above referred to, in-

cluding its president and each trustee, and service thereof is intended to be and shall be taken as notice to said company and said officers, directors and trustees of the facts, claims and demands herein contained; and the Clerk of the Board is ordered to take receipts for the delivery thereof at the time of delivery and also ordered and directed to spread of record this resolution on the permanent records of this Board and to also spread of record the receipts obtained for said copies.

"Dated this 20th day of March, 1929.

"The Board of Public Works of the City of Indianapolis, Indiana,
By Theodore H. Dammeyer,
President.
Emsley W. Johnson,
John C. McCloskey.

Attest:
Ernest F. Frick,
Clerk of said Board."

"The undersigned Clerk of the Board of Public Works of the City of Indianapolis, Indiana, hereby certifies that the foregoing is a full, true and complete copy of a 1149 resolution duly adopted by said Board on the 20th day of March, 1929, and as the same appears upon the records of said Board.

"In Witness Whereof, I have hereunto set my hand and seal this 20th day of March, 1929.

(Signed) Ernest F. Frick,
Clerk of the Board of Public Works of the City of Indianapolis."

1150 PLAINTIFFS' STIPULATION EXHIBIT 23.

First Resolution of Board of Directors of Citizens Gas Company Adopted April 3, 1929.

"On motion of Mr. Hornbrook, seconded by Mr. Insley, the following resolution was unanimously adopted:

"Whereas, notice and demand from the City of Indianapolis, have been served on the officers, directors and trustees of Citizens Gas Company of Indianapolis, reading as follows:

(Here the resolution of the Board of Public Works, dated March 20, 1929, was copied in full. A correct copy

of said resolution is attached to Stipulation No. 1 in each of these causes as Exhibit 22 thereto).

"Whereas, the directors of said Citizens Gas Company of Indianapolis desire to make acknowledgment of the receipt of said notice and demand, and a formal statement of the attitude of the Company with reference to the matters therein contained;

"Now, Therefore, Be It Resolved, that the directors of Citizens Gas Company of Indianapolis hereby recognize the trust created by the franchise heretofore granted by the City of Indianapolis to Alfred F. Potts et al, under date of August 25th, 1905, and thereafter assigned to the Citizens Gas Company, and by the Articles of Association of this Company, entered into pursuant to the terms and provisions of said franchise, and the amendments to said Articles of Association thereafter made, and acknowledge the right of the City of Indianapolis to take over the property and assets of said Company pursuant to the terms of said franchise and Articles of Association; subject, however, to the retirement of the certificates representing the beneficial ownership of the common stock of said Company and the preferred stock of said Company, as provided in such certificates and in the Articles of Association of said Company.

"Resolved Further, that the Board of Directors of said Company proceed in all lawful ways to carry out all its obligations to such certificate holders and preferred stockholders, and having discharged such obligations, convey the property and assets of said Company to the City of Indianapolis.

"Resolved Further that the officers of the Company be and they are hereby directed to send a certified copy of these resolutions to the City of Indianapolis, and to transmit a printed copy thereof to all stockholders of the Company."

1151 PLAINTIFFS' STIPULATION EXHIBIT 24.

Second Resolution of Board of Directors of Citizens Gas Company Adopted April 3, 1929.

"On motion of Mr. Hornbrook, seconded by Mr. Insley, the following resolution was unanimously adopted:

"Whereas, it is provided by Article 9 of the Articles of Association of the Citizens Gas Company of Indianapolis as amended, as follows:

" 'The earnings of said Company, after the payment of operating expenses and taxes, shall be applied, subject to the discretion by law vested in the directors, but which discretion shall not affect the order in which such application shall be made in the following order, to-wit:

" 'First, to the payment of any accrued and unpaid dividends upon any preferred stock of the company at the time outstanding; Second, to the payment of dividends at the rate of not to exceed 10 per centum per annum upon the common stock, and any unpaid and accrued dividends at the same rate on account of prior years: Third, to the payment in whole or partial payments of the par value of the common stock of the company; provided, however, that when any part of the amount subscribed and paid in by any certificate-holder has been repaid, only the balance unpaid shall thereafter be entitled to receive such dividends of ten per centum per annum.' "

"Whereas, the Company now has outstanding Two Million Dollars ($2,000,000) of common stock issued in the name of the Board of Trustees of the Company, and against which certificates representing beneficial ownership have been issued to various parties; and

"Whereas, dividends at the rate of ten per cent (10%) per annum have been paid on account of all of said stock from the date of its issuance up to and including March 31st, 1929;

"Whereas, the Company has quick assets representing a part of the earned surplus of the Company and which are lawfully available for the purpose of making a partial payment upon the principal of the certificates representing the beneficial interest in said common stock in the amount of at least $400,000, and it is desired that a capital payment in the amount of $5.00 per share shall be made on May 15th, 1929, to the holders of such certifi-

cates, in addition to the dividend at the rate of ten per cent (10%) per annum for the half-quarter year ending May 15th, 1929;

"Now, Therefore, Be It Resolved,

1152 "(a) That a dividend of one and one-quarter per cent (1-1/4%) is hereby declared upon the Two Million Dollars ($2,000,000) outstanding common stock of the Company for the half-quarter year ending May 15th, 1929, to be paid May 15th, 1929, to the holders of record of such certificates on May 4th, 1929, and that the stock transfer books representing such certificates be closed from the close of business May 4th, 1929, to May 16th, 1929.

"(b) That a capital payment in the amount of $5.00 per share be made May 15th, 1929, on account of the Two Million Dollars ($2,000,000) of certificates outstanding, representing the beneficial interest in the common stock of the Company, to be paid to the record holders of such certificates May 4th, 1929, and that the stock transfer books representing such certificates be closed from the close of business May 4th, 1929, to May 16th, 1929; such capital dividend shall be paid upon presentation of such certificates for endorsement upon the back thereof of the amount of such payment.

"Further Resolved, that any portion of the funds necessary to make said capital payment which shall not have been paid over to the certificate holders on May 15th, 1929, be deposited in special trust with The Union Trust Company of Indianapolis, for the benefit of the several holders of the certificates representing the beneficial ownership of said common stock, to whom such payment has not yet been made, such fund to be withdrawn from time to time by the proper officers of the Citizens Gas Company for the purpose of making payments to the several certificate holders as hereinabove provided.

"Further Resolved, that from and after May 16th, 1929, all right of the several holders of the certificates representing the beneficial ownership of the common stock of this Company, to receive dividends on that portion of the par value of such certificates represented by the capital payment hereby ordered and directed, shall cease.

"Further Resolved, that from and after May 16th, 1929, the foregoing payment on capital account having been made, or provision therefor made, the capital account represented by the common stock of the Company shall be

reduced to the sum of $1,600,000, and so carried on the books of account of the Company.

"Resolved Further, that from and after May 16th, 1929, all new certificates issued by the Company representing the beneficial ownership of the common stock of the Company, shall contain an endorsement showing partial payment of the principal in the same form and to the same extent as is endorsed upon the certificate surrendered and in exchange for which such new certificate is issued.

1153 "Resolved Further, that a printd copy of the foregoing resolutions be mailed to each and all of the certificate holders with a suitable letter from the officers of the Company, notifying the certificate holders of the action this day taken and requesting them to present their certificates for proper endorsement and partial payment on the 15th day of May, 1929."

1154 PLAINTIFFS' STIPULATION EXHIBIT 30.

Bill of Complaint in Todd Case.

This bill of complaint is copied on pages 2-72, inclusive, of the Record in the United States Circuit Court of Appeals for the Seventh Circuit in the case of *Todd* v. *Citizens Gas Company of Indianapolis, et al.*, Plaintiffs' Exhibit 2 for Identification, which original exhibit is included in this transcript by order of the Court.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Indiana,

Indianapolis Division.

Newton Todd,
Plaintiff,
v.
Citizens Gas Company of Indianapolis, John R. Welch, Gustav A. Efroymson, Henry H. Hornbrook, William H. Insley, Clarence L. Kirk, James H. Hooker, Franklin Vonnegut, James I. Dissette, Edgar H. Evans, Gustav A. Schnull, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis, Robert Lieber, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis, Lucius B. Swift, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis, Thomas L. Sullivan, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis, Henry Kahn, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis, City of Indianapolis, L. Ert Slack, as Mayor of the City of Indianapolis, William A. Boyce, Jr., as City Clerk of the City of Indianapolis, Theodore H. Danmeyer, John C. McCloskey, and Emsley W. Johnson, as and constituting the Board of Public Works of the City of Indianapolis,
Defendants.

No. 1191.
In Equity

BILL OF COMPLAINT FOR INJUNCTION AND TO QUIET TITLE.

To the Honorable, the Judge of the District Court of the United States for the Southern District of Indiana:

Plaintiff files this, his bill of complaint against all of the above named defendants, and alleges that:

I.

Plaintiff, Newton Todd, is a citizen of the State of Indiana, residing in the City of Indianapolis, in said state. Defendant Citizens Gas Company of Indianapolis is a corporation, organized and existing under and by virtue of the laws of the State of Indiana, with its principal office and place of business in the City of Indianapolis, in said state. Defendant City of Indianapolis is a municipal corporation, organized and existing under and by virtue of the laws of the State of Indiana. Each of the individual defendants herein, to-wit, John R. Welch, Gustav A. Eforymson, Henry H. Hornbrook, William H. Insley, Clarence L. Kirk, James H. Hooker, Franklin Vonnegut, James I Disette, Edgar H. Evans, Gustav A. Schnull, Robert Lieber, Lucius B. Swift, Thomas L. Sullivan, Henry Kahn, L. Ert Slack, William A. Boyce Jr., Theodore H. Dammeyer, John C. McCloskey and Emsley W. Johnson, is a citizen of the State of Indiana, residing in the City of Indianapolis, in said state.

II.

Plaintiff is the owners of 250 shares of the common capital stock of defendant Citizens Gas Company of Indianapolis; and brings this suit on behalf of himself and all other holders of common stock who may wish to join in this suit and contribute to the expense hereof, asserting corporate rights and immunities of defendant Citizens Gas Company of Indianapolis. This is a suit in equity which arises under the Constitution of the United States, and is brought to enjoin and restrain the threatened deprivation, under color of certain statutes of the State of Indiana, of certain rights, privileges and immunities secured to defendant Citizens Gas Company of Indianapolis, and to plaintiff and other stock holders, by the Constitution of the United States, and to quiet the title of said defendant Company to certain real and personal property, situated within the Southern District of Indiana, against the claims and demands of defendant City of Indianapolis and its officers based upon a certain Franchise and certain Articles of Incorporation, and upon a certain statute of the State of Indiana purporting to legalize such Articles of Incorporation, which statute attempts to deprive defendant Company, the plaintiff and other stock holders of rights, privileges and immunities secured to them by the Constitution of the United

States. The matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000).

III.

Defendant L. Ert Slack, since the 1st day of January, 1929, has been, and now is Mayor of defendant City of Indianapolis. Defendant William A. Boyce, Jr., since the 1st day of January, 1929, has been, and now is City Clerk of defendant City of Indianapolis. Defendants Theodore H. Dammeyer, John C. McCloskey and Emsley W. Johnson, since the 1st day of January, 1929, has been, and now are and constitute the Board of Public Works of defendant City of Indianapolis. Defendant John R. Welch, since the 1st day of January, 1929, has been, and now is president and a member of the Board of Directors of defendant Citizens Gas Company of Indianapolis. Defendant Clarence L. Kirk, since the 1st day of January, 1929, has been, and now is vice-president and general manager and a member of the Board of Directors of defendant Citizens Gas Company of Indianapolis. One F. J. Rastenberg, since the 1st day of January, 1929, has been, and now is the secretary defendant Citizens Gas Company of Indianapolis. Defendant Gustav A. Efroymson, since the 1st day of January, 1929, has been, and now is treasurer and director of defendant Citizens Gas Company of Indianapolis. Defendants John R. Welch, Gustav A. Efroymson, Henry H. Hornbrook, William H. Insley, Clarence L. Kirk, James H. Hooker, Franklin Vonnegut, James I. Dissette and Edgar H. Evans, since the 1st day of January, 1929, have been, are, and now constitute the Board of Directors of defendant Citizens Gas Company of Indianapolis. Defendants Gustav A. Schnull, Robert Lieber, Lucius B. Swift, Thomas L. Sullivan and Henry Kahn, since the 1st day of January, 1929, have been, are, and now constitute the trustees holding in the voting trust provided for in Articles 6, 7, and 8 of the Articles of Incorporation of defendant Citizens Gas Company, certificates evidencing all of the common stock of defendant Citizens Gas Company of Indianapolis, against which have been issued trustees certificates evidencing the entire beneficial ownership of those shares in accordance with the provisions in the Articles of Incorporation of said Company, as hereinafter more fully appears.

IV.

Defendant Citizens Gas Company of Indianapolis, during its corporate existence, has acquired title to and is now the owner of certain real estate, together with the buildings, fixtures, machinery and equipment used and useful for the manufacture, storage and distribution of artificial gas and the by-products thereof, together with pipe lines, mains and other equipment necesary for distributing artificial gas in the City of Indianapolis, and also a manufacturing plant and ovens for the production, manufacture and sale of commercial coke. Said real estate is situated in the City of Indianapolis, Marion County, State of Indiana, and within the jurisdiction of the District Court of the United States for the Southern District of Indiana, Indianapolis, Division, and said property, so situated, is more particularly described as follows, to-wit:

* * * * * *

"(Here follows detailed description of real estate owned by Citizens Gas Company)."
(Inserted pursuant to stipulation filed November 22, 1939.)

Defendant Company has also acquired title to and now owns certain leasehold rights in coal lands located in the Counties of Raleigh and Fayette, in the State of West Virginia, used and useful for the purpose of mining and producing therefrom coal for use in the operation of the business of defendant Company. Defendant Company also is the owner of a certain leasehold estate in and to the property of the Indianapolis Gas Company, as created by a certain contract of lease dated September 30, 1913, and recorded in Miscellaneous Record 78, pages 257-278, inclusive, of the records in the Recorder's office of Marion County, State of Indiana.

V.

Plaintiff became a holder of trustees' certificate No. 12093, dated May 16, 1924, evidencing the entire beneficial ownership of 100 shares of common capital stock of defendant Citizens Gas Company of Indianapolis on or about said date, and has been a holder of said certificate continuously ever since. Plaintiff acquired other similar certificates from time to time thereafter, and now is the owner and holder of trustees' certificates No. 12093, 13230, 13231,

dated May 16, 1924, October 17, 1927, October 17, 1927, respectively, and evidencing, respectively the entire beneficial ownership of 100, 100 and 50 shares of the common capital stock of defendant Company. This suit is not a collusive one to confer on a court of the United States jurisdiction of a suit of which it would not otherwise have cognizance.

VI.

On the 30th day of August, 1905, defendant City of Indianapolis, acting by and through its common council, ratified, confirmed and approved a certain Franchise Contract executed on the 25th day of August, 1905, by the Board of Public Works of the said City, and Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, contracting for themselves and their associates and assigns. Said Franchise Contract and the Ordinance ratifying the same are in the following words and figures, to-wit:

* * * * * *

"(Here follows the Franchise Contract of August 25, 1905, which appears as part of Exhibit C to the bill (I. R. 81-94))."

(Inserted pursuant to stipulation filed November 22, 1939.)

Said Franchise was published in a book printed and published by authority of the City of Indianapolis, entitled "Charter and Ordinances of the City of Indianapolis," which said book was published in the year 1905, and which said Franchise appears on pages 289-311, inclusive. Said Franchise was also published in a book printed and published by defendant City entitled "Proceedings of the Common Council of Indianapolis," which was the journal of said Common Council from October 15, 1903, to December 31, 1905, and said Franchise, and the proceedings of the Common Council relating thereto, appear in said book on pages 795-806, inclusive.

VI-a.

During the year 1905 and prior thereto The Indianapolis Gas Company, an Indiana corporation, was furnishing gas in certain portions of the City of Indianapolis under a franchise from said City. During the year 1905 and until the formation of defendant Citizens Gas Company, The Indianapolis Gas Company was the sole

company furnishing gas in the City of Indianapolis. The rates and service of The Indianapolis Gas Company were unsatisfactory and it was feared that because of its entrenched position it might be able to absorb, through stock ownership, any new competing companies. The purpose of the voting trust provided for in the franchise of 1905 heretofore set out and in the articles of incorporation of defendant Citizens Gas Company hereafter set forth, was to insure that control of defendant Citizens Gas Company should not pass to The Indianapolis Gas Company or its stockholders and to that end it was provided that no Voting Trustee of the Gas Company should be an employee or stockholder of said The Indianapolis Gas Company.

VII.

On the 23d day of May, 1906, defendant Citizens Gas Company of Indianapolis was incorporated under an Act of the General Assembly of the State of Indiana, entitled:

"An Act for the incorporation of manufacturing and mining companies and companies for mechanical, chemical and building purposes,"

approved May 20, 1852, and subsequent amendments thereto. The Articles of Incorporation of said defendant, omitting names, signatures and acknowledgments, were as follows:

* * * * * *

"(Here follows the Articles of Incorporation of Citizens Gas Company, which appears as part of Exhibit C to the bill (I. R. 95-100))."

(Inserted pursuant to stipulation filed November 22, 1939.)

Said Articles of Incorporation were recorded on the 23d day of May, 1906, in the office of the Recorder of Marion County, State of Indiana, in Miscellaneous Record, Vol. 50, beginning at page 96.

VIII.

Thereafter, on the 24th day of May, 1906, the aforesaid Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt assigned and transferred to defendant Citizens Gas Company of Indianapolis all of their rights in the aforesaid Franchise Contract, which assignment was accepted by

defendant Company, and said defendant Company continuously thereafter operated under said Franchise until it surrendered the same as hereinafter alleged.

IX.

Thereafter defendant Citizens Gas Company of Indianapolis proceeded to take subscriptions for its common stock to the full authorized amount of $1,000,000, and upon payment of said subscriptions defendant Citizens Gas Company issued certificates representing its common capital stock in the following form:

"Incorporated under the laws of the State of Indiana

Citizens Gas Company of Indianapolis

Capital Stock $1,000,000

Number Shares $25.00 Each Shares

This Certifies that .....
is the owner of .....
fully paid shares of the Capital Stock of the par value of $25.00 per share in the Citizens Gas Company of Indianapolis, to be held by the Board of Five Trustees named in the Articles of Incorporation and their successors as Trustees in accordance with the terms of the Articles of Incorporation of said Company.

A trust Certificate is issued to said Stockholder by said Trustees on surrender of which with proper assignment of same on the books of said Corporation by the aforementioned Stockholder or his attorney, the Trustees of the Citizens Gas Company of Indianapolis will make proper transfer as directed in said assignment.

In Witness Whereof, the said corporation has caused this certificate to be signed by its President and Secretary and to be sealed with the seal of the corporation of Indianapolis, Ind., this ..... day of .....,
A. D. 19.....

.....,
President

.....,
Secretary"

When issued there were inserted in each certificate the name of the owner of the shares and the number of shares represented by said certificate. Said certificates were

placed in the possession and control of the voting trustees who thereupon issued and delivered to each stockholder a certificate representing such shares, which certificate is the document referred to herein as a certificate of beneficial interest in the common stock of defendant Citizens Gas Company. Thereafter on the 25th day of March, 1911, said defendant Company increased its common capital stock from $1,000,000 to $2,000,000 face value, the amount of such increase being divided into 40,000 shares of the par value of $25.00 each, and said defendant Company proceeded to sell and issue said additional $1,000,000 of common stock in the manner provided in the Articles of Incorporation, and in the sale thereof received a net premium above such face or par value in the sum of $418,-711.28. For said increase of stock said defendant Company issued stock certificates and trustees' certificates in the same manner and form as the stock certificates and trustees' certificates were issued in connection with the original issue of stock of defendant Company. Stock certificates in the above form were issued by defendant Citizens Gas Company for the shares of stock purchased by plaintiff at, or shortly before, the time when the trustees' certificates were issued and delivered to plaintiff, as alleged in Paragraph V of this bill.

X.

Thereafter, the General Assembly of the State of Indiana passed an act entitled

"An Act concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission."

Said Act went in force on the 1st day of May, 1913, and is commonly referred to as the "Shively-Spencer Utility Commission Act." Under the terms and provisions of said Act, as amended by Indiana Acts 1921, page 197, in force May 31, 1921, defendant Citizens Gas Company of Indianapolis, on the 27th day of August, 1921, filed with the City Clerk of defendant City of Indianapolis, and with the Public Service Commission of Indiana, a written declaration, legally executed, surrendering its Franchise from the City of Indianapolis and accepting an indeterminate permit in lieu thereof, as provided in said Shively-Spencer Utility Commission Act. Said written declaration and the

certificate of the City Clerk of defendant City of Indianapolis are in the words and figures following, to-wit:

"Declaration of Surrender of
Licenses, Permits and Franchises
By
Citizens Gas Company of Indianapolis

This Indenture Witnesseth, That Citizens Gas Company of Indianapolis, a corporation duly organized and existing under the laws of the State of Indiana, and which is the owner and operator of by-product gas plants in the City of Indianapolis, Indiana, and is a public utility, declares that it hereby surrenders each and every license, permit and franchise from the city of Indianapolis, Indiana, now owned or held by it and under or by virtue of which said Company is operating its gas utility or any part thereof, in said city; and hereby accepts indeterminate permits in lieu of said licenses, permits and franchises hereby surrendered as provided in the Act of the General Assembly of the State of Indiana entitled "An Act concerning public utilities creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission," approved March 4, 1913, and acts amendatory thereof or supplemental thereto; but if said act shall be repealed or annulled, then said Company shall be reinstated in the possession and enjoyment of all the licenses, permits and franchises hereby surrendered as provided in said Act.

In Witness Whereof, the said Citizens Gas Company of Indianapolis has this 12th day of August, 1921, caused its name to be hereunto subscribed by its President and its corporate seal hereto affixed, attested by its Secretary duly authorized thereto by resolutions of the stockholders and directors of said Company, duly adopted at meetings of said stockholders and directors duly called and held.

Citizens Gas Company of Indianapolis,
By John R. Welch,
President.

Attest:
John D. Forest,
Secretary.

Certificate

This is to certify that on the 27th day of August, 1921, the Citizens Gas Company of Indianapolis filed in the office of the Clerk of the city of Indianapolis, Indiana, a declaration, of which the above is an exact copy.

Geo. Hutsell,
Clerk of the City of Indianapolis."

Thereafter certain proceedings were had before the Public Service Commission of Indiana in a matter entitled "In the matter of the declaration of surrender of licenses, permits and franchises by the Citizens Gas Company of Indianapolis," numbered 6178. In said proceedings, the Public Service Commission of Indiana made an order on the 12th day of December, 1921, which order is in the following words and figures, to-wit:

"On August 27, 1921, the Citizens Gas Company of Indianapolis filed with the Commission its declaration of surrender of its franchise with the City of Indianapolis, said declaration being in the usual form and executed in conformity to the law of Indiana in such cases made and provided.

On August 30, 1921, Ira Chase Koehne, on his own behalf and on behalf of all other consumers of the said Citizens Gas Company, filed his objection to the surrender of said franchise by said Citizens Gas Company, the specific objections set out being as follows:

First: That the Citizens Gas Company is not a public utility;

Second. That said Company forfeited its contract with said City on May 4, 1921, when it began to receive a price for its gas in excess of that provided for in its contract and franchise with the City of Indianapolis, and by reason thereof had no franchise to surrender on said 27th day of August, 1921;

Third. That the Acts of the Legislature of 1913 and 1921 concerning surrender of franchises are each unconstitutional.

After due notice this cause was heard in the rooms of the Commission on December 6, 1921.

It is wholly useless for the Commission to go into a detailed examination of the specific objections hereinbefore set out, for the reason that the petitioner is only attempting to surrender whatever franchise it may have with the City of Indianapolis. If it has no franchise the

objectors can in no way be prejudiced or harmed by the declaration of surrender on the part of petitioner. If, on the other hand, petitioner has a franchise with the City of Indianapolis, it has the power to surrender the same and receive in lieu thereof by operation of law, an indeterminate permit as defined by the statutes of the State of Indiana.

If the objectors have any rights in the premises herein, their remedy is through the courts and not through this Commission.

This Commission is not a court, although in certain matters its acts are quasi-judicial. The formal order written in surrender of franchises is a mere acknowledgment of the filing of such surrender and a finding that the surrender was made in conformity to the provisions of the law applicable thereto. The order of the Commission therefore neither adds to nor detracts from the sanctity of the declaration of surrender.

The Commission therefore, of its own motion, dismisses the objections filed by the said Ira Chase Koehne, and being fully advised in the premises, finds that said Citizens Gas Company of Indianapolis, Indiana, has filed its written declaration, as provided by the Public Service Commission Act, surrendering all licenses, permits and franchises from the City of Indianapolis, Indiana, now owned or held by the petitioner herein in accordance with the provisions of said Act and that said Company receives in lieu thereof, by operation of law, an indeterminate permit to be held under all the terms, conditions and limitations of said Act.

It Is Therefore Ordered by the Public Service Commission of Indiana, that said declaration and all instruments in writing filed by said Company in the matter shall be filed in the office of the Secretary of the Commission and kept on file as a record of said surrender.

Defendant City had notice of the above proceedings but took no steps to join with those objecting to the surrender of said franchise. Defendant City took no steps of any kind to oppose the surrender of said franchise and acceptance of said indeterminate permit and did not at the time of said surrender and acceptance, or defendant Company's right to operate under said indeterminate permit, or make any objection thereto, but on the contrary acquiesced in said surrender and acceptance of said indeterminate permit and the operation by defendant Company under said indeterminate permit until defendant City on

the 20th day of March, 1929, took action as hereinafter alleged.

As a result of the aforesaid surrender of said Franchise and acceptance of said indeterminate permit, the original contract between defendant City of Indianapolis and defendant Citizens Gas Company of Indianapolis was entirely rescinded, abrogated and annulled, and a new contract was substituted therefor, the terms of which were and are prescribed in said Shively-Spencer Utility Commission Act.

X-a.

On and before the 27th day of August, 1921, the Citizens Gas Company was in serious financial embarrassment. It had been found impossible to earn a sufficient sum from the sale of gas at sixty cents per thousand cubic feet to pay matured debts and operating expenses, semi-annual dividends at the rate of ten per cent per annum, and to make and pay for such extensions and betterments as were ordered by the Board of Public Works of the defendant City of Indianapolis, or as were necessary to meet the needs of the inhabitants of said City and of defendant Citizens Gas Company. According to the books of defendant Citizens Gas Company the total curent assets aggregated on the 30th day of June, 1921, $2,704,108.41, and included cash and deposits $207,647.99; accounts receivable, $295,450.20; notes receivable, none; materials and supplies $944,128.34; and saleable products, $1,256,881.88; and on said date current liabilities aggregated $2,303,-993.04, and included accounts payable, $394,737.67; short time notes payable to banks for money borrowed to finance operation, $1,520,511.89; and trade acceptances payable, $388,743.48. Due to the unsatisfactory operations of defendant Citizens Gas Company it was impossible for said Company, so long as it continued to operate under the provisions of its franchise to borrow more money on bonds or to market any stock in order to obtain additional working capital. The paid-in surplus of said Company of $418,711.28 had been impaired to the extent of $323,-714.22, and on said date amounted to $94,997.06. By reason of general business conditions then prevailing, it was impossible to dispose of the items of materials and supplies, and saleable products, except at prices far below the figures at which they were carried, as above stated. Said condition continued to be substantially the same until said surrender of the franchise and acceptance of the

indeterminate permit. By reason of the aforesaid condition, on August 27, 1921, defendant Citizens Gas Company was in imminent danger of insolvency.

XI.

On the 27th day of August, 1921, defendant Citizens Gas Company of Indianapolis filed in the office of the Secretary of State a document, which, omitting signatures and acknowledgments, is in the following words and figures, to-wit:

* * * * * *

"(Here follows a certificate of amendment to the Articles of Incorporation of Citizens Gas Company, filed August 27, 1921, which appears as part of Exhibit C to the bill (1 R. 112-116))."

(Inserted pursuant to stipulation filed November 22, 1939.)

Said document was also filed for record on the 27th day of August, 1921, in the office of the Recorder of Marion County, State of Indiana, and was placed of record in said office in Miscellaneous Record Vol. 121, at page 32.

XI-A.

The statutes under which defendant Citizens Gas Company was incorporated, and in force when the above quoted amendments to its original Articles of Incorporation were purported to be made, contained no sanction or authority for any of the provisions contained in said original Articles, or in the attempted amendments thereto, relating to the payment of certificate holders or the transfer or conveyance of the plant and property of defendant Company to defendant City; and all such provisions, and particularly Articles 9, 10 and 12, both in their original and amended form, were and are mere surplusage, and null, void and of no effect. Furthermore, said defendants Voting Trustees were wholly without authority to execute the purported certificate of amendment to said Articles of Incorporation, or to cause the same to be adopted or filed on behalf of defendant Company, and had no authority or right under any terms of said voting trust or said original Articles of Incorporation to vote the stock of the Company, or to take any other steps, which would extend, increase or otherwise modify their powers as Vot-

ing Trustees, or to make any new or amended agreement affecting the rights or the property of said Company or its stockholders, and for said reason said purported amendments to said Articles were and are invalid, void and of no effect.

XII.

Defendant Citizens Gas Company of Indianapolis now has outstanding first mortgage bonds in the amount of $3,404,000, bearing interest at 5% per annum; and has outstanding preferred capital stock in the face amount of $1,000,000, entitled to cumulative dividends at 5% per annum; and has outstanding common stock in the face amount of $2,000,000, entitled to dividends at 10% per annum, payable semi-annually. It is not possible that the net earnings of defendant Company from January 1, 1929, to August 30, 1930, will be sufficient, together with existing earned surplus, to redeem and retire the preferred stock of defendant Company according to the terms and conditions thereof, and thereafter to pay to the holders of certificates of beneficial interest in the common stock of said Company an amount equal to the face value thereof, together with interest thereon at the rate of 10% per annum. The individual defendants, directors and trustees of defendant Company, having knowledge of the financial condition of the Company and of the facts aforesaid, have not undertaken, nor asserted that they would undertake, to pay to said certificate holders of common stock the entire face value thereof, with dividends thereon at 10% per annum, pursuant to Section 1, Clause (g) of the Franchise Contract, repeated in Article X of the Articles of Incorporation. Defendant City, knowing that it could not become entitled, under the terms of Section 1, Clause (g) of the Franchise, repeated in Article X of the Articles of Incorporation, to a conveyance of the plant and property of defendant Company on or before August 30, 1930, proceeded, through its Board of Public Works, to assert its alleged right and option to acquire the plant and property of defendant Company, as provided by Section 22 of the aforesaid Franchise, repeated in Article XII of the Articles of Incorporation of said Company, by adopting the resolution of March 20, 1929, and by serving the same, including the notice and demand therein contained, upon said defendant Company, its trustees and directors, as hereinafter set forth.

XIII.

Thereafter, during the early part of the year 1929, defendant City of Indianapolis, acting through its Board of Public Works, Legal Department, and special counsel employed expressly for the purpose of bringing about the conveyance of the plant and property of defendant Citizens Gas Company of Indianapolis to defendant City in accordance with the terms of the original Franchise Contract, in part repeated in said Articles of Incorporation heretofore referred to, prepared a bill to be submitted to the Seventy-sixth General Assembly of the State of Indiana, for the purpose of securing the enactment of said bill into a statute to assist defendant City in acquiring the plant and property of defendant Company. Said bill was introduced in the House of Representatives of said General Assembly by members thereof residing in said City of Indianapolis and elected from Marion County, in said State of Indiana. Said bill is entitled:

"A Bill for an Act relating to corporations organized before May 1, 1913, for the purpose of furnishing gas for fuel or illuminating purposes or electric lights or water, or light, heat and power to any town or city or the citizens or inhabitants thereof, and the articles of incorporation of which provide for the transfer of the property of such corporations to such town or city, legalizing certain provisions in the articles of incorporation thereof and authorizing the conveyance of the property of such corporations to such towns or cities and authorizing such towns or cities to accept such conveyance, repealing all laws in conflict therewith and declaring an emergency."

Said bill thereafter passed both branches of said General Assembly in the exact form prepared and submitted by said counsel for defendant City without change or amendment of any kind or character. Said bill contained an emergency clause providing for its taking effect immediately upon its passage, was approved on the 11th day of March, 1929, and said act became a law on said day. Said act was directed solely at the Articles of Incorporation of defendant Company, and by the terms of said act, said General Assembly of the State of Indiana purported to legalize the Articles of Incorporation of defendant Citizens Gas Company of Indianapolis in order that defendant City might assert successfully the right to obtain the plant and property of defendant Company on payment to hold-

ers of certificates of beneficial interest in the common stock of said Company the face value of their certificates plus dividends at ten per cent per annum, all as provided in said original Franchise Contract between defendant City of Indianapolis and defendant Citizens Gas Company of Indianapolis and repeated in part in the Articles of Incorporation of defendant Company.

XIV.

On the 20th day of March, 1929, the defendant City of Indianapolis, acting by and through its Board of Public Works, passed a resolution asserting its right to acquire the plant and property of the defendant Citizens Gas Company of Indianapolis under the provisions of the Franchise and the Articles of Incorporation hereinbefore set out. Said resolution was in the following words and figures, to-wit:

• • • • • •

"(Here follows the resolution adopted by the Board of Public Works on March 20, 1929, a copy of which is in evidence as Plaintiffs' Stipulation Exhibit 22)."
(Inserted pursuant to stipulation filed November 22, 1939.)

Defendant City of Indianapolis, through its agents and employees, served a copy of said resolution upon the defendants constituting the Board of Directors of the defendant Citizens Gas Company of Indianapolis and upon the defendants constituting the Board of Trustees of defendant Citizens Gas Company of Indianapolis, on said 20th day of March, 1929.

XV.

On the 3rd day of April, 1929, the directors of defendant Citizens Gas Company of Indianapolis, in meeting assembled, adopted a resolution designated as "Resolution No. 1," purporting to acknowledge the claim of right asserted in the aforesaid notice and demand of said City, to acquire the plant and property of defendant Citizens Gas Company of Indianapolis, which Resolution No. 1 is in the words and figures following:

• • • • • •

"(Here follows the first resolution of the Board of Directors of Citizens Gas Company adopted on April 3, 1929,

a copy of which is in evidence as Plaintiffs' Stipulation Exhibit 23)."
(Inserted pursuant to stipulation filed November 22, 1939.)

At the same meeting, said Board of Directors adopted a second resolution designated as "Resolution No. 2," purporting to authorize the payment from the surplus of the defendant Company of $5.00 as a "capital dividend" upon each share of the common capital stock of defendant Company, to be paid to the persons holding the certificates evidencing the beneficial ownership of said shares of common stock respectively. Said Resolution No. 2 is in the following words and figures:

* * * * * *

"(Here follows the second resolution of the Board of Directors of Citizens Gas Company adopted on April 3, 1929, a copy of which is in evidence as Plaintiffs' Stipulation Exhibit 24)."
(Inserted pursuant to stipulation filed November 22, 1939.)

The aforesaid action of said Board of Directors in response to the demand of said City of Indianapolis is in violation of the rights of defendant Citizens Gas Company of Indianapolis and of all owners of common stock in said defendant Company, including this plaintiff, in the particulars hereinafter set forth.

XVI.

Each of said resolutions adopted by said Board of Directors on April 3, 1929, as aforesaid, was approved by the Board of Trustees of defendant Citizens Gas Company of Indianapolis, by a resolution adopted at a meeting of said Board on said April 3, 1929, and the resolution adopted by said Board of Trustees, approving said resolutions, is in the following words and figures:

"Whereas, the directors of the Citizens Gas Company of Indianapolis have this day adopted resolutions reading as follows: (Here the trustees inserted the directors' resolutions replying to the city's demand), and

"Whereas, such resolutions were adopted in joint meeting with this board of trustees and the form of such resolutions was agreed upon by both the trustees and directors; now therefore be it

"Resolved, that the board of trustees of the Citizens Gas Company of Indianapolis hereby recognize the trust

created by the franchise referred to in the resolutions adopted by the board of directors, by the assignment thereof to the Citizens Gas Company and by the articles of association and the amendments thereto and acknowledge the right of the City of Indianapolis to take over the property and assets of said Citizens Gas Company pursuant to the terms of said franchise and articles of association, subject to the retirement of the certificates representing the beneficial ownership of the common stock of said company and the preferred stock of said company. And be it further

"Resolved, that this board of trustees hereby adopts and confirms the resolutions adopted by the board of directors of said company as a correct statement of the attitude of the board of trustees with reference to the matters therein contained. And be it further

"Resolved, that said board of trustees of the Citizens Gas Company of Indianapolis proceed in all lawful ways to carry out all the obligations of said company to its certificate holders and preferred shareholders, and that upon the discharge of said obligations the property and assets of said company be conveyed and transferred to the City of Indianapolis and that said conveyance be made as soon as that can reasonably be done. And be it further

"Resolved, that Thomas L. Sullivan, chairman of the board of trustees, be authorized and empowered to transmit a true copy of these resolutions, as adopted by the board of trustees, to the City of Indianapolis."

Said action of said Board of Trustees is in violation of the rights of defendant Citizens Gas Company of Indianapolis and of all owners of the common stock therein, including this plaintiff, in the particulars hereinafter set forth.

VII.

Prior to the filing of this bill of complaint, and on the 26th day of April, 1929, plaintiff served upon defendants constituting the Board of Trustees of defendant Citizens Gas Company of Indianapolis, a demand in writing, by which plaintiff demanded of said Board of Trustees that they demand of the Board of Directors that said Board of Directors cause defendant Citizens Gas Company of Indianapolis to assert certain rights. Plaintiff's demand upon said Board of Trustees is in the words and figures following, to-wit:

To Gustav A. Schnull, Robert Lieber, Lucius B. Swift, Thomas L. Sullivan, Henry Kahn,

Constituting the Board of Trustees holding legal title in and to all shares of the common capital stock of Citizens Gas Company of Indianapolis, in trust for the holders of certificates of beneficial interests in such common stock.

You and each of you are notified hereby:

That I, the undersigned, holder of certificates representing the entire beneficial interest in 250 shares of the common capital stock of Citizens Gas Company of Indianapolis, on behalf of myself and all other holders of certificates of beneficial interest in the common stock of the Citizens Gas Company of Indianapolis, without confirming or acknowledging the existence of any title, power or authority in you as trustees or in any other capacity, and without decreasing or waiving any rights, legal or equitable, in such common stock which certificate holders may have possessed heretofore, or may now or may hereafter possess, respectfully request and demand that you, as record holders in trust of the common stock of said Citizens Gas Company of Indianapolis, take action as follows:

1. That you rescind the resolution adopted by you on the 3rd day of April, 1929, approving Resolution Number 1 and Resolution Number 2, adopted by the Board of Directors of said corporation on said date, and notify the officers and directors of said corporation of your action in rescinding your said resolution.

2. That you serve upon the Board of Directors and officers of said Citizens Gas Company of Indianapolis a written notice of protest and objection, therein protesting and objecting

(a) To the adoption by said Board of Directors, on April 3, 1929, of the resolutions designated as Resolution Number 1 and Resolution Number 2.

(b) To the recognition or acknowledgment by said Board of Directors or by said officers, then, now or hereafter that there was created, has existed, and now exists or may hereafter exist a trust for any purpose whatsoever either by virtue of the franchise heretofore granted by the City of Indianapolis to Alfred F. Potts, et al., under date of August 25, 1905 (afterwards assigned to Citizens Gas Company of Indianapolis), or by virtue of recitals contained in either the original or amended Articles of Incorporation of Citizens Gas Company of Indianapolis.

(c) To the recognition or acknowledgment by said Board of Directors or by said officers, then, now or hereafter, that there exists in the City of Indianapolis any right to acquire, at any time, any of the property of Citizens Gas Company of Indianapolis, except in accordance with the terms and conditions prescribed by the Shively-Spencer Utility Commission Act of the State of Indiana.

(d) To the performance or the taking of any steps looking to the performance by said Board of Directors or by the said officers of any of the acts referred to and described or proposed in said Resolution Number 1 and said Resolution Number 2.

3. That you serve upon the Board of Directors and officers of said Citizens Gas Company of Indianapolis a written request and demand, therein requesting and demanding

(a) That said Board of Directors rescind and cancel the aforesaid Resolution Number 1 and Resolution Number 2 and enter such action upon the records of the said Company.

(b) That said Board of Directors make reply to the notice served upon it by the City of Indianapolis, which notice is in such Resolution Number 1 described and, in such reply, expressly deny the assertion, claim and demand of said City that any rights, title, interest and/or ownership of any nature or character whatsoever have been granted, reserved, transferred or vested in and to said City in and to the gas plant, mains and property or in and to any property of said Citizens Gas Company of Indianapolis by virtue of either the certain ordinance franchise of August 25th, 1905, or the said Company's original or amended Articles of Incorporation or the certificates issued to the subscribers of the common stock of the said Company or by virtue of any other writing or document or by virtue of any statute or law.

(c) That said Board of Directors and officers institute and prosecute to final judgment in any court of competent jurisdiction a suit in equity or action at law or any other legal proceeding which may be proper to have declared wrongful and void and to quiet title against any and all claims of the City of Indianapolis in and to any of the property, real or personal, of Citizens Gas Company of Indianapolis, and that said Board of Directors and said officers take all and such other steps as may be required

to remove any clouds upon the title in and to the Company's said property.

4. That you, as the owners in trust of the common stock of Citizens Gas Company of Indianapolis, in behalf of yourselves as such trustees and in my behalf and in behalf of all other holders of certificates of beneficial interest in the common stock of said corporation, take all steps necessary to protect the said corporation against any claim of the City of Indianapolis to and against the title of any of the property and assets of said Citizens Gas Company of Indianapolis, and if Citizens Gas Company of Indianapolis, its Board of Directors and officers fail, neglect or refuse to take the steps requested and demanded in accordance with the foregoing, that you, as holders of the legal title in the common stock of said corporation, proceed to exercise all stockholders' rights, by instituting suit or any other proper legal proceeding to have declared null and void, and to quiet the title of the Corporation against, any such claim or assertion of such claim by the City of Indianapolis to or against any of the property or assets of said Citizens Gas Company of Indianapolis, and to prevent the carrying out of any of the said claims of said City or the performance or attempted performance of any of the acts or purposes described in the aforesaid Resolution Number 1 and Resolution Number 2.

Because of the emergency existing by reason of the notice heretofore served by the City of Indianapolis upon Citizens Gas Company of Indianapolis, its Board of Directors and officers, and by reason also of the action with reference thereto by said Board of Directors, I ask respectfully a prompt reply hereto, setting forth your position and intentions in connection with the foregoing demands. On failing to hear from you within a reasonable time, I shall assume that no action is by you to be taken and shall, as the owner of the equitable interest in the common stock represented by my certificates, proceed to take such action as may be necessary to protect and establish all of such rights of said corporation, of its stockholders, and of the holders of certificates of beneficial interests in the common stock of said corporation.

Dated this 26th day of April, 1929.

(Signed) Newton Todd.

Said Board of Trustees denied plaintiff's demand, and failed and expressly refused to take the action requested

of them in said demand, and notified plaintiff of such refusal on the 27th day of April, 1929.

XVIII.

Thereafter and on the 27th day of April, 1929, plaintiff served upon defendants constituting the Board of Directors of defendant Citizens Gas Company of Indianapolis, a written demand that said Board of Directors enforce the rights of defendant Citizens Gas Company of Indianapolis which plaintiff is asserting in this bill of complaint. Said demand is in the following words and figures, to-wit:

To

Citizens Gas Company of Indianapolis.

The Board of Directors of Citizens Gas Company of Indianapolis.

James I. Dissette, G. A. Efroymson, Edgar H. Evans, J. H. Hooker, H. H. Hornbrook William H. Insley, Franklin Vonnegut, Clarence L. Kirk and John R. Welch, who constitute the Board of Directors of Citizens Gas Company of Indianapolis.

John R. Welch, President of Citizens Gas Company of Indianapolis.

C. L. Kirk, Vice-President of Citizens Gas Company of Indianapolis.

G. A. Efroymson, Treasurer of Citizens Gas Company of Indianapolis.

F. C. Rastenburg, Secretary of Citizens Gas Company of Indianapolis.

L. M. Edwards, Assistant Secretary of Citizens Gas Company of Indianapolis.

V. V. Smith, Assistant Treasurer of Citizens Gas Company of Indianapolis.

You and each of you are notified that I, the undersigned, holder of certificates representing the entire beneficial interests in 250 shares of the common capital stock of Citizens Gas Company of Indianapolis, respectfully object to and protest against the certain actions heretofore taken and proposed hereafter to be taken by Citizens Gas Company of Indianapolis, its Board of Directors, and officers, in the following particulars, to-wit:

1. In adopting, at a meeting of the Board of Directors, on April 3, 1929, the resolution designated as Resolution Number 1.

2. In recognizing, by such resolution or otherwise, then,

now or hereafter, that there was created a trust for any purpose whatsoever by the franchise heretofore granted by the City of Indianapolis to Alfred F. Potts, et al., under date of August 25th, 1905 (afterwards assigned to Citizens Gas Company of Indianapolis), or that there now exists or may exist hereafter any such trust by virtue of such franchise.

3. In recognizing, by such resolution or otherwise, then, now or hereafter, that there was created a trust for any purpose whatsoever by either the original Articles of Incorporation or by the Amended Articles of Incorporation of Citizens Gas Company of Indianapolis, or that there now exists or may exist hereafter, any such trust by virtue of such Articles of Incorporation.

4. In acknowledging, by such resolution or otherwise, then, now or hereafter, the existence of any right of the City of Indianapolis to take over the property and assets of said Company pursuant to the terms of said franchise and/or of such Articles of Incorporation, either subject to the retirement of the certificates representing the beneficial ownership of the common stock of said Company and subject to the retirement of the preferred stock of said Company or upon any conditions whatsoever, except such as are prescribed by the terms and provisions of the Shively-Spencer Utility Commission Act.

5. In proceeding or proposing to proceed, in any manner or form whatsoever, now or hereafter, either before or after carrying out any of the Company's obligations to such certificate holders and preferred stockholders, to convey the property and assets of said Company to the City of Indianapolis, except in accordance with the terms and conditions provided in the Shively-Spencer Utility Commission Act.

6. In adopting, at a meeting of the Board of Directors, on April 3, 1929, the Resolution designated as Resolution Number 2.

7. In proposing to make or hereafter making, from the assets of said Company, a capital payment in the amount of five dollars ($5.00) per share on account of the Two Million Dollars ($2,000,000.00) of certificates outstanding, representing the beneficial interest in the Common Stock of the Company, to be distributed to the record holders of such certificates.

8. In proposing to receive or hereafter receiving presentation of any of such certificates for endorsement thereon of the amount of any such proposed capital payments

or in proposing to make or hereafter making any such endorsements upon such certificates.

9. In proposing to appropriate or hereafter appropriating from the assets of the said company and withdrawing from its proper corporate uses and depositing with the Union Trust Company of Indianapolis or with any other bank, trust company, person, firm or corporation any moneys whatsoever for the purpose of making any capital payments to certificate holders as in said Resolution Number 2 provided.

10. In declaring, claiming, recognizing, acknowledging or asserting by said resolution or by any other form of resolution or corporate action, then, now or hereafter that from and after May 16, 1929, or from any other date, any or all right of the several holders of the certificates representing the beneficial ownership of the common stock of said Company, to receive dividends on that portion of the par value of such certificates represented by such capital payment, in such Resolution Number 2 described, shall cease; or that the capital account represented by the common stock of the Company shall be reduced to the sum of One Million Six Hundred Thousand Dollars ($1,600,000.00) or to any other sum below Two Million Dollars ($2,000,000.00) or carried on the books of account of said Company in any amount below Two Million Dollars ($2,000,000.00); or that there should be placed any indorsements or additional recitals upon new certificates issued by the Company representing the beneficial ownership of the common stock of the Company.

11. In recognizing, acknowledging or asserting, in any manner or form, that the City of Indianapolis possesses any right, title or interest, legal or equitable, vested or unvested, contingent or otherwise, in any of the property or assets, real or personal, belonging to Citizens Gas Company of Indianapolis.

The objections and protest herein contained are addressed separately to each of the actions above specified, and are based upon each of the following reasons:

1. Any rights and claims in and to any of the property or assets of Citizens Gas Company of Indianapolis asserted to exist in the City of Indianapolis by virtue of the recitals of any franchise or Articles of Incorporation as amended or otherwise, always have been and are illegal, invalid and void.

2. Any right and claims in and to any of the said Company's property or assets asserted to exist in the City of Indianapolis by virtue of the terms of any franchise ordinance or by virtue of any other written instrument were terminated and rescinded by the action of the State of Indiana in accepting the surrender by such Company of such franchise and the issuance, in lieu thereof, on December 15, 1921, of an Indeterminate Permit in accordance with the Shively-Spencer Utility Commission Act of the General Assembly of the State of Indiana.

3. Because of the foregoing and other reasons, good and sufficient in law, all claims of said City in and to any of the assets of said Company are null and void, cast a cloud upon the said Company's title to its property, depreciate the value of shares of the Company's common capital stock and thereby do great wrong and injury to the undersigned as well as to all other holders of certificates of beneficial interests in such stock.

Wherefore, I do now request and demand that you and each of you take corporate action as follows:

1. Rescind and cancel the aforesaid Resolution Number 1 and Resolution Number 2 and enter such action upon the records of the said Company.

2. Make reply to the notice served upon you by the City of Indianapolis, which notice is in such Resolution Number 1 described, and, in such reply, expressly deny the assertion, claim and demand of said City that any rights, title, interest and/or ownership of any nature and character whatsoever have been granted, reserved, transferred or vested in and to said City in and to the gas plant, mains and property or in and to any property of said Citizens Gas Company of Indianapolis by virtue of either the certain ordinance franchise of August 25th, 1905, or the said Company's original or amended Articles of Incorporation or the certificates issued to the subscribers of the common stock of the said Company or by virtue of any other writing or document or by virtue of any statute or law.

3. That you institute and prosecute to final judgment in any court of competent jurisdiction a suit in equity or action at law or any other legal proceeding which may be proper to have declared wrongful and void and to quiet title against any and all claims of the City of Indianapolis

in and to any of the property, real or personal, of Citizens Gas Company of Indianapolis and that you take all and such other steps as may be required to remove any clouds upon the title in and to the Company's said property, and to prevent the carrying out or the attempt to carry out now or hereafter, any claims of said City to any of the property of said Citizens Gas Company.

In view of the notice of assertions of claim to title heretofore made by the City of Indianapolis and of actions taken by the Board of Directors of said Company, and the emergency arising by reason thereof, I ask respectfully a prompt reply to the matters contained herein, and, upon failure to receive the same within a reasonable time, I shall proceed to take such action as, in my opinion, will protect and safeguard the property of the Company against the illegal claims of the City of Indianapolis.

Dated this 26th day of April, 1929.

(Signed) Newton Todd.

Said Board of Directors denied plaintiff's said written request and failed and expressly refused to take the action requested therein to be taken, and notified plaintiff of such refusal on the 27th day of April, 1929. Plaintiff has made no effort, other than as heretofore alleged, to secure action from the common stockholders of defendant Citizens Gas Company of Indianapolis, for the reason that said Board of Trustees claims the exclusive right to vote all of the common stock of defendant Citizens Gas Company of Indianapolis, including the right to elect the Board of Directors thereof, and having so refused to act for the protection of the stockholders, as heretofore alleged, any further demand upon the body of common stockholders of defendant Company would have been futile and unavailing.

XIX.

The original agreement between the State of Indiana, acting through the agency of defendant City of Indianapolis, and the defendant Citizens Gas Company of Indianapolis, which was contained in and evidenced by the aforesaid Franchise Contract and in part repeated in the Articles of Incorporation of said Company, was in all respects rescinded, abrogated and annulled, and a new agreement between said State and said defendant Company was substituted therefor, by the voluntary act of said Com-

pany in accepting the offer to enter into a new agreement made by the State to defendant Company in said Shively-Spencer Utility Commission Act, which said acceptance was evidenced by the surrender by defendant Company of the aforesaid Franchise, and the receiving, in lieu thereof, of an indeterminate permit under the terms and provisions of said Shively-Spencer Utility Commission Act. The effect of the foregoing was the creation of a new contract between the State and the defendant Company. One of the terms of said new agreement was that, in lieu of the right of defendant City of Indianapolis to acquire the plant and property of Citizens Gas Company of Indianapolis, as provided in Sections 1, 2, 22 and 23 of said Franchise Contract and in part repeated in Articles X and XII of said Articles of Incorporation, defendant City should have the right to acquire the property of defendant Company under the terms and conditions, and at its then value, as determined and prescribed by the Public Service Commission of Indiana, and defendant Company relinquished all of the rights and remedies secured to it by its former contract with defendant City, and thereafter possessed only such rights and remedies as were granted to it under the Shively-Spencer Utility Commission Act. In so far as the Articles of Incorporation of defendant Company were inconsistent with said new agreement, they were by implication modified by the Shively-Spencer Utility Commission Act to conform to the provisions thereof; and Articles X and XII of the Articles of Incorporation of defendant Citizens Gas Company of Indianapolis were completely abrogated, rescinded, annulled and superseded by said new agreement arising out of the acceptance by defendant Company of the aforesaid indeterminate permit. The passage by the General Assembly of the State of Indiana of said legalizing act of 1929 purporting to revive and legalize all of the provisions of said Articles of Incorporation, and particularly those in respect to the mode of acquisition of the plant and property of defendant Citizens Gas Company of Indianapolis by defendant City of Indianapolis, constitutes and is an impairment of the obligations of the aforesaid new contract between the State and the defendant Company in violation of Article I, Section 10, of the constitution of the United States, and in violation of Article I, Section 24, of the Constitution of Indiana, and said legalizing act is therefore void and of no effect.

XX.

The aforesaid legalizing act of 1929 denies to defendant Citizens Gas Company of Indianapolis the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States in that it makes certain facts a basis for classification in order to enact, under the guise of a general law, a special law directed at and applicable to defendant Citizens Gas Company of Indianapolis alone. The distinctions made by said act, in order to render it applicable to defendant Citizens Gas Company of Indianapolis alone, are based upon mere differences and have no reasonable or substantial relation to the purpose of the act in respect to which the classification is proposed. Said differences and arbitrary distinctions, the possible purposes thereof, and the reasons why each of said differences and distinctions is arbitrary and irrational, are as follows, viz.:

(a) Said act applies only to certain corporations organized prior to May 1, 1913, and implies that the reason for selecting said date is that May 1, 1913, was the date of the creation of the Public Service Commission of this State under said Shively-Spencer Utility Commission Act. The only rational ground that can be suggested for selecting such time as a basis of classification is that corporations organized prior to that date ought not to be under the control of the Public Service Commission. That said alleged ground has no basis in reason is shown by the fact that the Shively-Spencer Utility Commission Act in Section 101 thereof provided that any utility organized prior to the date of said Act might bring itself voluntarily under the terms of said Act by filing a written declaration of the surrender of its franchise and taking in lieu thereof an indeterminate permit. In the original Section 101 of said Shively-Spencer Utility Commission Act, utilities organized prior to May 1, 1913, were required to file said surrender prior to July 1, 1917. The General Assembly of the State of Indiana extended the time for filing said surrender by Acts 1915, page 110, and further extended the time for filing said surrender by Acts 1921, Chapter 93, thereby establishing the legislative policy of the State of Indiana as favoring the bringing under the terms of the Shively-Spencer Utility Commission Act all public utility corporations organized prior to May 1, 1913, and the attempt on the part of said legalizing act to alter said legislative policy

for corporations having certain charter provisions is wholly irrational and arbitrary.

(b) Said legalizing act of 1919 contains the following provision, viz.:

"That if in the original articles of incorporation of any corporation organized under the laws of this state prior to May 1st, 1913 (that being the date of the creation of the public service commission of this state), for the purpose of furnishing natural or artificial gas for fuel or for illuminating purposes, or for furnishing electric lights or water to the citizens of any town or city within this state, or to furnish light, heat and power to any town or city, or the inhabitants thereof, provision is made for the transfer or conveyance of the property of such corporation to such town or city, subject to the outstanding legal obligations of said corporation, whenever the holders or owners of shares of stock, stock certificates or holders or owners of any beneficial interest in such capital stock shall have received the face or par value of such shares of stock, stock certificates or beneficial interest, together with the interest or dividends thereon provided for in such articles of incorporation, such provision in such articles shall be, and is hereby legalized and declared to be, valid and binding upon such corporation and upon the holders and owners of any such shares of stock, stock certificates or beneficial interest therein or their assigns."

The only rational purpose for a general statute legalizing a provision such as that referred to in the above quoted part of said act would be that, when a public utility has made a contract with a municipality under which such municipality has the right under certain conditions to acquire its property, such contract should be enforced. Said legalizing act does not purport to legalize all contracts between municipalities and public utility companies which contain provisions for the transfer or conveyance of the property of such public utility to the municipality, but only such contracts as are contained in articles of incorporation of a corporation of the type described in said act. Said agreements are much more frequently contained in franchises than in articles of incorporation, and in legalizing only such agreements contained in articles of incorporation, said legalizing act makes a classification which is based upon a mere difference and which has no reasonable or rational relation to the only possible lawful end to be secured by such legalizing act.

(c) Said legalizing act further provides as follows: "and said town or city shall be authorized and entitled to accept a transfer and conveyance of any such property in accordance with the terms and conditions of such articles of incorporation, without the question of the acceptance or acquisition of such property being submitted to a vote of the electors of such town or city and without any election being held therein to determine whether such property shall be acquired by such town or city."

The general law in force with regard to the acquisition of public utility property by a municipality in the State of Indiana is found in an Act entitled "An Act concerning municipal corporations," approved March 6, 1905. Section 93 of said act, in so far as material, provides as follows:

"The Board of Public Works shall have power: * * *

Eighth. To purchase within or without the limits of such city, and to construct, by contract or otherwise, and to operate, water works, gas works, electric light works, heating and power plants, steam and power houses and lines, for the purpose of supplying such city and the inhabitants thereof with the use and convenience of such works, or to purchase or hold a majority of the stock in corporations organized for any of the above purposes; and to purchase within or without the limits of such city, lands or other property for such purposes; Provided, That none of the powers conferred by this paragraph shall be exercised except pursuant to an ordinance specifically directing the same, and after an election had in relation thereto, as hereinafter provided."

Section 249 of said act, as amended by the General Assembly of the State of Indiana in 1915, provides:

"Any city or town may erect or construct water works, gas works, electric light works, heating, steam and power plants, or combination of such utilities, together with all building, lines and accessories necessary thereto, and may purchase or lease any such works and utilities already constructed or in course of construction, and owned by any other persons; and may also purchase, condemn or lease other lands for said purposes, and may also extend, change and improve such works and utilities when so acquired, all for the purpose of furnishing the inhabitants of such city or town and vicinity thereof with the use and convenience of any or all of such utilities: Provided, That before any city or town shall enter upon the policy of erecting and constructing any such new works and utilities, or the purchase of the same from other persons, the common council of

such city or the board of trustees of such town, as the case may be, shall adopt a resolution, designated by number, declaring the necessity for entering upon the policy of such erection and construction or purchase. In case of the proposed erection and construction of new works, said declaratory resolution shall fix the general character and the probable maximum cost thereof; and in case of the purchase of such works from other persons, such common council or board of trustees shall first procure an option from the owners of such works, agreeing to sell the same upon the terms of a definite proposed contract of sale, upon approval thereof by popular vote, and a full copy of said proposed contract of sale shall be incorporated in, and made a part of, said declaratory resolution. Before such declaratory resolution is confirmed and the policy thereof entered upon, said common council or board of trustees shall submit the same to the qualified voters of such city or town, at a special or general election, of which election previous notice shall be given by publication once each week for two weeks in some newspaper printed and of general circulation in such city or town, and if there be no such newspaper, then in some newspaper printed and of general circulation in the county in which such city or town is situated, the first of said publications to be at least twenty days prior to the day fixed for such election. The tickets for such election shall have printed thereon, in separate lines, the following phrases:

'For declaratory resolution Yes' and 'Against declaratory resolution No', designating the number of resolution submitted, or other similar phrases by which the voter may effectually express his choice upon the question submitted; and each phrase shall have printed to the left thereof a voting square, by marking in which square, the voter shall express his choice; and such elections shall otherwise be governed by the general election laws of the State of Indiana, so far as applicable. If such resolution be submitted at a general election of such city or town, the tickets therefor shall be printed upon and at the bottom of the general tickets containing the names of candidates at such election. If a majority of the votes cast at such election be in favor of such resolution, such common council or board of trustees may, by ordinance, confirm such resolution and proceed to execute the policy thereof; but if a majority of such votes be opposed to such resolution, then such common council or board of trustees shall have no power to confirm the same or to execute the policy thereof. Such

city or town is hereby authorized, for the purpose of procuring the means to acquire the aforesaid works and utilities, or to improve the same when acquired, as hereinbefore authorized, to issue and sell the bonds of such city or town pursuant to and in conformity with the provisions of section 55 of this act."

Since the Legislature has deemed it desirable that an election should be held to determine whether any municipal corporation will acquire a utility plant, the mere fact that articles of incorporation of a utility operating within the municipality contain stipulations empowering the municipality to acquire its plant under certain conditions, offers no basis for dispensing with an election to determine whether or not the municipality will acquire such property; and the attempted creation of such an exception on such grounds is arbitrary and based on a mere difference and amounts to a denial to defendant Citizens' Gas Company of Indianapolis and its stockholders of the equal protection of the laws.

(d) Said legalizing act further provides:

"It shall not be necessary to obtain the consent or approval of the public service commission of Indiana or any other state board, commission or officer for such transfer and conveyance or of the terms and conditions upon which the same is to be made, but such transfer and conveyance shall be valid without any order or approval of such commission, board or officer."

The general law in force with regard to the acquisition of public utility property by a municipality in the State of Indiana, where utilities are operated under the provisions of the Public Service Commission Law, as is defendant Citizens Gas Company of Indianapolis, is found in said Shively-Spencer Utility Commission Act, and more particularly in Section 102 thereof, which provides as follows:

"Sec. 102. Any public utility accepting or operating under any indeterminate license, permit or franchise hereafter granted shall by acceptance of any such indeterminate license, permit or franchise be deemed to have consented to a future purchase of its property by the municipality in which the major part of it is situate at the value and under the terms and conditions determined by the commission as provided in this act, and shall thereby be deemed to have waived the right of requiring the necessity of such taking to be established by the verdict of a jury, and to have waived all other remedies and rights relative to condemnation, except such rights and remedies as are pro-

vided in this act and shall have been deemed to have consented to the revocation of its license, permit or franchise by the commission for cause."

If the Legislature deemed it desirable that the purchase of the plant and property of a public utility and the terms of such purchase should be approved by the Public Service Commission, the fact that the articles of incorporation of a utility operating within a municipality contain provisions that the municipality may acquire said plant and property under certain conditions, offers no basis in reason for dispensing with the approval of said Public Service Commission, nor the adoption of any other and different rule than if said option were contained in a franchise, contract or other document other than articles of incorporation, and the attempted creation of such exception on the foregoing grounds is arbitrary and irrational, and based upon a mere difference, and is a denial to defendant Citizens Gas Company of Indianapolis and its stockholders of the equal protection of the laws.

XXI.

Said legalizing act of 1929, in so far as it purports to legalize the Articles of Incorporation of defendant Citizens Gas Company of Indianapolis and make them binding upon said defendant Company and enforceable by defendant City of Indianapolis, with respect to the provisions and terms upon which said defendant City would have a right to acquire the plant and property of defendant Company, deprives defendant Company of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, because the agreement between the State of Indiana, acting through the agency of defendant City of Indianapolis, and defendant Citizens Gas Company of Indianapolis, contained in said franchise and in part repeated in said Articles of Incorporation, was abrogated by the surrender of said franchise by defendant Company and the acceptance, in lieu thereof, of an indeterminate permit under the Shively-Spencer Utility Commission Act, one of the terms of which indeterminate permit was that the defendant City could only acquire the plant and property of defendant Company at its then value and under the terms and conditions determined by the Public Service Commission of Indiana; and said legalizing act purports to authorize defendant City to enforce conveyance and to require defendant Company to convey upon the terms fixed in said Franchise and in part

repeated in said Articles of Incorporation, to-wit, upon the receipt by the stockholders and holders of certificates of beneficial interest, either from earnings of the company, or from money paid by defendant City, or from the proceeds of a mortgage to be placed upon the property of defendant Company at the request of defendant City, of the face value of their stock and/or certificates of beneficial interest, together with the stipulated dividends thereon, which sum is far less than said defendant Company, and indirectly said stockholders and/or holders of certificates of beneficial interest, including plaintiff, would receive if defendant City were to acquire the plant and property of defendant Company as provided for in said Shively-Spencer Utility Commission Act.

XXII.

Said legalizing act of 1929, in so far as it attempts to legalize and make enforceable the provisions of the Articles of Incorporation of defendant Citizens Gas Company of Indianapolis with respect to the right of the City of Indianapolis to require a conveyance of the plant and property of defendant Company, is in violation of Article I, Section 21, of the Constitution of Indiana, because it permits said State of Indiana, through the agency of the City of Indianapolis, to take private property without just compensation, in that the agreement between the State of Indiana, acting through the agency of defendant City of Indianapolis, and defendant Citizens Gas Company of Indianapolis, contained in said Franchise and in part repeated in said Articles of Incorporation, was abrogated by the surrender of such Franchise by defendant Company and the acceptance, in lieu thereof, of an indeterminate permit under the Shively-Spencer Utility Commission Act, one of the terms of which indeterminate permit was that defendant City could only acquire the plant and property of defendant Company at a price equal to its then value as fixed by the Public Service Commission of Indiana; and said legalizing act purports to authorize defendant City to enforce conveyance and to require defendant Company to convey upon the terms fixed in said Franchise and in part repeated in said Articles of Incorporation, to-wit, upon the receipt by the stockholders and holders of certificates of beneficial interest, either from earnings of the Company, or from money paid by defendant City, or from the proceeds of a mortgage to be placed upon the property of defendant Company at the request of defendant City, of the face value of

their stock and/or certificates of beneficial interest, together with the stipulated dividends thereon, which sum is far less than said defendant Company, and indirectly said stockholders and/or holders of certificates of beneficial interest, including plaintiff, would receive if defendant City were to acquire the plant and property of defendant Company as provided for in said Shively-Spencer Utility Commission Act.

XXIII.

Plaintiff and numerous other persons, subsequent to the issuance of said indeterminate permit in 1921 and prior to the passage of said legalizing act of 1929, purchased, acquired still hold and own certificates of beneficial ownership in the common stock of defendant Citizens Gas Company of Indianapolis, having paid therefor amounts far in excess of what their value would have been if the said City had possessed the right thereafter to acquire the Company's property in the manner now asserted by said City. Said legalizing act, in so far as it purports to validate and make binding upon defendant Company certain of the aforesaid invalid and non-binding provisions of said Articles of Incorporation after the rights of plaintiff and the said other certificate holders had vested, deprives them of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and takes private property without just compensation in violation of Article I, Section 21, of the Constitution of the State of Indiana, and grants to certain citizens or classes of citizens, namely, the defendant City, privileges or immunities which, upon the same terms, do not equally belong to all citizens, in violation of Article 1, Section 23, of the Constitution of the State of Indiana.

XXIV.

Said legalizing act of 1929 not only purports to legalize articles of incorporation containing the provisions therein stated, but also purports to grant to municipal corporations power to acquire the property of a public utility without submitting the question of the acquisition of said property to a general election, and also purports to remove determination of the terms of acquisition of such utility property from the jurisdiction of the Public Service Commission. Said act does not deal with but one subject and the matters properly connected therewith, but deals with three

separate and unrelated subjects, viz., (a) the legalizing of said Articles of Incorporation, (b) the powers of said municipal corporations, and (c) the jurisdiction of the Public Service Commission, and as such is in violation of Article IV, Section 19, of the Constitution of the State of Indiana, and is void.

XXV.

By reason of the facts heretofore alleged in paragraph XX of this bill, which are hereby referred to and by reference made a part of this paragraph, said legalizing act of 1929 grants to certain citizens or classes of citizens, viz., defendant City of Indianapolis, privileges or immunities which, upon the same terms, do not equally belong to all citizens, and said legalizing act of 1929 constitutes special legislation aimed solely at defendant Citizens Gas Company of Indianapolis in violation of Article I, Section 23, of the Constitution of the State of Indiana.

XXV-A.

By reason of the facts heretofore alleged in paragraph XX of this bill, which are hereby referred to and by reference made a part of this paragraph, said legalizing act of 1929 attempts to create a corporation, not a banking corporation, by special act, and not under general laws, in violation of Article XI, Section 13, of the Constitution of the State of Indiana.

XXVI.

The provisions in Section 1, Clause (g) of the aforesaid Franchise Contract of August 30, 1905, and repeated in Article X of the Articles of Incorporation of defendant Company, that the gas plant and property of said Company shall be conveyed to said City when the said certificate holders shall have received by dividends or otherwise the face value thereof with interest thereon at the rate of ten per cent per annum purports to create an interest in real and personal property to vest upon a contingency which might occur at a time more remote from the date of the creation of such right, than the period of a life or lives then in being and twenty-one years thereafter, and such provisions were in violation of the common law of the State of Indiana and are now and at all times have been

illegal, null, void and unenforceable by defendant City of Indianapolis.

XXVII.

The option or right of defendant City of Indianapolis to demand the conveyance of the property of the Citizens Gas Company of Indianapolis, under the provisions of Sections 1, 2 and 22 of the aforesaid Franchise Contract of August 30, 1905, and in part repeated in Article XII of the Articles of Incorporation of defendant Gas Company, by its terms might be exercised at a time more remote from the date of the creation of such option or right than the period of a life or lives then in being and twenty-one years thereafter, and is in violation of the common law of the State of Indiana and is now and at all times has been illegal, null, void and unenforceable by defendant City of Indianapolis.

XXVIII.

Under the provisions of the aforesaid Franchise, in part repeated in said Articles of Incorporation, defendant City of Indianapolis claimed an option or right to acquire the property of defendant corporation on or before the expiration of the term and period of said Franchise. The term and period of said Franchise expired on the 27th day of August, 1921, when said Franchise was surrendered by defendant Company, and in lieu thereof an intermediate permit was accepted under the terms and provisions of the Shively-Spencer Utility Commission Act. The defendant City took no steps to exercise the alleged option at or prior to said 27th day of August, 1921, and in truth and fact took no steps whatever looking toward the acquisition of said plant and property until the 20th day of March, 1929, at which time the term and period of said Franchise had long since expired, and the attempt on said 20th day of March, 1929, to exercise said option was and is of no effect, because the period within which said option must, by its terms, have been exercised, terminated on the 27th day of August, 1921.

XXIX.

Under the terms and provisions of Sections 100, 101, 102, 105 and 106 of said Shively-Spencer Utility Commission Act, defendant City of Indianapolis is without the power to purchase or acquire a public utility, except according to the terms and conditions fixed by the Public Service Commission of Indiana. Defendant City of Indianapolis has not proceeded under the terms of said Shively-Spencer Utility Commission Act in making its aforesaid demand, and the Public Service Commission of Indiana has neither ordered nor approved the acquisition by defendant City of the plant and property of defendant Company, nor determined the value of said plant and property, nor affixed the terms and conditions of such acquisition. The demand of defendant City upon the officials of defendant Citizens Gas Company of Indianapolis, as heretofore set forth, is therefore ultra vires and void.

XXX.

At the time of the execution and approval of the aforesaid Franchise, and of the incorporation of defendant Citizens Gas Company of Indianapolis, and of the service upon defendant Company and its directors and trustees of the demand of the Board of Public Works, heretofore referred to, there was and is now in force in the State of Indiana an act entitled "An Act concerning municipal corporations," approved March 6, 1905. By the express provisions of Section 93 (Eighth) and Section 249 of said Act, before any municipality could lawfully construct or acquire the property of a public utility, it was and is necessary to submit the question of said construction or acquisition to popular vote at a special or general election under the terms and restrictions contained in said Section 249. At no time has the question of the acquisition of the plant and property of defendant Company by defendant City been submitted to popular vote of the electors of said City under the terms and restrictions of said Section 249. Said attempt, on the part of defendant City, to acquire said plant and property of defendant Company, is therefore ultra vires and void.

XXXI.

Said directors of defendant Company have caused the aforesaid resolutions to be printed and mailed to all holders of the certificates evidencing ownership of the beneficial interest in the common capital stock of defendant Company, including this plaintiff, and have caused said resolutions No. 1 and No. 2 to be published in newspapers in the City of Indianapolis and elsewhere, and have publicly expressed their intentions of acceding to the demands of defendant City and of conveying the plant and property of defendant Company to defendant City in accordance with the foregoing notice and demand, notwithstanding that the only method by which said property may lawfully be transferred from defendant Company to defendant City is under the terms and provisions of Sections 100, 101 and 102 of said Shively-Spencer Utility Commission Act. Said directors and trustees will carry out said threats, and will pay said "capital dividend," and will convey said plant and property of defendant Company, pursuant to said demand by defendant City, unless restrained and enjoined from such action.

XXXII.

The aforesaid record of said Franchise and Articles of Incorporation, and the purported amendments thereto, under date of August 27, 1921, and the aforesaid acts, proceedings, and threatened acts and proceedings of defendants City of Indianapolis, Citizens Gas Company of Indianapolis and the other defendants herein, create a cloud upon the title of defendant Citizens Gas Company of Indianapolis to its plant and property, greatly impair the value thereof, and render the sale of said property at an adequate price impossible, and impair the value of the stock and certificates of beneficial interest therein held by plaintiff and all others in a similar situation.

XXXIII.

The aforesaid notice and demand of defendant City of Indianapolis and the acquiescence therein of the individual defendants, constituting the Board of Directors and the Board of Trustees of defendant Citizens Gas Company of Indianapolis, will, if carried into effect, compel defendant

Company to convey its property at a tremendous loss, and compel plaintiff and all others in like situation to accept the sum of $25 per share in full satisfaction of all their rights as holders of certificates of beneficial interest in the common stock of defendant Company, instead of a much larger sum, the amount of which is uncertain and unknown and can only be ascertained by a valuation of the plant and property of defendant Company by the Public Service Commission of Indiana, as provided in the Shively-Spencer Utility Commission Act. The amount of said damage is large and cannot be definitely ascertained, and by reason of the aforesaid facts, the action of defendant City of Indianapolis and of the other defendants herein has caused, and is causing great and irreparable injury and damage to defendant Citizens Gas Company of Indianapolis and the plaintiff, and all others in a similar situation.

Prayer.

Inasmuch, therefore, as the plaintiff is without adequate remedy at law and can obtain relief only in a court of equity, plaintiff prays:

1. That writs of subpoena be issued to each of the defendants, requiring each of them to answer this complaint fully and truthfully, but not under oath, an answer under oath being hereby expressly waived as to each and all of said defendants.

2. That defendant City of Indianapolis and defendants L. Ert Slack, as Mayor of the City of Indianapolis, William A. Boyce, Jr., as City Clerk of the City of Indianapolis, Theodore H. Dammeyer, John C. McCloskey and Emsley W. Johnson, as and constituting the Board of Public Works of the City of Indianapolis, and their successors in office be each and all forever enjoined, after final hearing, from asserting any right, title or interest, present or future, in and to any of the property of defendant Citizens Gas Company of Indianapolis by virtue of the aforesaid Franchise, and or Articles of Incorporation, and or by virtue of the apparent force of said legalizing act of 1929, or from attempting to acquire the same in any manner other than pursuant to the terms and conditions of the Shively-Spencer Utility Commission Act.

3. That defendant Citizens Gas Company of Indianapolis and defendants Welch, Efroymson, Hornbrook, Insley, Kirk, Hooker, Vonnegut, Dissette, Evans, Schnull,

Lieber, Swift, Sullivan and Kahn, and their successors in office, be forever restrained and enjoined, after final hearing, from carrying into effect the provisions of the aforesaid Resolutions No. 1 and No. 2, and the resolution of the Board of Trustees heretofore referred to, and from paying a capital dividend of $5.00 per share, or any other amount, upon the common stock of defendant Citizens Gas Company of Indianapolis, or upon the certificates of beneficial interest in said stock, and from taking any steps of any kind or character, acknowledging, admitting or recognizing any right in, or asserted by, defendant City of Indianapolis, its officers, agents or employees, now or hereafter, to acquire the plant and property of defendant Citizens Gas Company of Indianapolis, other than in the manner and subject to the terms and conditions prescribed by the Shively-Spencer Utility Commission Act.

4. That this Court order and decree that the claims of defendant City of Indianapolis of any right, now or hereafter, to acquire the plant and property of defendant Citizens Gas Company of Indianapolis, under the aforesaid Franchise and or Articles of Incorporation, and or by virtue of the apparent force of said legalizing act of 1929 are illegal, unfounded and without right, and constitute a cloud upon the title of defendant Citizens Gas Company of Indianapolis to its plant and property aforesaid, and that the title of defendant Citizens Gas Company of Indianapolis to its said plant and property be quieted and forever set at rest as against said illegal and unfounded claims of defendant City of Indianapolis, its officers, agents, attorneys, servants and employees.

5. That this Court grant to plaintiff such other and further relief as may be deemed proper in the premises.

Barnes & Johnson,
Matson, Carter, Ross & McCord,
Solicitors for Plaintiff.

Frederick E. Matson,
Earl B. Barnes,
Austin V. Clifford,
Of Counsel.

(Signed) Frederick E. Matson
Earl B. Barnes
Austin V. Clifford

State of Indiana, } ss.
Marion County. }

NEWTON TODD, being first duly sworn, upon his oath says:

That the matters and facts stated in the foregoing bill of complaint are true as he is informed and verily believes.

(Signed) Newton Todd.

Subscribed and sworn to before me this 30th day of April, 1929.

(Signed) Thelma Geis,
(Seal) *Notary Public.*

My Commission Expires Jan. 25, 1931.

1155 PLAINTIFFS' STIPULATION EXHIBIT 31.

Answer of City of Indianapolis, et al., in Todd Case.

This answer is copied on pages 115-152, inclusive, of the Record in the United States Circuit Court of Appeals for the Seventh Circuit in the case of *Todd* v. *Citizens Gas Company of Indianapolis, et al.*, Plaintiffs' Exhibit 2 for Identification, which original exhibit is included in this transcript by order of the Court.

* * (Caption) * *

SEPARATE AND SEVERAL ANSWER OF DEFENDANTS, CITY OF INDIANAPOLIS; L. ERT SLACK, AS MAYOR OF THE CITY OF INDIANAPOLIS; WILLIAM A. BOYCE, JR., AS CITY CLERK OF THE CITY OF INDIANAPOLIS; THEODORE H. DAMMEYER, JOHN C. McCLOSKEY, AND EMSLEY W. JOHNSON, AS AND CONSTITUTING THE BOARD OF PUBLIC WORKS OF THE CITY OF INDIANAPOLIS, TO PLAINTIFF'S BILL OF COMPLAINT.

City of Indianapolis; L. Ert Slack, as Mayor of the City of Indianapolis; William A. Boyce, Jr., as City Clerk of the City of Indianapolis; Theodore H. Dammeyer, John C. McCloskey, and Emsley W. Johnson, as and constituting the Board of Public Works of the City of Indianapolis,

defendants in the above cause, for answer to plaintiff's bill of complaint, say:

1. These answering defendants admit all the allegations contained in each of the following numbered subdivisions of plaintiff's bill of complaint numbered One, Four, Six, Seven, Fourteen, and Seventeen.

2. These answering defendants deny the allegations of Subdivision II of the complaint that the plaintiff is the owner of 250 shares of the common capital stock of defendant Citizens Gas Company of Indianapolis, but allege that although there was delivered to the Trustees of the Citizens Gas Company certificates reciting that the plaintiff was the owner of shares of stock in said Citizens Gas Company, in the form set forth in Subdivision IX of the complaint herein, such certificates were at all times held by the Trustees of the Citizens Gas Company subject to the provisions of the Articles of Association of said company as set out in Subdivision VII of the complaint herein, and the only interest in said stock held by the plaintiff was that evidenced by the certificates of beneficial ownership issued to the plaintiff by the Trustees of said Citizens Gas Company in the form set out in Subdivision 15 of this answer. Pursuant to the plan as established at the time of the organization of said Citizens Gas Company, for the purpose of carrying out the limitations upon the interest of subscribers to the capital stock of the Citizens Gas Company and establishing the public charitable trust in and to the property of said Citizens Gas Company, as more particularly alleged in Subdivision 15 of this answer, all the stock of said Citizens Gas Company was delivered to the Trustees of said Citizens Gas Company of Indianapolis, and trustees' certificates representing the beneficial interest of the subscribers were issued to all subscribers to the capital stock of said company and to their several assignees, including the plaintiff herein, and neither the plaintiff nor any person similarly situated ever had, or claimed the right to hold, or requested the possession of, any stock certificate of said company or any other evidence of his interest therein than such trustees' certificates representing their beneficial interest; and these defendants allege that plaintiff acquired and holds said certificates and each of them subject to all the terms and conditions of the ordinance and franchise set out in Subdivision Six of plaintiff's bill of complaint, originally granted to Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, and by said individuals assigned to

defendant Citizens Gas Company on the 24th day of May, 1906, of the original Articles of Association of said Citizens Gas Company set out in Subdivision Seven of plaintiff's bill of complaint and the amendments thereto set out in Subdivision Eleven of plaintiff's bill of complaint, of the provisions contained in said trustees' certificates and subscriptions for the common capital stock of the Citizens Gas Company, as hereinafter in Subdivision 15 of this answer set out and also subject to all the terms and conditions of a public charitable trust created in the property of the Citizens Gas Company of Indianapolis in favor of the City of Indianapolis in trust for the inhabitants and/or gas consumers of said city as more specifically alleged in Subdivision 15 of this answer.

These answering defendants further admit that plaintiff brings this suit on behalf of himself and all others claiming similar rights in the common stock of the Citizens Gas Company, defendant hereto. who may wish to join in this suit and contribute to the expense thereof, and that plaintiff is attempting to assert corporate rights and immunities of defendant Citizens Gas Company of Indianapolis; these answering defendants further admit that the amount in controversy herein exceeds, exclusive of interests and costs, the sum or value of $3,000.00.

These answering defendants admit that this is a suit in equity, but deny that it arises under the Constitution of the United States and deny that there has been any threatened deprivation under color of any statute of the State of Indiana of any rights, privileges or immunities secured to the defendant Citizens Gas Company of Indianapolis or to plaintiff or others similarly situated by the Constitution of the United States.

These answering defendants further admit that plaintiff seeks in this action to quiet the title of said defendant Citizens Gas Company of Indianapolis to certain real and personal property situated within the Southern District of Indiana as against the claims and demands of the City of Indianapolis and its officers, but deny that the claims so asserted are based exclusively upon a certain franchise and Articles of Incorporation and an Indiana statute purporting to legalize such Articles of Incorporation and allege that the bases upon which said claims are asserted are more fully set forth in Subdivisions 15 and 16 of this answer. These answering defendants deny that the statute referred to deprives the defendant Citizens Gas Company of Indianapolis, the plaintiff or others similarly situated

of any rights, privileges or immunities secured to them by the Constitution of the United States.

3. These answering defendants admit all of the averments contained on Subdivision Three of the plaintiff's bill of complaint except the averment that the trustees of the Citizens Gas Company hold the stock of said Company in the voting trust provided for in Articles 6, 7 and 8 of said Citizens Gas Company, answering which these defendants allege that said trustees hold said stock not only in a voting trust but subject to all the terms and conditions of the trust in the property of the Citizens Gas Company, as set out in the Articles of Association of said Company, and as hereinafter set out in Subdivision 15 hereof, and except the averment that the trustees' certificates issued to the plaintiff and other holders thereof evidence the entire beneficial ownership of the shares of stock represented thereby, but on the contrary aver that the holders of said beneficial certificates acquired and hold the same subject to all of the terms and conditions heretofore set out in Subdivision 2 of this answer and hereafter set out in Subdivision 15 hereof.

4. These answering defendants admit that there were issued to the plaintiff the certificates of beneficial ownership described in Subdivision Five of the plaintiff's bill of complaint at the times herein stated and further admit that this suit is not a collusive one to confer on a court of the United States jurisdiction over a suit of which it would not otherwise have cognizance, but deny that by reason of the issuance of such certificates the plaintiff acquired the entire beneficial ownership of 250 shares of the common capital stock of defendant Citizens Gas Company of Indianapolis, but on the contrary allege that plaintiff at the time he acquired said certificates and continuously since such time was bound by all the terms and conditions more particularly set forth in Subdivisions 2 and 15 of this answer.

4a. These answering defendants for answer to the averments of Subdivision VIa of the plaintiff's complaint admit that during the year 1905 and prior thereto the Indianapolis Gas Company, an Indiana corporation, was furnishing gas in certain portions of the City of Indianapolis, but whether under a franchise, these defendants have no knowledge and leave plaintiff to make proof thereof if deemed necessary; they further admit that during the year 1905 and until the formation of Citizens Gas Com-

pany the Indianapolis Gas Company was the sole company furnishing gas in the City of Indianapolis.

As to the allegation in said complaint, that the rates and service of the Indianapolis Gas Company were unsatisfactory and that it was feared that because of the intrenched position it might be able to absorb through stock ownership any new competing companies, these defendants have not sufficient knowledge to admit or deny the same, but leave the plaintiff to make proof thereof.

These defendants deny that the purpose of the voting trust provided for in the franchise of 1905, as set out in the complaint and in the Articles of Incorporation of the Citizens Gas Company, as set out therein, was to insure that control of defendant Citizens Gas Company should not pass to the Indianapolis Gas Company or its stockholders, and that to that end it was provided that no Voting Trustee of the Citizens Gas Company should be an employee or stockholder of said Indianapolis Gas Company, but on the contrary these defendants allege that such voting trust had for its primary object, and was one of the means of carrying out, the public charitable trust in the property of the Citizens Gas Company as hereinafter alleged.

5. These answering defendants admit the averments contained in Subdivision Eight of the plaintiff's bill of complaint except they do not admit that after the surrender of the franchise of the Citizens Gas Company and the acceptance by said company of an indeterminate permit that the rights of the certificate holders or the City of Indianapolis were in any way changed or affected so far as the public charitable trust in the property of the Citizens Gas Company is concerned.

6. These answering defendants admit the averments contained in Subdivision IX of the plaintiff's bill of complaint, averring that the defendant Citizens Gas Company took subscriptions for its common stock and upon payment of such subscriptions, issued certificates representing its common stock in the form set out in said Subdivision, and that the name of the subscriber and number of shares represented by said certificate were written into such certificates, and that such certificates of stock were placed in the possession and control of the voting trustees, who thereupon issued and delivered to each stockholder, a beneficial certificate, but these defendants deny that such beneficial certificates represented the ownership of said shares of common stock, but only the restricted interest therein

of the beneficial certificate holders, all as more particularly set out in Subdivision 15 of this answer.

These defendants further admit the allegations of said Subdivision of plaintiff's complaint, alleging the increase in the common stock of defendant company and the sale thereof in the manner provided in the Articles of Association of the corporation and the amount of net premium above the face value received therefor; they further admit that for such increase the defendant company issued stock certificates and trustees certificates in the same manner and form as such certificates were issued in connection with the original issue, and defendants further admit that stock certificates in the form above referred to were issued by the Citizens Gas Company for the shares purchased by plaintiff at or shortly before the time when the trustees' certificates were issued and delivered to plaintiff, as alleged in Subdivision IX of the complaint, but allege that such stock certificates did not evidence any absolute ownership in the plaintiff of such shares of stock, but only a restricted interest therein, as more particularly hereinafter set forth.

7. These answering defendants admit the averments contained in the Tenth Subdivision of plaintiff's bill of complaint to the effect that the Shively-Spencer Utility Commission Act became effective May 1st, 1913; that on the 27th day of August, 1921, the Citizens Gas Company of Indianapolis, defendant hereto, filed in the office of the Clerk of the City of Indianapolis the written declaration set out in said subdivision of said answer and that in Cause No. 6178 the Public Service Commission of Indiana entered the written order set out in said paragraph of plaintiff's bill of complaint.

These answering defendants admit that the defendant City of Indianapolis had notice of the proceedings looking to the surrender of the franchise of the Citizens Gas Company and the acceptance of an intermediate permit by that company; that the defendant city took no steps to oppose the surrender of said franchise or the acceptance of said permit and did not at that time or at any time since dispute the legality of such surrender and acceptance or the defendant company's right to operate under said indeterminate permit and made no objection thereto, but acquiesced in such surrender and acceptance and the operation by the defendant company under said indeterminate permit; but these answering defendants deny that such surrender of said franchise or the acceptance of said inde-

terminate permit in any way affected the right of the City of Indianapolis to acquire the plant and property of the defendant Gas Company or the public charitable trust created in favor of the inhabitants and gas consumers of said city and refer the court to Subdivision 17 of this answer wherein is specifically alleged the effect of the surrender of said franchise.

These answering defendants deny that as a result of the certificate so filed by the defendant Citizens Gas Company of Indianapolis and of the action taken by the Public Service Commission of Indiana with respect thereto that the original contract between the City of Indianapolis and the defendant Citizens Gas Company of Indianapolis was entirely rescinded, abrogated and annulled and a new contract substituted therefor, the details of which were and are prescribed in said Shively-Spencer Utility Commission Act, but on the contrary aver that the public charitable trust created in the property of the Citizens Gas Company, as hereinafter more particularly set out in Subdivision 15 of this answer was in no way affected, altered or changed by the surrender of said franchise and the taking out of said indeterminate permit.

7a. These answering defendants admit the averments contained in Subdivision Xa of the complaint, that on or before the 27th day of August, 1921, the Citizens Gas Company was in serious financial embarrassment and that it had been found impossible to earn a sufficient sum from the sale of gas at Sixty Cents (60¢) per thousand cubic feet to pay maturing debts and operating expenses, semi-annual dividends at the rate of 10% per annum, and to make and pay for such extensions and betterments as were ordered by the Board of Public Works of the defendant City of Indianapolis, or as were necessary to meet the needs of the inhabitants of said City and the defendant Citizens Gas Company; they further admit that according to the books of said company, the current assets and liabilities and the amount of paid-in surplus as it has originally existed and as it was on June 30, 1921, were as set out in said subdivision of the complaint. These defendants deny that due to unsatisfactory operations of the said Citizens Gas Company it was impossible for said company, so long as it continued to operate under the provisions of its franchise, to borrow more money on bonds, or to market any stock in order to obtain additional working capital, and they deny that by reason of general business conditions then prevailing it was impossible to dispose of the items of materials

and supplies (although they admit the same as to certain salable products) except at prices far below the figures at which they were carried, and that said condition continued to be substantially the same until said surrender of the franchise and acceptance of an indeterminate permit, and that by reason of such conditions, on August 27, 1921, said company was in imminent danger of insolvency, but on the contrary these defendants say that the financial condition of the company as it then existed did not in any wise arise from the fact that it was operating under said franchise, nor was such condition relieved through the surrender of said franchise in August, 1921, but on the contrary such condition arose from the inadequate rate of 90¢ per thousand cubic feet, which was then being received by said company for gas and which financial condition was changed for the better not as a result of the surrender of such franchise, but as a result of the action of said company instituted in the year 1922, in the United States District Court for the District of Indiana, through which compensatory rates were secured for the use of the property of said company devoted to public service.

8. These answering defendants admit that the Citizens Gas Company of Indianapolis filed in the office of the Secretary of State the document set out in Subdivision Eleven of plaintiff's bill of complaint and further alleged that said document is a certificate of amendment to the Articles of Incorporation of the Citizens Gas Company which was duly and legally adopted by the voting stockholders of said company in accordance with law and that the same became and was effective from the date of the filing thereof, August 27, 1921, and that the amendments therein set forth were duly and legally adopted and constitute valid amendments to the original Articles of Association of the Citizens Gas Company set out in Subdivision Seven of plaintiff's bill of complaint.

For answer to the averments contained in Subdivision XI-A of plaintiff's bill of complaint, these defendants deny that the statutes under which the defendant, Citizens Gas Company, was incorporated, and in force when the amendments to its Articles of Incorporation were made in 1921, contained no sanction or authority for any of the provisions contained in said original Articles or in the amendments thereto in 1921, relating to the payment of certificate holders or the transfer or conveyance of the plant and property of said company to the City of Indianapolis, and deny that all such provisions, and particularly Articles IX,

X, and XII, both in their original and amended form, were and are mere surplusage and null and void and of no effect.

These answering defendants allege that it was at the time of the organization of said company and always since has been the law in Indiana that Articles of Incorporation could contain valid and binding agreements although such agreements were not included in the facts required by law to be stated in the Articles of Incorporation, provided such agreements are not inconsistent with any of the provisions of law. These defendants further allege that the provisions contained in said Articles of Incorporation respecting the payment of certificate holders and the acquisition by the City of Indianapolis of the plant and property of said Gas Company were to evidence the creation of a public charitable trust, all as hereinafter in Subdivision 15 of his answer more particularly alleged, and that the insertion thereof in said Articles of Incorporation and the amendment thereto was legalized by the Act of 1929 hereinafter more particularly referred to.

These defendants deny that the Voting Trustees of said Gas Company were wholly without authority to execute the purported Certificate of Amendment to the Articles of Incorporation of said company or to cause the same to be adopted or filed on behalf of the defendant company, and deny that they had no authority or right under any terms of said Voting Trust or of the original Articles of Incorporation to vote the stock of the company or to take any other steps which would extend, increase or otherwise modify their powers as Voting Trustees or to make any new or amended agreement affecting the rights or the property of said company or its stockholders, and deny that for such reason said purported amendments to said Articles were and are invalid, void and of no effect; and the defendants alleged that said Voting Trustees had full power and authority under the provisions of said Voting Trust as embodied in the Articles of Association of said company and as referred to in the certificates issued representing the stock of said company and the beneficial interest in said stock to vote all the stock of said company and to do all other things as stockholders which it might be found wise or expedient in their judgment to do for the best interests of said company not inconsistent with the objects, provisions and purposes of said trust as embodied in the Articles of Association of said Company; and these defendants allege that all of the amendments so made in

said Articles of Association were consistent with such objects, provisions and purposes and the action of said Voting Trustees in voting said stock for the adoption of such amendments was consistent with and within the power so granted to them.

These defendants further allege that each and every holder and owner of trustees' certificates of beneficial ownership in the first million dollars of capital stock issued by the Gas Company agreed, in the manner alleged in subdivision 15 hereof, by the execution of the subscription agreement and the acceptance of the trustees' certificates as therein alleged, to the inclusion in said articles of incorporation of said provisions, and each and every holder of trustees' certificates of beneficial ownership in the second million dollars of said capital stock, by buying pursuant to the published notice referred to in subdivision 15 hereof, and by accepting the trustees' certificates referred to in subdivision 15 hereof ratified and agreed to the inclusion of said provisions in said articles of incorporation and these defendants say that by reason of the foregoing facts, neither these plaintiffs nor any others similarly situated, can now object to the said agreement contained in said articles of incorporation nor question the validity of such provisions in said articles or in the amendments thereto.

9. These answering defendants admit the averments contained in Subdivision Twelve of plaintiff's bill of complaint that the defendant Citizens Gas Company now has outstanding first mortgage bonds in the total amount of Three Million Four Hundred and Four Thousand Dollars ($3,404,000), bearing interest at the rate of five per cent. per annum; has outstanding preferred stock of the face value of One Million Dollars ($1,000,000) entitled to cumulative dividends at the rate of five per cent. per annum and has outstanding common stock in the face amount of Two Million Dollars ($2,000,000), but allege that all of said common stock is held by the defendants, Gustav A. Schnull, Robert Lieber, Lucius B. Swift, Thomas L. Sullivan and Henry Kahn as voting trustees of said common stock pursuant to the Articles of Incorporation and the amendments thereto of said Citizens Gas Company, and as provided by law; these answering defendants further allege that beneficial certificates have been issued by said voting trustees representing the interest of the holders thereof in the common stock of the company, but allege that the holders of such beneficial certificates are entitled to dividends thereon, payable out of earnings at the rate of ten per cent.

per annum, payable semi-annually, only so long as the face value of such benefit certificates, viz: $25 each remains unpaid and that if and as any partial payment is made thereon future dividends are to be paid at the rate of ten per cent. per annum only upon the remaining unpaid portion of the face value of such certificates.

These answering defendants further admit that the net earnings of the defendant Citizens Gas Company of Indianapolis from January 1st, 1929, to August 30th, 1930, together with existing earned surplus, will not be sufficient to redeem and retire the preferred stock of said defendant Citizens Gas Company of Indianapolis and also to pay to the holders of beneficial certificates an amount equal to the face value thereof together with interest thereon at the rate of ten per cent. per annum; these answering defendants further admit that the individual defendants who are directors and trustees of said Citizens Gas Company of Indianapolis have not at this or any previous time undertaken nor asserted that they would undertake to pay to the certificate holders the entire face value of such certificates with dividends thereon at this time.

These answering defendants deny that the City of Indianapolis knew that it could not become entitled under the terms of Section 1, Clause "G" of the franchise set out in the Sixth (6th) Subdivision of plaintiff's bill of complaint and in Article Ten (10) of the Articles of Incorporation of said company to a conveyance of the plant and property of said defendant on or before August 30th, 1930; but on the contrary allege that, properly interpreted, said subdivision of said franchise and the Articles of Incorporation of the Citizens Gas Company authorize and permit the transfer of the plant and property of the Citizens Gas Company of Indianapolis to the City of Indianapolis when the certificate holders have received either by dividends or otherwise an amount equal to the face value of such certificates together with interest thereon at the rate of ten per cent. per annum and these answering defendants further allege that it is wholly immaterial whether said payments are made by way of dividends or from any other source and that upon said payments being made to the extent of the face value of said certificates with interest at the rate of ten per cent. per annum, all interest of the certificate holders in the property and plant of the Citizens Gas Company of Indianapolis ceases and that the City of Indianapolis is thereupon entitled to receive a conveyance of such property.

These answering defendants admit that the City of Indianapolis did proceed through its Board of Public Works to assert its right to acquire the plant and property of the defendant Citizens Gas Company of Indianapolis by adopting a certain resolution on March 20, 1929, and by serving the same upon the Citizens Gas Company of Indianapolis, its trustees and directors; but these answering defendants deny that the demand of said city set out in Subdivision Fourteen of the plaintiff's bill of complaint is predicated or based exclusively upon the provisions of Section 22 of the franchise of the Citizens Gas Company as repeated in Article Twelve (12) of the Articles of Incorporation of said company, but allege that said demand was in the form and tenor set out in the Fourteenth Subdivision of plaintiff's bill of complaint and that in such demand the defendant City of Indianapolis, asserted its right to said property not only under the franchise, the Articles of Incorporation and the amendments thereto, the certificates issued to the subscribers of the common stock of the Citizens Gas Company, but under all statutes and laws of this State.

10. These answering defendants admit the averment contained in Subdivision Thirteen of the plaintiff's bill of complaint as to the enactment by the 76th General Assembly of the State of Indiana of a bill, the title of which is correctly set forth in said Subdivision of plaintiff's bill of complaint. These answering defendants deny that said Act was directed solely at the Articles of Incorporation of the defendant Citizens Gas Company of Indianapolis, but on the contrary allege that said law is a general law applicable to all companies covered by the terms of said Act. These answering defendants admit that said bill contained an emergency clause and that it did become a law on the 11th day of March, 1929.

These defendants further allege that if said Act is a special law and only applicable to the Citizens Gas Company and said City that it is valid: that the General Assembly of the State of Indiana could have authorized the inclusion in the articles of incorporation of such corporations of the provisions contained in the articles of the Citizens Gas Company before the same was formed, and it legally could and did legalize such provisions by said Act of 1929.

These answering defendants admit that said bill was prepared by the legal department and special counsel of the City of Indianapolis employed for the purpose of

bringing about a transfer of the plant and property of the defendant Citizens Gas Company of Indianapolis to the City of Indianapolis; that said bill was passed in the exact form prepared and submitted by said counsel for the defendant City without change or amendment of any kind or character, and that it was introduced in the House of Representatives of the General Assembly by members residing in the City of Indianapolis and elected from Marion County; but while admitting said averments of Subdivision Thirteen of plaintiff's bill of complaint last above referred to, these answering defendants say that said averments are wholly immaterial and without any legal effect whatever.

11. These answering defendants admit that on the 3rd day of April, 1929, the directors of defendant, Citizens Gas Company of Indianapolis, in meeting assembled, adopted two resolutions designated in Subdivision Fifteen of Plaintiff's Bill of Complaint as "Resolution No. 1" and "Resolution No. 2," and that correct copies of the said resolutions are set out in said Subdivision of plaintiff's bill of complaint; but these answering defendants deny that said action so taken by the directors of said Citizens Gas Company of Indianapolis was or is in violation of the rights of defendant, Citizens Gas Company of Indianapolis, or of plaintiff or others similarly situated in any particular whatsoever.

12. These answering defendants admit the averments contained in Subdivision Sixteen of the plaintiff's bill of complaint that the resolutions adopted by the Board of Directors of the Citizens Gas Company on April 3, 1929, as set out in Subdivision Fifteen of the plaintiff's bill of complaint were approved by the Board of Trustees of said Citizens Gas Company of Indianapolis by a resolution adopted at a meeting of said Board of Trustees on April 3, 1929, and that a correct copy of said resolution of said Board of Trustees is set out in Subdivision Sixteen of plaintiff's bill of complaint. These answering defendants deny that said action of said Board of Trustees was or is in violation of rights of the defendant Citizens Gas Company of Indianapolis or of plaintiff or others similarly situated in any particular whatsoever.

13. These answering defendants admit the averments contained in Subdivision Eighteen of the plaintiff's bill of complaint to the effect that on the 27th day of April, 1929, the plaintiff served upon the defendants, constituting the Board of Directors of the Citizens Gas Company of In-

dianapolis, a written demand, a correct copy of which is set out in said Subdivision of plaintiff's bill of complaint and admit that any further demand upon the body of the common stockholders of the defendant company would have been futile and unavailing and admit that said demand so made on the Board of Directors by plaintiff was denied and admit that said Board of Trustees claims the exclusive right to vote all the common stock of the Citizens Gas Company of Indianapolis, including the right to elect the Board of Directors thereof, but deny that said Board of Directors or said Board of Trustees of the Citizens Gas Company of Indianapolis has refused to act for the protection of the stockholders but on the contrary allege that both said Board of Directors and said Board of Trustees have at all times acted in accordance with the legal rights of said holders of beneficial certificates, although said answering defendants admit the refusal to comply with the demand of plaintiff.

14. That with respect to the averments contained in Subdivisions nineteen to thirty-three both inclusive of plaintiff's bill of complaint, these answering defendants say:

(a) These answering defendants deny that the franchise contract a correct copy of which is set out in Subdivision Six of the plaintiff's bill of complaint, was in all respects rescinded, abrogated and annulled and a new agreement substituted therefor by the act of the Citizens Gas Company of Indianapolis in taking the action set out in Subdivision Ten of plaintiff's bill of complaint; deny that the effect of said action was the creation of a wholly new contract between the State and the Citizens Gas Company of Indianapolis and deny that one of the terms of said alleged contract was that the defendant City of Indianapolis should have the right to acquire the property of the defendant company under terms and conditions and at its then value as determined and prescribed by the Public Service Commission of Indiana; deny that the Citizens Gas Company of Indianapolis relinquished all of the rights and remedies secured to it by its contract with the City of Indianapolis and thereafter possessed only such rights and remedies as were granted to it under the Shively-Spencer Utility Act; deny that the Articles of Incorporation of the defendant company and the amendments thereto were by implication or otherwise modified by the Shively-Spencer Utility Act, and deny that there is any inconsistency between said Articles of Incorporation

and the Shively-Spencer Utility Act; deny that Articles 10 and 12 of the Articles of Incorporation of the Citizens Gas Company of Indianapolis were abrogated, rescinded or superceded by the acceptance by said company of said indeterminate permit; deny that the passage by the General Assembly of Indiana of the Legalizing Act of 1929, impaired the obligations of any contract between the State and the defendant company in violation of Article I, Section 10 of the Constitution of the United States and in violation of Article I, Section 24 of the Constitution of Indiana; deny that said Legalizing Act of 1929 is void and of no effect; deny that said Legalizing Act impairs the obligation of any contract between the State of Indiana and the Citizens Gas Company of Indianapolis; deny that by virtue of the surrender of said franchise and the acceptance of said indeterminate permit any contract exists or ever has existed between the defendant Citizens Gas Company of Indianapolis and the State of Indiana so far as said public charitable trust is concerned, but on the contrary allege that a public charitable trust was created in the plant and property of the Citizens Gas Company of Indianapolis in favor of the inhabitants and/or gas consumers of the City of Indianapolis, all as more particularly alleged in Subdivision 15 of this answer; and allege that no act of the Citizens Gas Company of Indianapolis or of the City could in any way alter, modify or impair said public charitable trust, or deprive the beneficiaries thereof, viz: the inhabitants and/or gas consumers of Indianapolis, of their interest in said property constituting such public charitable trust.

(b) These answering defendants admit that there are correctly set forth in Subdivision Twenty of plaintiff's bill of complaint, portions of certain statutes of the State of Indiana; deny that the Legalizing Act of 1929 denies to the Citizens Gas Company of Indianapolis, defendant hereto, the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States or that it is a special law directed at and applicable to the defendant Citizens Gas Company of Indianapolis alone, but on the contrary allege that said Legalizing Act of 1929 is a valid law and that the classification therein contained is general and proper. They further deny that the classification made by said Act of 1929 is unreasonable, irrational or arbitrary in any of the particulars set forth in said Subdivision of plaintiff's complaint, or in any other particular.

These answering defendants refer to Subdivision 16 of this answer in which is set forth the bases upon which the Legalizing Act of 1929 can properly be sustained, and in which facts are stated showing that the plaintiff's interests are not adversely affected by said act.

(c) These answering defendants deny that said Legalizing Act of 1929 deprives the defendant Citizens Gas Company of Indianapolis of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States in any of the particulars set forth in Subdivision Twenty-one of plaintiff's complaint or in any other particular; deny that the acceptance of an indeterminate permit by the Citizens Gas Company of Indianapolis resulted in the abrogation of the franchise and articles of incorporation of the defendant company, or that thereby the defendant City of Indianapolis could only acquire the plant and property of the Citizens Gas Company at its then value through an application to the Public Service Commission of the State of Indiana. And reference is hereby made to Subdivision 17 of this answer in which these answering defendants allege the effect of the acceptance of said indeterminate permit.

(d) These answering defendants deny that said Legalizing Act of 1929 in any respect violates Article 1 of Section 21 of the Constitution of Indiana in any of the particulars set out in Subdivision Twenty-two of the plaintiff's bill of complaint or in any other particular; deny that the result of accepting said indeterminate permit under the Shively-Spencer Utility Act was that the City of Indianapolis could only acquire the plant and property of the defendant company at a price equal to its then value as fixed by the Public Service Commission of Indiana; deny that said Legalizing Act takes private property without just compensation in any of the particulars alleged in said Subdivision Twenty-two of the plaintiff's complaint or in any other particular; and deny that the original franchise contract, the Articles of Incorporation and the amendments thereto of the Citizens Gas Company were abrogated by the acceptance of said indeterminate permit in whole or in part so far as the right of the City of Indianapolis to acquire the property of the Citizens Gas Company was concerned.

(e) That with respect to the averments contained in Subdivision Twenty-three of the plaintiff's bill of complaint to the effect that the plaintiff and numerous other persons subsequent to the issuance of said indeterminate

permit in 1921 and prior to the passage of said Legalizing Act of 1929, purchased, acquired and still hold and own said certificates of beneficial ownership in the common stock of Citizens Gas Company having paid therefor amounts far in excess of what their value would have been if said City had possessed the right thereafter to acquire the company's property in a manner now asserted by said City, these answering defendants neither admit nor deny said averments but leave plaintiff to his proof thereof, but aver that during all of said time the City of Indianapolis did have the right to acquire the property of the Citizens Gas Company in the manner and for the considerations now asserted by said City of Indianapolis. These answering defendants deny that said Legalizing Act of 1929 deprives the certificate holders, including plaintiff, of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States or takes private property without just compensation in violation of Article 1, Section 21 of the Constitution of the State of Indiana, or grants to certain citizens or classes of citizens, namely, the defendant City of Indianapolis, privileges or immunities which upon the same terms do not equally belong to all citizens, in violation of Article I, Section 23 of the Constitution of the State of Indiana, but on the contrary allege that said Legalizing Act of 1929 is not invalid because of any of the provisions of the Constitution of Indiana or the Constitution of the United States.

(f) These answering defendants deny that the Legalizing Act of 1929 deals with three separate and unrelated subjects in violation of Article 4 Section 19 of the Constitution of the State of Indiana, and deny that said Legalizing Act is void, but on the contrary allege that it deals with a single subject and matters properly connected therewith.

(g) These answering defendants deny that by reason of the facts alleged in Paragraph 20 of the plaintiff's bill of complaint, which are made by reference a part of Paragraph 25 thereof, that said Legalizing Act of 1929 grants to certain citizens or classes of citizens, viz., the defendant City of Indianapolis, privileges or immunities which upon the same terms do not equally belong to all citizens or that said Legalizing Act of 1929 constitutes special legislation, aimed solely at defendant Citizens Gas Company of Indianapolis, in violation of Article 1, Section 23 of the Constitution of the State of Indiana; deny that said Le-

galizing Act creates a corporation, not a banking corporation, by special act in violation of the Indiana Constitution.

(h) These answering defendants deny the averments contained in Subdivision Twenty-six of the plaintiff's bill of complaint that the provisions in Section 1, Clause (g) of the franchise contract of August 30, 1905, and also contained and incorporated in Article 10 of the Articles of Incorporation of the Citizens Gas Company of Indianapolis to the general effect that the gas plant and property of said company shall be conveyed to said City when said certificate holders shall have received by dividends or otherwise the face value thereof with interest thereon at the rate of ten per cent. per annum, purports to create or does create an interest in real and personal property to vest upon a contingency which might occur at a time more remote from the date of the creation of such right than the period of a life or lives in being and twenty-one years thereafter; deny that such provisions were or are in violation of the common law of the State of Indiana, and deny that said provisions now are or ever were illegal, null, void or unenforceable by the defendant City of Indianapolis, but on the contrary aver that said provisions are valid and do not offend against the common law of Indiana or any statute of this state.

(i) These answering defendants deny the averments contained in Subdivision Twenty-seven of the plaintiff's bill of complaint that the option (if such provision should be construed as an option) or right of the defendant City of Indianapolis to demand the conveyance of the property of the Citizens Gas Company of Indianapolis under the provisions of the franchise contract of August 30, 1905, and the provisions of Article 12 of the Articles of Incorporation, is in violation of the common law of Indiana or that such provision is or ever has been illegal, null, void or unenforceable by the defendant City of Indianapolis for the reason that its terms might be exercised at a time more remote from the date of the creation of such option and right than the period of a life or lives in being and twenty-one years thereafter, but on the contrary allege that the right so granted and given to the City of Indianapolis is and always has been valid and enforceable under the statutes and law of this State.

(j) These answering defendants deny the averments contained in Subdivision Twenty-eight of the plaintiff's bill of complaint that the right of the City of Indianapolis

to acquire the property of the Citizens Gas Company of Indianapolis expired on the 27th day of August, 1921, when the Citizens Gas Company of Indianapolis accepted an indeterminate permit under the terms and provisions of the Shively-Spencer Utility Act, and further deny that said franchise, insofar as it evidenced the right of the City to acquire said plant and property, was in any way affected by the acceptance of said indeterminate permit; but on the contrary allege that the public charitable trust created in the property of the Citizens Gas Company as hereinafter in Subdivision 15 of this answer set forth, was wholly unaffected by the acceptance of said indeterminate permit.

These answering defendants admit that the City of Indianapolis did not attempt to exercise the right which it had to acquire the property and plant of the Citizens Gas Company of Indianapolis prior to March 20, 1929, but deny that the rights of the City had at that time expired and deny that the City's right to acquire the property of said Citizens Gas Company of Indianapolis terminated on the 27th day of August, 1921, but allege that such right has not now terminated but on the contrary exists.

(k) These answering defendants deny the averments contained in Subdivision Twenty-nine of the plaintiff's bill of complaint that under Sections 100, 101, 102, 105 and 106 of said Shively-Spencer Utility Commission Act the defendant City of Indianapolis is without power to purchase or acquire a public utility except according to the terms and conditions fixed by the Public Service Commission of Indiana; but on the contrary allege that the City of Indianapolis has the right to acquire the property and plant of the Citizens Gas Company under the terms of said public charitable trust, and by virtue, among other things, of said Legalizing Act of 1929.

These answering defendants admit that the defendant City of Indianapolis has not proceeded under the terms of said Shively-Spencer Utility Act in making its demand upon the Citizens Gas Company of Indianapolis, and admit that the Public Service Commission of Indiana has neither ordered nor approved the acquisition by defendant City of the plant and property of defendant Company nor determined the value of said plant and property, nor fixed the terms and conditions of such acquisition, and allege that under the law of Indiana as applicable to the property and plant of the Citizens Gas Company, the Public Service Commission of Indiana has no jurisdiction

whatever to determine whether such a conveyance will be made, the price to be paid or to annex any conditions whatever to such transfer, but is wholly without jurisdiction in the premises.

These answering defendants further deny that the demand of the defendant City upon the officials of defendant Citizens Gas Company of Indianapolis was ultra vires and void, but on the contrary allege that it was a valid and legal demand.

(l) These answering defendants admit that the question of the acquisition of the plant and property of the Citizens Gas Company of Indianapolis by the City of Indianapolis has never been submitted to a popular vote of the electors of said City under the terms of Sections 93 and 249 of an Act entitled "An Act Concerning Municipal Corporations," approved March 6, 1905. These defendants admit that said Sections are now in force, but allege that they have no application whatever to the acquisition by the City of Indianapolis of the plant and property of the Citizens Gas Company of Indianapolis.

These defendants say that under the terms of Section 53 of the aforesaid Act of 1905 the Common Council of said City had power by ordinance to receive and accept public trusts and to agree to conditions and terms accompanying the same and bind such City to carry them out, and said defendants further allege that independently of statutory authority said City had power to accept and execute public trusts.

These answering defendants deny that the attempt on the part of the defendant City to acquire said plant and property is therefore ultra vires and void.

(m) These answering defendants admit the averments contained in Subdivision Thirty-one of plaintiff's bill of complaint that the directors of the defendant Company have caused the resolutions referred to in plaintiff's bill of complaint to be printed and mailed to all holders of certificates evidencing ownership of beneficial interest in the common capital stock of the Company, including plaintiff, and that said resolutions Nos. 1 and 2 have been published in the newspapers of Indianapolis and elsewhere, and that said directors have publicly expressed their intention of acceding to the demands of the defendant City and of conveying the plant and property of the defendant Company to the City in accordance with the notice and demands set out in plaintiff's bill of complaint, but deny that the only method by which said property may lawfully

be transferred from the defendant Company to the defendant City is under the terms and provisions of Sections 100, 101 and 102 of said Shively-Spencer Utility Commission Act. These answering defendants further admit that said directors and trustees will carry out said expressed intention and will pay said capital dividend and will convey said plant and property of the defendant Company pursuant to said demand by the defendant City unless finally enjoined and restrained from such action.

(n) These answering defendants deny the averments contained in Subdivision Thirty-two of plaintiff's bill of complaint that the franchise and articles of incorporation and amendments thereto and the acts, proceedings and threatened acts and proceedings of the defendants City of Indianapolis, Citizens Gas Company of Indianapolis and the other defendants herein create a cloud upon the title of defendant Citizens Gas Company of Indianapolis to its plant and property, impair the value thereof, render the sale of said property at an adequate price impossible and impair the value of the certificates of beneficial interest held therein by plaintiff and all others in a similar situation, but on the contrary allege that the plaintiff and all others similarly situated acquired and hold such certificates subject to all the terms and provisions set out in Subdivision 2 and 15 of this answer. These defendants deny that plaintiff or any others similarly situated hold any stock certificates or interest therein which were impaired as alleged in said subdivision of plaintiff's bill of complaint.

(o) These answering defendants deny that the aforesaid notice and demand of the defendant City of Indianapolis and the acquiescence therein of the individual defendants constituting the Board of Directors and Board of Trustees of the defendant Citizens Gas Company of Indianapolis will, if carried into effect, compel defendant Company to convey its property at a tremendous loss, although admitting that if said public charitable trust is carried out the City of Indianapolis has the right to acquire the property of defendant Citizens Gas Company of Indianapolis after the certificate holders have been paid the par value of their certificates with interest at the rate of ten per cent. per annum and the preferred stock of the Company has been retired. These answering defendants admit that the plaintiff and others in like situation will receive no more than $25.00 per share and interest at the rate of ten per cent. per annum in full satisfaction of all

their rights as holders of certificates of beneficial interest in the common stock of defendant Company, and allege that they are not entitled to receive any more, but admit that if said public charitable trust could be declared invalid and the holders of the beneficial certificates could become entitled to the entire equity in said property after the payment of defendant Gas Company's preferred stock and other indebtedness, and the right of the City to acquire said plant and property could be defeated, that said certificates of beneficial interest would be worth a sum in excess of $25.00 per share, and that the value thereof would, under such circumstances, be uncertain and can not now be definitely ascertained, but these answering defendants deny that by reason of any of the facts stated in the bill of complaint the action of the defendant City of Indianapolis and other defendants hereto has caused or is causing great and irreparable injury and damage to the defendant Citizens Gas Company of Indianapolis, and the plaintiff and all others in a similar situation, or is causing any damage whatever to any of said parties.

15. These answering defendants allege that a public charitable trust was created and exists in the plant and property of defendant Citizens Gas Company of Indianapolis in favor of the inhabitants and/or gas consumers of said City of Indianapolis, which trust was to be administered by the defendant Citizens Gas Company of Indianapolis and by the defendant City of Indianapolis as respective trustees thereof, in accordance with the terms of said trust, as hereinafter in this subdivision of this answer alleged.

That the facts in connection with the establishment of said public charitable trust were and are as follows:

That in the year 1887, the City of Indianapolis by an ordinance granted to the Consumers Gas Trust Company a franchise to furnish natural gas to the citizens of said City and vicinity upon the terms and conditions specified in said ordinance; that the supply of natural gas failed some time prior to 1904 and that an attempt was made by said Consumers Gas Trust Company to engage in the business of furnishing artificial gas to the citizens of Indianapolis; that as a result of this effort, litigation ensued in the District Court of the United States for the District of Indiana and the United States Court of Appeals for the Seventh Circuit wherein it was held and finally adjudged as follows:

First. That the certificate holders of the Consumers

Gas Trust Company of Indianapolis had the right to enjoin that company from engaging in the business of supplying artificial gas to the citizens of Indianapolis on the theory that such business was ultra vires the corporation.

Second. That under the franchise, Articles of Incorporation, Subscription Contracts and other relevant agreements, the City of Indianapolis had the right, by giving six months notice, to purchase the property of the Consumers Gas Trust Company at any time after the expiration of ten years from the date of the ordinance, the amount to be paid for such plant to be determined by three disinterested appraisers.

Third. That a public charitable trust existed in favor of the inhabitants and/or gas consumers of Indianapolis in the property of the Consumers Gas Trust Company to the end that gas should be furnished at cost after the holders of beneficial certificates had received by dividends or otherwise an amount equal to their subscriptions and eight per cent. interest per annum.

That as a result of such litigation the City of Indianapolis was determined to have the right to purchase the plant and property of the Consumers Gas Trust Company and did in fact exercise such right by the assignment thereof for a nominal consideration to Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, being the same identical persons to whom the franchise and ordinance set out in subdivision six of the plaintiff's bill of complaint was granted, to the end that such persons should organize or cause to be organized the Citizens Gas Company of Indianapolis.

That the property formerly belonging to the Consumers Gas Trust Company was in fact purchased by the said Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt and by them conveyed to the Citizens Gas Company of Indianapolis, defendant hereto; that as a result of said litigation there was a wide-spread public movement in the City of Indianapolis to the end that a Gas Company should be organized which should own the property and plant formerly owned by Consumers Gas Trust Company; that said property should be acquired through the medium of a new corporation in which the stockholders or the owners of beneficial certificates representing common stock should be entitled to receive only the re-payment of the face value of such beneficial certificates with interest thereon at the rate of ten per cent. per annum until paid and that thereafter the city on behalf of the gas consumers

of Indianapolis and the inhabitants thereof should have the right to acquire such property without the payment of any additional consideration; the plan was so formed for the purpose of avoiding that which had theretofore happened, viz: that the persons owning the beneficial certificates of stock should receive the face value of such certificates with interest and thereafter the city be compelled to purchase said plant and pay therefor a large sum of money.

That wide publicity was given by the public spirited citizens engaged in the organization of the Citizens Gas Company of Indianapolis to the plan, including publicity in all of the newspapers in the City of Indianapolis, Marion County, Indiana, and that the essential elements of the plan and of the public charitable trust to be thereby created were stated and agreed upon as follows:

First. That all of the common stock of the Citizens Gas Company of Indianapolis should be held and perpetually voted by voting trustees to be appointed as provided in Section 6 of the original Articles of Incorporation which are set forth in Subdivision Seven of the plaintiff's bill of complaint.

Second. That such Trustees should issue to each subscriber to the capital stock of the company a beneficial certificate and that the holder thereof should be entitled to repayment of the face value of the same out of dividends or otherwise with interest at the rate of ten per cent. per annum, payable semi-annually and that when the face value of such certificate had been paid the holder should have no further interest in the property and plant of the Citizens Gas Company.

Third. That when said certificate holders have been paid in full the City of Indianapolis should have the right to acquire said property for the benefit of the public and the consumers of gas in Indianapolis without the payment of any money or further consideration.

Fourth. That a public charitable trust to be administered by the Citizens Gas Company of Indianapolis and the City of Indianapolis respectively as trustees was to be and was created in the property and plant of the Citizens Gas Company of Indianapolis to the end that private exploitation thereof should be prevented and that gas should be supplied at the lowest possible cost to the citizens of Indianapolis who should desire to use the same.

It was necessary, in order to acquire the property and plant formerly belonging to the Consumers Gas Trust

Company, to interest local capital in the enterprise and for the purpose of inducing the persons who should invest in the common stock of said company to make such investment upon the condition that they should never receive any more than the face value of said certificate, it was proposed and agreed that interest thereon should be paid at the rate of ten per cent. per annum.

Fifth. Said plan contemplated that the Citizens Gas Company of Indianapolis should be the Trustee of said public charitable trust until such time as said certificate holders were repaid the face value of their certificates with interest at the rate of ten per cent. annually and that thereafter the City of Indianapolis should acquire said property for the benefit of the gas consumers and inhabitants of said city, but that it was never intended that title to the plant and property of said Citizens Gas Company should be vested and it was not in fact vested in the City of Indianapolis as an agency of the State, but solely for the benefit of the inhabitants of said city and particularly those who at that time or thereafter should desire to use the gas to be supplied by said company.

That each of the original subscribers to the common capital stock of the Citizens Gas Company with which it was to begin business, to wit: One Million Dollars par value thereof was required to and did execute subscriptions to the capital stock of the Citizens Gas Company upon the following form:

"Trustees—Thos. L. Sullivan, Thos. H. Spann, W. D. Cooper, Lucius B. Swift, Henry Kahn.

Directors—Franklin Vonnegut, Lorenz Schmidt, Jas. L. Keach, Geo. J. Marott, E. H. Eldridge, Alfred F. Potts, Jno. R. Welch, Robert Lieber, J. D. Forrest.

Subscription to Stock of
Citizens Gas Company of Indianapolis
Temporary Office, 1201 Law Building
New Phone 361

I hereby subscribe for and agree to take _____ shares (par value $25.00 each) of the capital stock of the Citizens Gas Company of Indianapolis, and to pay for same at the rate of $25.00 per share to the Union Trust Company of Indianapolis, Trustee for said Citizens Gas Company, as follows: 10 per cent. on demand, and 20 per cent. on the tenth day of each month thereafter (except

that the last payment shall be 30 per cent.) until the full amount of said subscription shall have been paid.

All money paid on this subscription shall be held by the Union Trust Company, Trustee, until the first installment of 10 per cent. shall have been paid on not less than $500,000 of subscriptions; but if for any reason such installment shall not be paid by October 31, 1907, then the full amount of money paid on this subscription shall be returned to subscriber by said Union Trust Company, Trustee.

I hereby agree that the stock above subscribed shall be issued to a Board of Five (5) Trustees, named in the Articles of Incorporation of said Company, in perpetual and irrevocable trust, in the manner and according to the terms and conditions of the Articles of Incorporation under which said Company is formed; and that when the indebtedness of said Company is fully paid, and the subscribers shall have received an amount equal to the amount by them subscribed and paid, with dividends equal to 10 per cent. per annum, then the Trustees and Directors of said Company shall execute proper instruments transferring all the property of said Company, of every kind and description, to the City of Indianapolis; and that thereupon all my interest in said Company and all its property shall thereby be cancelled, released and extinguished.

Date .....

.....

Name .....

Address .....

Pay No Money to Solicitors"

That the plaintiff and all other present holders of beneficial certificates representing their ownership of the first one million dollars to be issued of the common capital stock of the Citizens Gas Company acquired the same either directly or by mesne assignments from the original subscribers to said capital stock and each and all of such present holders of said beneficial certificates had full knowledge and notice at the time of such acquisition, of the terms of said subscription contract hereinbefore set out; that said subscription contracts constituted and were a part of the general plan to form said public charitable trust.

That after the organization of the Citizens Gas Com-

pany of Indianapolis the voting trustees issued to each subscriber of the common capital stock and thereafter to all purchasers of such stock a trustee's certificate in the following form:

"Capital Stock $2,000,000. Shares $25.00 Each

Trustee's Certificate

Citizens Gas Company of Indianapolis

This Certifies That

..... is entitled to ..... Shares of the par value of $25.00 each, of the Capital Stock of the Citizens Gas Company of Indianapolis, which, together with all other outstanding Stock of said Company, have, with the consent and agreement of the aforesaid owner, been issued to a Board of Five Trustees as provided in the Articles of Incorporation of said Company and in the Gas Franchise granted to it by the City of Indianapolis, August 25th, 1905, and said Capital Stock shall be and remain under the exclusive and irrevocable control of said Board of Five Trustees and their Successors, with full, complete, exclusive and irrevocable power in said Board of Trustees to hold said Stock and vote the same during the continuance of the Citizens Gas Company of Indianapolis as a corporation, for all uses and purposes in the Articles of Incorporation of said Company mentioned, set forth and described. The aforesaid holders of this certificate shall receive all dividends declared from the earnings of said Citizens Gas Company of Indianapolis by the Directors thereof; and when said certificate-holder shall have received, by dividends or otherwise, upon said certificate an amount equal to the face value thereof together with interest thereon at the rate of ten per centum per annum payable semi-annually then this Certificate shall be deemed fully paid and cancelled and the interest of said holder in said Company and its assets shall thereupon cease and the property of said Company shall be disposed of as provided in said Articles of Incorporation. This Certificate is transferable only on the books of the Company by holder thereof in person or by attorney on surrender of this Certificate properly endorsed.

In Witness Whereof, this Certificate is signed by the President of the Board of Trustees, attested by the Presi-

dent and Secretary of the Board of Directors, and sealed with the seal of said Company this ..... day of ..... A. D. 19.....

.....

Presiden' Board of Trustees.

Attest:

.....

President Board of Directors

.....

Secretary Board of Directors

For value received ..... hereby sell, assign, and transfer unto ..... Shares of the Capital Stock represented by the within Certificate and do hereby irrevocably constitute and appoint ..... Attorney to transfer said stock on the books of the within named Company with full power of substitution in the premises.

Dated ..... 19.....

.....

In presence of

.....

Notice: The signature to this assignment must correspond with the name as written upon the face of the certificate, in every particular, without alteration or enlargement or any change whatever."

That on the 25th of March, 1911, pursuant to the provisions of Article 4 of the Articles of Incorporation of the Citizens Gas Company of Indianapolis, as set out in subdivision Seven of the plaintiff's bill of complaint, the common capital stock of said Company was encreased from One Million Dollars to Two Million Dollars, and thereafter, from time to time, prior to July 1, 1919, said additional One Million Dollars of common capital stock was sold at public auction to the highest bidder therefor after giving thirty (30) days notice of the time and place of such sale by publication in three Indianapolis newspapers having the largest city circulation, all as provided in said Article 4 of said original Articles of Incorporation.

That in said published notices of the offering of said additional common stock for sale at public sale, it was specifically stated that all stock sold should be issued in all respects conformably to the terms and conditions of the Articles of Incorporation and franchise of the Citizens Gas Company relating thereto.

That all of said additional One Million Dollars of common stock was sold, pursuant to such notices of sale, and Trustees' certificates representing the beneficial ownership of said additional One Million Dollars of common stock were issued to the purchasers at such public sales, or their nominees, in the form of the certificate hereinabove set out, and no other form of certificate or other evidence of ownership was ever issued to any such purchasers or the nominees of any such purchasers.

That all subsequent owners of any of said second Million Dollars of common stock, upon acquisition thereof from prior owners thereof, received, and the present owners thereof now hold, Trustees' certificate of beneficial ownership in the form hereinabove set out, and there has never been issued or authorized any other form of certificate representing any part of the Two Million Dollars authorized common capital stock of the company other than the Trustees' certificates of beneficial ownership in the form hereinabove set out.

That the plaintiff and each and every present or former holder of Trustees' certificates has received, accepted and held such Trustees' certificates containing the specific agreements hereinbefore set forth and has never at any time had any other evidence of his ownership of the beneficial interest in the Citizens Gas Company and that the plaintiff and all the other holders of beneficial certificate of the Citizens Gas Company of Indianapolis defendant hereto are bound by each and all of the terms and conditions of the foregoing subscription contract and beneficial certificates as well as by the provisions of the franchise contract the Articles of Association the amendments thereto and the public charitable trust created at the time of the organization of the Citizens Gas Company of Indianapolis, defendant hereto, as in this paragraph of answer specifically alleged.

That neither the plaintiff nor any other present holder of such beneficial certificates has ever objected or protested against the form of such beneficial certificates or the covenants or agreements therein contained or in any way at any time evidenced his unwillingness to be bound thereby until within the last few months when publicity was given to the plan of the City of Indianapolis to acquire the plant and property of the Citizens Gas Company; that at no time either before or after such mentioned publicity has the plaintiff or any other holder of beneficial certificates of the Citizens Gas Company of Indianapolis surren-

dered or offered to surrender the same or asked or demanded the issuance to him or them of certificates representing his or their beneficial ownership free from the conditions above set forth.

16. These answering defendants say that said Legalizing Act of 1929 is valid in all respects. Said Act only legalizes a contract voluntarily made by said corporation with the State in its articles of incorporation and in the amendments thereof and enables said City to take said property in accordance therewith. Said Act does not attempt to revive any obligation abrogated by the surrender of said franchise, but only places the express stamp of approval by the State on a contract made by said corporation and which survived the surrender of said franchise.

Said act does not deprive plaintiff of the equal protection of the law by providing for an invalid classification. The classification to which it applies is a self-created class consisting of corporations who voluntarily placed in their articles of incorporation provision for the transfer of their properties prior to the time when the new rules in said Shively-Spencer Act governing such transfers came into effect, on to-wit, May 1, 1913. Said Act does not impose on said class any obligations, but merely approves self-imposed obligations contained in articles of incorporation. Said corporation is not complaining of said Act, but is voluntarily performing its obligations which said Act approves. Plaintiff cannot complain of said Act for the reason that he, through said board of trustees having power to vote all stock, has given his consent to the performance of said obligation, and further because he is not injuriously affected by said Act in that he took his rights subject to the obligations which said Act approves.

Plaintiff cannot complain on the ground that said Act should also, to be valid, have approved similar provisions appearing only in franchises held by corporations for the reason that he is not injured by such exclusion. Only an excluded corporation could complain on that ground if any such ground of complaint exists.

Said defendants say that said Act is not invalid in that it provides a method for effecting the acquisition of the instant property different from the methods provided for in said Shively-Spencer Act, or the Act of 1905 mentioned in plaintiff's complaint. Said Acts do not apply to cases, as the instant one, where a corporation owns its property subject to a trust and an obligation to transfer its property in accordance with an agreement contained in

its articles of incorporation. The Act of 1929 directly approves provisions for the transfer of property subject to trusts and obligations voluntarily created by the corporations included in the class to which the Act applies. Plaintiff is not injuriously affected by said Act on account of approval therein by the legislature of the transfer in question without the submission thereof to a vote or to the Public Service Commission. By such direct approval said Act only provides for the transfer which said corporation voluntarily agreed to, and which the plaintiff and all other holders of certificates of beneficial interests in said stock agreed to by accepting his and their certificates wherein said conditions for surrender of said stock and the transfer of said property were incorporated. If said provisions for transfer of said property are not as advantageous to plaintiff as transfers under the provisions of other statutes, in the absence of such contract, might be, such disadvantage is not created by said Act of 1929, but is a disadvantage voluntarily created by said corporation when it agreed to make such transfer and voluntarily acquiesced in by plaintiff when he purchased said certificates subject to such obligation to transfer, and said Act cannot be invalid as to plaintiff in such situation.

These defendants further allege that if said Act is a special law and only applicable to the Citizens Gas Company and said City that it is valid. That the General Assembly of the State of Indiana could have authorized the inclusion in the articles of incorporation of such corporations of the provisions contained in the articles of the Citizens Gas Company before the same was formed, and it could and did legalize such provisions by said Act of 1929.

Said defendants say that said Act of 1929 is not duplicitous. The subject on which it legislates is the transfer of utility properties under agreements to transfer expressed in articles of incorporation.

The provisions approving and legalizing such agreements and those enabling cities to take under such agreements are matters properly connected with said subject and are in aid of the main object of said Act to give effect to such agreements to transfer. Said Act of 1929 is in all respects valid.

17. These answering defendants allege and say that the City of Indianapolis now has all of the rights in and to the property of the Citizens Gas Company of Indianapolis as claimed by it in the resolution set out in Subdivision Fourteen of plaintiff's complaint, and as recognized in the

several resolutions of the board of directors and the board of trustees of said corporation set out in Subdivisions Fifteen and Sixteen of said complaint; that the surrender of said franchise did not, and legally could not, take said rights from said city, or impair in any manner the aforesaid trust or the rights, interests and obligations thereunder. As to the effect of this surrender of said franchise upon the said rights of said city, these defendants allege more particularly as follows:

(a) That it was the desire of the public spirited citizens of Indianapolis who promoted the formation of said public charitable trust, as set forth in Subdivision 15 of this answer, of the City of Indianapolis and of said Citizens Gas Company that said public charitable trust and the terms and conditions thereof should, for the protection of all concerned, be evidence in every possible way. In order to accomplish such purpose, the dominant terms and conditions of said trust were placed in the franchise contract itself, in the Articles of Incorporation of the Citizens Gas Company and the amendments thereto, in the subscription contracts and in the beneficial certificates issued by the trustees of the Citizens Gas Company. These answering defendants allege that the agreement so arrived at was not intended to be merely a part of the franchise contract or of the Articles of Incorporation, or of the subscription contracts, or of the Trustees' Certificates, but was stated in each and all of said papers and writings for the purpose aforesaid and in order to evidence the public charitable trust which had been created and which was to continue to exist and which trust could not be abrogated by the surrender of said franchise.

(b) Any provisions contained in the ordinance granting said franchise which provide for the retirement and cancellation of the common stock and the conveyance of such property to the city, were not abrogated by the surrender of the municipal franchise to the state, but the surrender of such franchise only had the effect herein alleged in sub-paragraph (c) (2) hereof, and all such provisions relating to the retirement of such stock and the conveyance of such property continued and remained in full force and effect after the surrender of such franchise and are still in full force and effect.

The voting trustees of the defendant Citizens Gas Company, at a meeting thereof held on the 11th day of August, 1921, adopted a formal resolution authorizing the surrender of said franchise and at the same meeting of

said voting trustees a formal resolution was adopted authorizing the amendments to the Articles of Association of said Gas Company which are particularly set forth in Subdivison Eleven of the bill of complaint herein; that by such action of said voting trustees taken at such meeting in authorizing the surrender of said franchise and the amendment of its Articles of Association the purpose of said trustees was plainly evidence and expressed to preserve and protect all rights of the City of Indianapolis and the inhabitants thereof in and to the property of the Citizens Gas Company.

These defendants further say that under the provisions of Section 53 of the Act of the General Assembly of the State of Indiana, entitled, "An Act Concerning Municipal Corporations," approved March 6th, 1905, said City was authorized and empowered by ordinance to receive and accept public trusts and to agree to conditions and terms accompanying the same and bind such City to carry them out, and by the ordinance set out in Subdivision Six of plaintiff's bill of complaint the Common Council of said City did receive and accept the public trust created in the manner set out in Subdivision Fifteen of this answer and as provided in the Articles of Association of the Citizens Gas Company, and did agree to the conditions and terms therein provided, and the surrender of said municipal franchise by said company did not abrogate or affect the public trust so accepted and agreed to; and said defendants further allege that independently of statutory authority said City had power to accept and execute public trusts.

(e) Even though it be held that the surrender of said franchise operated to abrogate all the terms and provisions embodied therein, such fact would not impair the rights of said city in and to the property of said Gas Company for the following reasons:

(1) The rights of said city in and to said property were never in favor of the state or of said city as the agent of the state and were in no sense subject to any power reserved in the State of Indiana by virtue of which it could make a legally effective offer to said corporation to abrogate the same.

(2) The only offer made by the state to said corporation in said Shively-Spencer Utility Commission Act was the offer to abrogate the franchise contract entered into by it, through said city as its agent, and said corporation, and to substitute therefor a new contract directly between

itself and said corporation. The effect of such offer was to establish new contractual and regulatory relations between the state itself and said corporation, and, to that end, to substitute for the permit granted by the city, as such agent, an indeterminate permit direct from the state, and to substitute direct regulations as to rates and service by means of state legislation to be administered by the Public Service Commission for regulation by the agency of the City of Indianapolis as embodied in such franchise contract. Such offer did not include the abrogation of obligations owing by said corporation to any one other than the state or to said city in its capacity as an agent of the state. Said offer did not include a proposition to surrender the corporate franchise of said corporation, or to abrogate the contract between the said corporation and the state which existed between them by virtue of the articles of incorporation of said company, or to abrogate said trust which was created as aforesaid, or to abrogate the obligations of said corporation to said city in its capacity as the beneficiary or prospective trustee of said trust, or to abrogate the rights and interests of the inhabitants of said city as beneficiaries of said trust, or as beneficiaries of the right to have said city acquire said property in accordance with said provisions for the acquisition of said property for their benefit. Said corporation could not, and did not, by surrendering said franchise, abrogate more than said offer included, and such surrender in no manner affected matters which were not a part of, or dependent upon, said franchise.

(3) Said rights of said city in its said capacity as the prospective owner and/or trustee of said property, and the obligation of said corporation to transfer said property to said city, and said trust, and said rights and interests of the inhabitants of said city were not dependent alone upon the franchise which said corporation surrendered. Said franchise and the exercise of any rights thereunder were themselves dependent upon the prior creation of said obligations, rights, trusts and interests aforesaid. Notwithstanding the fact that the provisions for the acquisition of said property by said city were included in the original instrument by which said city granted said franchise, the said provisions and the obligations and rights thereby created were at no time solely dependent upon said franchise or on the terms and provisions constituting the contract or franchise. The facts hereinabove alleged relating to the circumstances existing prior to,

and at the time of the granting of said franchise, together with said original instrument show that said provisions were included in the same instrument which evidences the contract of franchise, in part for the purpose of providing what should be incorporated in the articles of association of said company when it should be thereafter incorporated and it appears therefrom that a further and permanent agreement embodying said provisions should be the articles of incorporation of the corporation to be formed by the grantees of said franchise. The form of such permanent agreement was embraced in said original instrument, and the same was intended to be incorporated in said articles in haec verba. Such permanent agreement was intended to become a part of the corporate franchise thereafter to be granted by the state to the proposed corporation, made by the articles of incorporation between such corporation and the state, and, as there evidenced, was to be effective for the benefit of said city and its inhabitants. The provisions for the formation of said corporation and the inclusion of said permanent agreement for the acquisition of said property by said city in its articles constituted part of the consideration for the granting of said franchise by said city to said grantee and constituted conditions precedent to the exercise of any rights by said corporation under the said franchise to be assigned to it. The said circumstantial facts and said original instruments show that it was intended upon the organization of said corporation and the adoption of its articles of incorporation thereby to create vested rights and interests on the part of said city and the inhabitants thereof in and to the property of which the corporation might become the owner and that said corporation should own such property subject to said rights and interests and the obligation to transfer its property to said city in accordance therewith.

(4) In conformity with the aforesaid intention of the parties to said original instrument, and in performance of said conditions precedent, the persons to whom said franchise was granted formed the contemplated corporation, the said Citizens Gas Company, defendant herein, and incorporated in its articles the said provisions for the acquisition of said property by said city, and assigned said franchise to said corporation. Said corporation was thus created and said provisions were thus incorporated in its articles of incorporation more than fifteen years before said corporation surrendered said franchise. Said provisions have ever since remained in, and are now a part of,

said articles of incorporation. Said articles are a part of the corporate franchise of said corporation and constitute a permanent agreement between said corporation and the State of Indiana for the benefit of said city and its inhabitants, as aforesaid. By said provisions, said Citizens Gas Company became a trustee of its property for the purposes of said provisions. All of the property acquired by it became affected by said provisions and said trust, and the inhabitants and said city acquired vested rights and interests in and to all of said property, as aforesaid, before the said surrender of said franchise, and they are now the owners of said vested rights and interests. Said provisions in said articles, and said trust and said rights and interests have at all times since said incorporation existed wholly independently from said franchise. When said franchise was surrendered the said provisions in said articles, and the corporate franchise of said corporation, and said trust and said rights and interests, were not abrogated but remained unimpaired, and are now in full force and effect. The new contract arising between said corporation and the state upon surrender of said franchise, and the indeterminate permit as part thereof, do not in any sense supersede or abrogate said corporate franchise, said articles of incorporation or the contract made thereby, or said trust or any of said rights or interests. Any rights which said corporation may have under said indeterminate permit and under said new contract are subject to its obligations under said provisions in said articles of incorporation and to said trust, and to said rights and interests on the part of said city and its inhabitants to have said property transferred to said city in accordance with said provisions in said articles. The provisions in said Shively-Spencer Act relating to the purchase of the property of a utility that has surrendered its franchise do not supersede said provisions for the transfer of its property contained in the articles of association of said corporation, and said corporation has no right by virtue thereof to a purchase price for its property determined in accordance with the provisions of said act. Said act did not intend that said corporation could abrogate the contract made by its articles of incorporation and particularly by said provisions therein hereinbefore referred to, and did not intend that said trust and said obligations, rights and interests could be abrogated by the surrender of said franchise. The right of said city to the transfer of said property and the right of the inhabitants to have it

so transferred, the obligation of said corporation to make such transfer, the said trust, and the said vested rights and interests in no degree depend for the existence on the franchise which was surrendered, but they arise out of an executed consideration and executed conditions precedent, and are efficaciously evidenced by said provisions in said articles of incorporation.

(5) The inhabitants of said city and the said city have a continuing right to the transfer of said property in accordance with said provisions. Said right was created and given by said corporation as a consideration for and condition precedent to the granting of said franchise and the exercise of any rights thereunder. The surrender by said corporation of its franchise did not in anywise surrender or abrogate the irrevocable rights of others which it had agreed to confer, and did confer, before it could receive and enjoy the thing with which it has voluntarily parted, viz.: said franchise. Said corporation could, by said surrender, abandon or exchange the rights it received, but it could not escape its obligation provided for in the independent contract and which constituted the consideration and condition precedent which were essential to the existence and enjoyment of the rights granted it by said city.

(6) If the provisions for the transfer of said property constituted no more than an offer to make such transfer, the surrender of said franchise would not have operated to withdraw the same, inasmuch as said provisions have at all times appeared in said articles of incorporation and such articles were unaffected by the surrender of said franchise. Coincident with such surrender said provisions were reincorporated in articles of amendment of said articles of incorporation. Neither said corporation nor plaintiff ever did anything to withdraw or to avoid said provisions in said original and amended articles of incorporation before said city made demand for performance. On the contrary said corporation, by and through its board of directors, and its board of trustees having full power to represent plaintiff by virtue of the terms of said voting trust, is now carrying said provisions into effect in response to the demand made in behalf of said city, all as shown in Subdivisions Fourteen, Fifteen and Sixteen of plaintiff's complaint. Plaintiff's certificates, by virtue of which he claims the right to maintain this action, were issued and purchased by him after said franchise was surrendered, and the same

have incorporated therein the same provisions for such transfer as appear in said original and amended articles. Said provisions were in effect when plaintiff acquired said certificates, are a part of said certificates, and his rights in and to the property and assets of said corporation are subject to the rights of said city under said provisions for transfer.

(7) Said Citizens Gas Company of Indianapolis has at no time claimed, and is not now claiming, that the surrender of said franchise abrogated the right of said city to said property in accordance with said provisions. On the contrary said corporation reaffirmed said provisions in said amended articles coincident with said surrender, as aforesaid, and is now intending to perform in accordance therewith. Plaintiff is in no position to complain of said corporation's intention to transfer said property in accordance with said provisions for the reason that said provisions are a part of the contract between himself and said corporation and he took his certificate subject to said provisions, also for the reason that so far as his consent is material to performance of said provisions by the corporation such consent is being given by said board of trustees, who have full authority to give such consent for plaintiff by virtue of their power under said voting trust to vote all of the stock of said corporation on all matters affecting said corporation.

Wherefore, these answering defendants say that plaintiff's bill of complaint should, on final hearing, be dismissed for want of equity and that the plaintiff is not entitled to any relief whatever in the premises.

John W. Holtzman,
Oren S. Hack,
Edward H. Knight,
Smiley N. Chambers,
Pickens, Davidson, Gause,
Gilliom & Pickens,
Attorneys for said Answering Defendants.

John W. Holtzman,
Fred C. Gause,
Of Counsel.

1156 PLAINTIFFS' STIPULATION EXHIBIT 32.

Motion to Strike Portions of City's Answer in Todd Case.

This motion is copied on pages 154-161, inclusive, of the Record in the United States Circuit Court of Appeals for the Seventh Circuit in the case of Todd *vs.* Citizens Gas Company of Indianapolis, *et al.*, Plaintiffs' Exhibit 2 for Identification, which original exhibit is included in this transcript by order of the Court.

* * (Caption) * *

AMENDED MOTION TO STRIKE OUT PORTIONS OF SEPARATE AND SEVERAL ANSWERS OF DEFENDANTS, CITY OF INDIANAPOLIS; L. ERT SLACK, AS MAYOR OF THE CITY OF INDIANAPOLIS; WILLIAM A. BOYCE, JR., AS CITY CLERK OF THE CITY OF INDIANAPOLIS; THEODORE H. DAMMEYER, JOHN C. McCLOSKEY, AND EMSLEY W. JOHNSON, AS AND CONSTITUTING THE BOARD OF PUBLIC WORKS OF THE CITY OF INDIANAPOLIS, TO PLAINTIFF'S BILL OF COMPLAINT.

Plaintiff, Newton Todd, for the reason that each of the hereinafter specified portions of the answer of the above-named defendants fails to state a ground of defense to plaintiff's bill of complaint, moves the court to strike out each of said portions of said answer, to-wit:

1. That portion of Subdivision 3 of said answer reading as follows:

"answering which these defendants allege that said trustees hold said stock not only in a voting trust but subject to all the terms and conditions of the trust in the property of the Citizens Gas Company, as set out in the Articles of Association of said Company, and as hereinafter set out in Subdivision 15 hereof, and except the averment that the trustees' certificates issued to the plaintiff and other holders thereof evidence the entire beneficial ownership of the shares of stock represented thereby, but on the contrary aver that the holders of said beneficial certificates acquired and hold the same subject to all of the terms and conditions heretofore set out in Subdivision 2 of this answer and hereafter set out in Subdivision 15 hereof."

2. That portion of Subdivision 4 of said answer reading as follows:

"but deny that by reason of the issuance of such certificates the plaintiff acquired the entire beneficial ownership of 250 shares of the common capital stock of defendant Cititzens Gas Company of Indianapolis, but on the contrary allege that plaintiff at the time he acquired said certificates and continuously since such time was bound by all the terms and conditions more particularly set forth in Subdivisions 2 and 15 of this answer."

3. That portion of Subdivision 5 of said answer reading as follows:

"except they do not admit that after the surrender of the franchise of the Citizens Gas Company and the acceptance by said company of an indeterminate permit that the rights of the certificate holders or the City of Indianapolis were in any way changed or affected so far as the public charitable trust in the property of the Citizens Gas Company is concerned."

4. Those portions of Subdivision 6 of said answer reading as follows:

"but these defendants deny that such beneficial certificates represented the ownership of said shares of common stock, but only the restricted interests therein of the beneficial certificate holders, all as more particularly set out in Subdivision 15 of this answer."

and

"but allege that such stock certificates did not evidence any absolute ownership in the plaintiff of such shares of stock, but only a restricted interest therein, as more particularly hereinafter set forth."

5. That portion of Subdivision 7 of said answer reading as follows:

"but these answering defendants deny that such surrender of said franchise or the acceptance of said indeterminate permit in any way affected the right of the City of Indianapolis to acquire the plant and property of the defendant Gas Company or the public charitable trust created in favor of the inhabitants and gas consumers of said city and refer the court the Subdivision 17 of this answer wherein is specifically alleged the effect of the surrender of said franchise."

and also Subdivision 17 of said answer.

6. That portion of Subdivision 7 of said answer reading as follows:

"These answering defendants deny that as a result of

the certificate so filed by the defendant Citizens Gas Company of Indianapolis and of the action taken by the Public Service Commission of Indiana with respect thereto that the original contract between the City of Indianapolis and the defendant Citizens Gas Company of Indianapolis was entirely rescinded, abrogated and annulled and a new contract substituted therefor, the details of which were and are prescribed in said Shively-Spencer Utility Commission Act, but on the contrary aver that the public charitable trust created in the property of the Citizens Gas Company, as hereinafter more particularly set out in Subdivision 15 of this answer was in no way affected, altered or changed by the surrender of said franchise and the taking out of said indeterminate permit."

7. That portion of Subdivision 8 of said answer reading as follows:

* * * * * *

"(Here follows all but the first paragraph of subdivision 8 of the answer of the City of Indianapolis, et al. in the Todd case, a copy of which answer is in evidence as Plaintiffs' Stipulation Exhibit 31)."

(Inserted pursuant to stipulation filed November 22, 1939.)

8. That portion of Subdivision 9 of said answer reading as follows:

"but allege that the holders of such beneficial certificates are entitled to dividends thereon, payable out of earnings at the rate of ten per cent. per annum, payable semi-annually, only so long as the face value of such benefit certificates, viz: $25 each remains unpaid and that if and as any partial payment is made thereon future dividends are to be paid at the rate of ten per cent. per annum only upon the remaining unpaid portion of the face value of such certificates."

9. That portion of Subdivision 9 of said answer reading as follows:

"but on the contrary allege that, properly interpreted, said subdivision of said franchise and the Articles of Incorporation of the Citizens Gas Company authorize and permit the transfer of the plant and property of the Citizens Gas Company of Indianapolis to the City of Indianapolis when the certificate holders have received either by dividends or otherwise an amount equal to the face value of such certificates together with interest thereon at the rate of ten per cent. per annum and these answering defendants further allege that it is wholly immaterial whether said payments

are made by way of dividends or from any other source and that upon said payments being made to the extent of the face value of said certificates with interest at the rate of ten per cent. per annum, all interest of the certificate holders in the property and plant of the Citizens Gas Company of Indianapolis ceases and that the City of Indianapolis is thereupon entitled to receive a conveyance of such property."

10. That portion of Subdivision 10 of said answer reading as follows:

"These answering defendants deny that said Act was directed solely at the Articles of Incorporation of the defendant Citizens Gas Company of Indianapolis, but on the contrary allege that said law is a general law applicable to all companies covered by the terms of said Act."

11. That portion of Subdivision 10 of said answer reading as follows:

"These defendants further allege that if said Act is a special law and only applicable to the Citizens Gas Company and said City that it is valid; that the General Assembly of the State of Indiana could have authorized the inclusion in the articles of incorporation of such corporation of the provisions contained in the articles of the Citizens Gas Company before the same was formed, and it legally could and did legalize such provisions by said Act of 1929."

12. That portion of Subdivision 10 of said answer reading as follows:

"but while admitting said averments of Subdivision Thirteen of plaintiff's bill of complaint last above referred to, these answering defendants say that said averments are wholly immaterial and without any legal effect whatever."

13. That portion of Subdivision 12 of said answer reading as follows:

"These answering defendants deny that said action of said Board of Trustees was or is in violation of rights of the defendant Citizens Gas Company of Indianapolis or of plaintiff or others similarly situated in any particular whatsoever."

14. That portion of Subdivision 13 of said answer reading as follows:

"but deny that said Board of Directors or said Board of Trustees of the Citizens Gas Company of Indianapolis has refused to act for the protection of the stockholders, but on the contrary allege that both said Board of Directors and said Board of Trustees have at all times acted in

accordance with the legal rights of said holders of beneficial certificates, although said answering defendants admit the refusal to comply with the demand of plaintiff."

15. Subdivision 14(a) of said answer.
16. Subdivision 14(b) of said answer.
17. Subdivision 14(c) of said answer.
18. Subdivision 14(d) of said answer.
19. Subdivision 14(e) of said answer.
20. Subdivision 14(f) of said answer.
21. Subdivision 14(g) of said answer.
22. Subdivision 14(h) of said answer.
23. Subdivision 14(i) of said answer.
24. The first grammatical paragraph of Subdivision 14 (j) of said answer.
25. The first grammatical paragraph of Subdivision 14 (k) of said answer.
26. That portion of Subdivision 14(k) of said answer, reading as follows:

"and allege that under the law of Indiana as applicable to the property and plant of the Citizens Gas Company, the Public Service Commission of Indiana has no jurisdiction whatever to determine whether such a conveyance will be made, the price to be paid or to annex any conditions whatever to such transfer, but is wholly without jurisdiction in the premises.

These answering defendants further deny that the demand of the defendant City upon the officials of defendant Citizens Gas Company of Indianapolis was ultra vires and void, but on the contrary allege that it was a valid and legal demand."

27. Subdivision 14(l) of said answer.
28. That portion of Subdivision 14(m) of said answer reading as follows:

"but deny that the only method by which said property may lawfully be transferred from the defendant Company to the defendant City is under the terms and provisions of Sections 100, 101 and 102 of said Shively-Spencer Utility Commission Act."

29. That portion of Subdivision 14(o) of said answer reading as follows:

"and allege that they are not entitled to receive any more."

30. That portion of Subdivision 2 of said answer reading as follows:

* * * * *

("Here follows all of the first paragraph of subdivision 2 of the answer of the City of Indianapolis, et al. in the Todd

case (Plaintiffs' Stipulation Exhibit 31) except the first few lines of said paragraph, reading as follows: 'These answering defendants deny the allegations of Subdivision II of the complaint that the plaintiff is the owner of 250 shares of the common capital stock of defendant Citizens Gas Company of Indianapolis')."
(Inserted pursuant to stipulation filed November 22, 1939.)

also that portion of Subdivision 14(n) of said answer reading as follows:
"but on the contrary allege that the plaintiff and all others similarly situated acquired and hold such certificates subject to all the terms and provisions set out in Subdivision 2 and 15 of this answer."
and also Subdivision 15 of said answer.

31. Subdivision 16 of said answer.

Plaintiff hereby saves and reserves to himself all of his rights in the presentation of evidence and proofs, and to a hearing upon the merits of the issues of fact and law involved in this cause, in the event it should be determined that this motion should not be sustained.

Matson, Carter, Ross & McCord,
Barnes & Johnson,
Attorneys for Plaintiff.

Frederick E. Matson,
Earl B. Barnes,
Austin V. Clifford,
Of Counsel.

1157 PLAINTIFFS' STIPULATION EXHIBIT 35.

Bill of Complaint in Williams Case.

This bill of complaint is copied on pages 110-228, inclusive, of the Appellants' Brief in the Supreme Court of Indiana in the case of Williams *vs.* Citizens Gas Company, et al., Plaintiffs' Exhibit 3 for Identification, which original exhibit is included in this transcript by order of the Court.

COMPLAINT.

(1)

"The plaintiffs Allen G. Williams and Harold L. Bartholomew, as inhabitants and taxpayers of the City of Indianapolis, in the State of Indiana, suing in the right and behalf, and for the use and benefit, of themselves and of all

other inhabitants and taxpayers of said City, similarly situate, any of whom may join as plaintiff herein, complain of Citizens Gas Company of Indianapolis, Indiana, a corporation; Indianapolis Gas Company, of Indianapolis, Indiana, pretending to be a corporation; Henry Kahn, Otto R. Lieber, Gustav A. Schnull, Thomas L. Sullivan, Frank C. Dailey, James I. Dissette, Gustav A. Efroymson, Edgar H. Evans, James H. Hooker, Henry H. Hornbrook, William H. Insley, Clarence L. Kirk, Franklin Vonnegut, John R. Welch, Frederick G. Rastenburg, Paul E. Crosier; City of Indianapolis, in the State of Indiana, a municipal corporation; Reginald H. Sullivan, as Mayor of said City of Indianapolis; Henry O. Goett, as City Clerk of said City of Indianapolis; E. Kirk McKinney, Louis C. Brandt, Charles O. Britton, as the Board of Public Works of said City of Indianapolis; Sterling R. Holt, Thomas C. Howe, George J. Marott, A. Dallas Hitz, William J. Mooney, as the Board of Trustees for Utilities of said City of Indianapolis; Edward H. Kahn, Henry L. Dithmer, Eli Lilly, Brodehurst Elsey, John J. Madden, Almus G. Ruddell, Guy A. Wainwright, as the Board of Directors for Utilities of said City of Indianapolis; John W. McCardle, Francis T. Singleton, Howell Ellis, Calvin F. McIntosh, Jere West, as the Public Service Commission of Indiana; Ferdinand Winter and Trust Company of America as Trustees, under a mortgage executed by said Indianapolis Gas Company, defendants, and say:

"That the plaintiffs Allen G. Williams and Harold L. Bartholomew, each is an inhabitant and taxpayer of the City of Indianapolis in the State of Indiana, and as such bring this suit in the right and behalf, and for the use and benefit, of themselves and of all other inhabitants and taxpayers of said City, similarly situate, any of whom may join as plaintiffs herein.

"That the defendants Citizens Gas Company of Indianapolis is and the Indianapolis Gas Company pretends to be, each a manufacturing and Chemical Company organized and operating pursuant of an act of the General Assembly of the State of Indiana, entitled: 'An act for the incorporation of manufacturing and mining companies and companies for mechanical, chemical and building purposes' that said act was approved on May 20, 1852, but it was not published in the sessions laws of the session at which it was enacted. It was published in the Revised Statutes of 1852, and it took effect accordingly on May 6, 1853. Notwithstanding the irregularity in its publication said act

has been accepted by the general assembly as a valid law and was reenacted and republished in the revised statutes of 1881, and the defendants Citizens Gas Company of Indianapolis was and the Indianapolis Gas Company pretends to have been, each, organized thereunder prior to the year 1913. That said act contained no reservation of any power of amendment or revision by the general assembly.

"That the defendants John R. Welch, Gustav A. Efroymson, Henry H. Hornbrook, William H. Insley, Clarence L. Kirk, James H. Hooker, Franklin Vonnegut, James I. Dissette and Edgar H. Evans each is a duly incumbent member of and together they constitute the Board of Directors of said Citizens Gas Company and in that capacity each is, and they together are, made parties herein.

"That the defendants Gustav A. Schnull, Otto R. Lieber, Thomas L. Sullivan, Henry Kahn and Frank C. Dailey each is a duly incumbent member of, and together they constitute, the trustees holding in trust the legal title to all the common stock of said Citizens Gas Company, under and pursuant of the terms and conditions of a certain Public Charitable Trust contract, hereinafter described and in that capacity each is, and they together are, made parties herein.

"That the defendant John R. Welch, is president of said Citizens Gas Company and in that capacity he is made a party herein.

"That the defendant Clarence L. Kirk is vice-president and general manager of said Citizens Gas Company and in that capacity he is made a party herein.

"That the defendant Frederick G. Rastenburg is secretary of said Citizens Gas Company and in that capacity he is made a party herein.

"That the defendant Gustav A. Efroymson is treasurer of said Citizens Gas Company and in that capacity he is made a party herein.

"That the defendant Paul E. Crosier is general superintendent of said Citizens Gas Company and in that capacity he is made a party herein.

"That the defendant City of Indianapolis is a municipal corporation and a city of the first class of the State of Indiana and it is, also, the trustee of said Public Charitable Trust hereinafter described and in each of these capacities it is made a party herein.

"That the defendant Reginald H. Sullivan is the duly incumbent Mayor of said City of Indianapolis and in that capacity he is made a party herein.

"That the defendant Henry O. Goett is the duly incumbent City Clerk of said City of Indianapolis and in that capacity he is made a party herein.

"That the defendants E. Kirk McKinney, Louis C. Brandt and Charles O. Britton each is a duly incumbent member of, and together they constitute, the Board of Public Works of said City of Indianapolis and in that capacity each is, and they together are, made parties herein.

"That the defendants Sterling R. Holt, Thomas C. Howe, George J. Marott, A. Dallas Hitz and William J. Mooney each is a duly incumbent member of and together they constitute the Board of Trustees for Utilities of said City of Indianapolis, pursuant of an act of the General Assembly of Indiana, entitled: 'An act supplemental to an act entitled: "An act concerning Municipal Corporations," approved March 6, 1905,' approved March 11, 1929, and in that capacity each is and they together are made parties herein.

"That the defendants Edward A. Kahn, Henry L. Dithmer, Eli Lilly, Brodehurst Elsey, John J. Madden, Almus G. Ruddell and Guy A. Wainwright, each is a duly incumbent member of and together they constitute the Board of Trustees of Utilities of said City of Indianapolis, pursuant of an act of the General Assembly of Indiana, entitled 'An act supplemental to an act entitled "An act concerning Municipal Corporations," approved March 6, 1905', approved March 11, 1929, and in that capacity each is and they together are made parties herein.

"That the defendants John W. McCardle, Francis T. Singleton, Howell Ellis, Calvin F. McIntosh, Jere West, each is a duly incumbent member of and together they constitute the Public Service Commission of Indiana, and in that capacity they together are made parties herein.

"That the defendants Ferdinand Winter and Trust Company of America are named as trustees, with defined powers, in a certain mortgage executed by said Indianapolis Gas Company on October 1, 1902, to secure the payment of an authorized issue of $7,500,000.00 gold bonds, to bear interest at 5 per centum per annum, of which $4,833,000 pretend to have been issued, and as such trustees they are made parties herein.

"That the plaintiffs are inhabitants and taxpayers of said City of Indianapolis and as such are cestuis que trustent of the Public Charitable Trust herein defined.

(2)

"That on August 30, 1905 defendant City of Indianapolis, acting by and through its common council and its mayor, by ordinance duly enacted, ratified, confirmed and approved a certain franchise contract therefore executed on August 25, 1905, by the Board of Public Works of and for said City and Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, contracting for themselves, their associates and assigns, which said franchise contract, and the said ordinance which ratified, confirmed and approved the same, were in the words and figures following, towit:

• • • • • •

"(Here follows the Franchise Contract of August 25, 1905, which appears as part of Exhibit C to the bill (I R. 81-94))."
(Inserted pursuant to stipulation filed November 22, 1939.)

"Said franchise ordinance was published in a book printed and published by authority of the City of Indianapolis, entitled 'Charter and Ordinances of the City of Indianapolis', which said book was printed and published in the year 1905, and in which said franchise ordinance appears on pages 289-311, inclusive. Said Franchise ordinance was, also, published in a book printed and published by defendant City of Indianapolis entitled 'Proceedings of the Common Council of Indianapolis,' which was the journal of said Common Council from October 15, 1903, to December 15, 1905, and said franchise ordinance, and the proceedings of the Common Council relating thereto, appear in said book on pages 695-806, inclusive.

(4)

"That said defendant Citizens Gas Company was incorporated on May 23, 1906, and its Articles of Association, omitting names, signatures and acknowledgments, were as follows:

• • • • • •

"(Here follows the Articles of Incorporation of Citizens Gas Company, which appears as part of Exhibit C to the bill (I R. 95-100))."
(Inserted pursuant to stipulation filed November 22, 1939.)

"(Said Articles of Incorporation were recorded on the 23rd day of May, 1905 in the office of the recorder of Marion County, State of Indiana, in Miscellaneous record, Vol. 50, beginning at page 96.)

(5).

"That on May 24, 1906, said Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt assigned and transferred to defendant Citizens Gas Company of Indianapolis all their rights in and to the aforesaid contract, which assignment was duly accepted by said Citizens Gas Company and thereupon said Citizens Gas Company and said City of Indianapolis agreed and entered upon a practical construction and exposition of said franchise contract as being a Public Charitable Trust for the use and benefit of the inhabitants and taxpayers of said city and in carrying out such construction and exposition said Citizens Gas Company and said City of Indianapolis put into effect the following acts, towit:

(6).

"That thereupon said Citizens Gas Company took possession of the streets, alleys, avenues and public places of said city with the mains and connections of said Gas Company and erected and acquired a gas plant and continuously, thereafter, said Gas Company has operated, and does now operate, under said franchise, notwithstanding the pretense subsequently made by said company to abrogate the same.

(7).

"That thereupon said Citizens Gas Company proceeded to take subscriptions for the full amount of its authorized capital stock, viz., one million ($1,000,000.00) dollars; that each of said subscriptions for said stock was taken upon a form of memorandum as follows, towit:

" 'Trustees:—Thos. L. Sullivan, Thos. H. Spann, W. D. Cooper, Lucius B. Swift, Henry Kahn.

" 'Directors:—Franklin Vonnegut, Lorenz Schmidt, Jas. L. Keach, Geo. J. Marott, E. H. Eldridge, Alfred F. Potts, John R. Welch, Robert Lieber, J. D. Forrest.

" 'Subscription to Stock of Citizens Gas Company of Indianapolis.

" 'Temporary Office, 1261 Law Building
" 'New Phone 361

" 'I hereby subscribe for and agree to take ..... shares (par value $25.00) of the capital stock of the Citizens Gas Company of Indianapolis, and to pay for same at the rate of $25.00 per share to the Union Trust Company of Indianapolis, Trustee for said Citizens Gas Company,

as follows: 10 per cent. on demand, and 20 per cent. on the tenth day of each month thereafter (except that the last payment shall be 30 per cent.) until the full amount of said subscriptions shall have been paid.

" 'All money paid on this subscription shall be held by the Union Trust Company, Trustee, until the first installment of 10 per cent. shall have been paid on not less than $500,000 of subscriptions; but if for any reason such installment shall not be paid by October 31, 1907, then the full amount of money paid on the subscription shall be returned to subscriber by said Union Trust Company, trustee.

" 'I hereby agree that the stock above subscribed shall be issued to a board of five (5) trustees, named in the articles of incorporation of said company, in perpetual and irrevocable trust, in the manner and according to the terms and conditions of the Articles of Incorporation under which said Company is formed; and that when the indebtedness of said company is fully paid, and the subscribers shall have received an amount equal to the amount by them subscribed and paid, with dividends equal to 10 per cent. per annum, then the trustees and directors of said company shall execute proper instruments transferring all the property of said company, of every kind and description, to the City of Indianapolis, and that, thereupon, all my interest in said company and all its property shall be cancelled, released and extinguished.

" 'Date. . . . . .

" 'Name. . . . . .

" 'Address. . . . . .

" 'Pay no money to Solicitors.'

(8.)

"That upon the incoming of said stock subscriptions executed on said memorandum, and for the uses and purposes therein stated, the same were accepted by said defendant Citizens Gas Company, and said memorandum and the said acceptance thereof became, and they were, merged into a holder's certificate in the words and figures following, towit:

" 'Capital Stock $2,000,000.00. Shares $25.00 each.

" 'Trustees certificate:—Citizens Gas Company of Indianapolis.

" 'This certifies that (here appears name of subscriber)

is entitled to (here appear number of shares) shares of the par value of $25.00 each of the capital stock of the Citizens Gas Company of Indianapolis, which, together with all other outstanding stock of said company, have with the consent and agreement of aforesaid owner, been issued to a board of five trustees as provided in the Articles of Incorporation of said Company and in the gas franchise granted to it by the city of Indianapolis, August 25th, 1905, and said capital stock shall be and remain under the exclusive and irrevocable control of said board of five trustees, and their successors, with full, complete, exclusive and irrevocable power in said board of trustees to hold said stock and vote the same during the continuance of the Citizens Gas Company of Indianapolis as a corporation, for all the uses and purposes in the Articles of Incorporation of said Company mentioned, set forth and described. The aforesaid holder of this certificate shall receive all dividends declared from the earnings of said Citizens Gas Company of Indianapolis by the directors; and when said certificate-holder shall have received, by dividends or otherwise, upon said certificate, an amount equal to the face value thereof, together with interest thereon at the rate of ten per centum per annum, payable semi-annually, then this certificate shall be deemed fully paid and cancelled and the interest of said holder in said company and its assets shall thereupon cease and the property of said company shall be disposed of as provided in said Articles of Incorporation. This certificate is transferable only on the books of the Company by holder thereof in person, or by attorney on surrender of this certificate properly endorsed.

" 'In Witness Whereof, this certificate is signed by the president of the board of trustees, attested by the president and secretary of the board of directors, and sealed with the seal of said company this (here date of month) day of (here month of year) A. D. 19 (here year).

" '(Here name of President)
" 'President of Board of Trustees.

" 'Attest: (Here name of president)
" 'President of Board of Directors
" '(Here name of secretary)
" 'Secretary of Board of Directors

" 'For value received (here name of purchaser) hereby sell, assign and transfer unto (here names of trustees), (here number) shares of the capital stock represented by

the within certificate and do hereby irrevocably constitute and appoint (here name) attorney to transfer said stock on the books of the within named company, with full power of substitution in the premises,

" 'Date (here day and month), 19 (here year)

" '(Here name of purchaser)

" 'In presence of (here name of Witness)

" 'Notice: The signature to this assignment must correspond with the name as written upon the face of the certificate, in every particular, without alteration, or enlargement, or any change whatever.'

(9).

"That said memorandum of subscription and the Company's acceptance thereof and said holder's trustees-certificates of ownership, stated in writing the full, indivisible and entire transaction between said Citizens Gas Company and its said subscribers, save the proper and lawful reference to said frachise transferred to said company on May 24, 1905, by said Potts, Stalnaker and Schmidt, and save the proper and lawful reference to said Company Articles of Association; that thereafter said defendant, Citizens Gas Company, made no further memorandum concerning said stock except to note on its transfer books the transfer, from time to time, by assignment, of said certificate and the memorandum so made and executed by and between said Company and said subscribers constitutes a single and indivisible and entire contract and the sole contract in the premises.

(10).

"That thereupon and thereby said Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt fully performed all the conditions of said franchise contract on their part to be performed and such performance was duly accepted by all parties in interest.

(11).

"That thereafter the General Assembly of Indiana confirming said contract, passed an act entitled: 'An act regulating the making of contracts between cities having a population of one hundred thousand or over according to the last preceding United States Census, and persons, firms, associates and corporations furnishing fuel and il-

luminating gas to such cities or inhabitants thereof, fixing a standard of quality of gas for such contracts; fixing a maximum price for such gas for such contracts; providing for the submission of the question of the approval of such contracts to the voters of such cities; fixing a standard of quality below which gas furnished should not go, and a price above which consumers of such gas in such cities should not be charged by any person, firm, association or corporation occupying the streets and alleys of such cities by sufferance or having no contract governing the price of such gas; fixing the duties of persons, firms, associations and corporations to consumers of such gas in such cities where such persons, firms, associations and corporations had no contract with such cities governing the price of such gas to consumers, and where such persons, firms, associations and corporations had failed to remove their pipes and mains from the streets and alleys of such cities within a reasonable time after the expiration of their contracts governing the price of such gas with such cities; providing penalties for the violation thereof and declaring an emergency'. Approved March 4, 1907. (Acts 1907 page 149).

(12).

"Plaintiffs aver that if said Potts contract ordinance of 1905, when passed, was without legislative authority, then the act of 1907 constituted the persons named in said franchise ordinance of 1905 and their successors, a body politic and corporate under the name 'Citizens Gas Company of Indianapolis as trustee' for the term stated in the ordinance with all the powers incident to such corporation as trustees, at the expiration of which time said Citizens Gas Company became a part of the municipal city and the powers of the city, which were in the beginning inchoate as trustee, became vested as trustee. But the change in the nature and in the extent of the trustee's holding never modified the trust itself as to the beneficial interest of the cestuis que trustent. That said Public Charitable Trust is of the nature of a corporation sole with its beneficiaries the real parties in interest and the equitable owners thereof, and it may be dealt with accordingly in this suit and this right in its behalf these plaintiffs herein now claim and they ask that their said claim be determined and adjudged by this court in this suit.

(13).

"That in, by and upon the proceedings, records memoranda and agreements aforesaid, a Public Charitable Trust was created, established and confirmed for the use and benefit of the inhabitants and taxpayers of the City of Indianapolis, including these plaintiffs, in which said Citizens Gas Company and its trustees, agents, servants and representatives became the active trustee, for the time being, and the municipal city of Indianapolis became the inchoate trustee, said inchoate trusteeship to cease and to become determined, and to be transformed into an active trusteeship for the use and benefit of said inhabitants and taxpayers, when said municipal corporation should become liable, in due course of the administration of said trust, to take over the property and franchise of said Citizens Gas Company; that said trust, and said several trusteeships, constituted a single and indivisible contract and as such it ever has been, and is, entitled to protection under the contract clause of the Constitution of the United States against any impairment by the State of Indiana and this Federal right these plaintiffs now here assert and set up, and they ask that it be heard and determined and that their rights in the premises be accordingly protected and saved; that said Public Charitable Trust being for the benefit of the inhabitants and taxpayers of said city of Indianapolis be deemed to have been accepted by them, among whom are these plaintiffs.

(14).

"That there has been a substantial performance of all the conditions precedent to the changing of said inchoate trusteeship into an active trusteeship on the part of said municipal City of Indianapolis and said trust is now entitled to have made the formal and final transfer, accordingly, of all the property and franchises of said Citizens Gas Company to said Municipal City of Indianapolis as the active trustee of said Public Charitable Trust for the use and benefit of the inhabitants and taxpayers of said city, among whom are these plaintiffs. And plaintiffs say that such formal and final transfer should and would have been made at this time and the title of said Municipal City as trustee should and would at this time have become and be vested and clear of all clouds but for certain wrongful and unlawful obstruc-

tions put in the way thereof by the defendants, conspiring and confederating and colluding with others, in the form and manner hereinafter more fully stated; that the said wrongful acts of the defendants and their said confederates constitute an unlawful cloud upon the title of said Municipal City, as trustee, to the said property and franchises of said Citizens Gas Company which it is the object and purpose, among other things, of this suit to remove.

(15).

"That on March 25, 1911, pursuant of Article IV of its Articles of Association, hereinbefore set out, said Citizens Gas Company increased its common capital stock from the amount of one million dollars to the amount of two million dollars, and thereafter, from time to time, until July 1, 1919, said additional one million dollars of the common capital stock was sold at public auction to the highest bidder therefor, after having given thirty days notice of the time and place of such sale by publication in three Indianapolis daily newspapers having the largest circulation, all as provided in said Article IV of said Articles of Association. That in each of said published notices of sale, it was specifically stated that all said stock sold should be issued and acquired in all respects conformably to the terms and conditions of the Articles of Incorporation of said Citizens Gas Company, relating to such sale of stock. That in said sales of stock the conditions imposed by said Articles of Incorporation were complied with and said trustees certificates were accordingly issued to said purchasers of said stock and said stock was assigned to said trustees in trust.

(16).

"That on November 29, 1911, said city of Indianapolis and said Citizens Gas Company of Indianapolis, made with each other and entered into a supplemental agreement intended to amend certain provisions in the said franchise contract of August 25, 1905, thereafter confirmed by ordinance, made by and between said City of Indianapolis as one party and said Alfred F. Potts, Frank D. Stalnaker an Lorenz Schmidt, as other party. That said supplemental agreement of November 29, 1911 is exhibited at large in General Ordinance No. 86, 1911, passed by the common council of said City of Indianapolis and approved May 22, 1911, which said ordinance

was duly published and appears in General Ordinance record 13, page 341, of the ordinances of said City and it is in the words and figures following, towit:

"'General Ordinance No. 86, 1911.

* * * * * *

"(Here follows the Agreement of November 29, 1911, between the City of Indianapolis and Citizens Gas Company, modifying the Franchise Contract of August 25, 1905, which Agreement appears as part of Exhibit C to the bill (I R. 108-112))."
(Inserted pursuant to stipulation filed November 22, 1939.)

"That said amending ordinance was approved by S. L. Shank, Mayor, on May 12, 1912, and was published in General Ordinance Record 13, page 341. It was published also, in the Municipal Code of the City of Indianapolis, 1917, pages 454-457.

"That said amending ordinance being in aid of said Public Charitable Trust and for the benefit of the inhabitants and taxpayers of said City of Indianapolis, its acceptance by them will be implied.

(17).

"That in part performance of said Public Charitable Trust and in aid thereof, said Citizens Gas Company acquired property of the great value, towit, $20,000,000.00; that all said property became and it is impressed with said Public Charitable Trust; that plaintiffs herein have attempted to describe all said property according to its classification, and without particular enumeration of all the various specific items which compose any class; that if any item shall have been omitted herefrom, or shall be hereafter acquired or shall be inaccurately described herein, plaintiffs ask leave, upon discovery, to describe such newly discovered item and to include its enumeration herein and to make any proper correction as a part of this complaint, to the end that all the assets and property of said Citizens Gas Company, of whatsoever kind and wheresoever situate, may be brought properly within the issues of this suit and dealt with accordingly.

"That defendant Citizens Gas Company of Indianapolis, has acquired title to and is now the owner of certain real estate, together with the buildings, fixtures, machinery and equipment used and useful for the manu-

facture, storage and distribution of artificial gas and the by products thereof, together with pipe lines, mains and other necessary equipment for the distribution of artificial gas in the City of Indianapolis, and, also, a manufacturing plant and ovens for the production, manufacture and sale of commercial coke. Said real estate is situate in the city of Indianapolis, Marion County, State of Indiana, and is more particularly described as follows, towit:

• • • • • •

"(Here follows a detailed description of the property of the Citizens Gas Company)."
(Inserted pursuant to stipulation filed November 22, 1939.)

That said Citizens Gas Company of Indianapolis also, has acquired title to and owns certain leasehold rights in coal lands located in the counties of Raleigh and Fayette, in the State of West Virginia, useful and used for the purpose of producing therefrom coal for use in the operation of the business of defendant Company.

(18).

"That defendant Indianapolis Gas Company pretends to have been organized in 1891 pursuant of said act of the General Assembly of Indiana entitled 'An act for the incorporation of manufacturing and mining companies and companies for mechanical chemical and building purposes', approved May 20, 1852; that no articles of association of said Indianapolis Gas Company have ever been filed, or are on file, in the office of the Secretary of State of Indiana, but in lieu thereof, there appears a certified copy of an order of the Marion Circuit Court of Indiana changing the corporate name of Electric Lighting, Gas Heating and Illuminating Company to Indianapolis Gas Company; from this certified copy of decree the following facts may be traced chronologically, towit: On April 3, 1876, there was approved a general ordinance enacted by the common council of said city of Indianapolis investing Robert Dickson and his associates and their assigns with the privilege of furnishing gas to the City of Indianapolis and the inhabitants thereof, upon certain conditions therein named; pursuant of the conditions of the franchise granted Dickson and others, they incorporated a company shortly after the adoption of the ordinance, which was known as the 'Citizens Gas Company', and to that com-

pany the franchise was turned over. The 'Citizens Gas Company' constructed a gas-works plant on West Pratt Street and engaged in business of furnishing gas under this ordinance. A short time before 1880 the plant was damaged by an explosion and fire. Financial trouble ensued and as a result of the litigation in the Superior Court of Marion County, Indiana, the franchise was sold, as well as the entire plant, by the Sheriff. The purchaser was John S. Tarkington, who in 1881, incorporated a company known as the 'Electric Lighting, Gas Heating and Illuminating Company' with capital stock fixed at $100,000.00.

"The Articles of Association contained no provision subjecting them to revision or change by the State of Indiana. At the expiration of the year for redemption from said sheriff's sale, there having been no redemption, the sheriff's certificate was assigned to the company which had been organized by John S. Tarkington and all the property of the Citizens Gas Company was conveyed to the Tarkington Company. There does not appear any record of the dissolution of 'Citizens Gas Company'. The 'Electric Lighting, Gas Heating and Illuminating Company' appears to have done business in that name until 1890 at which time that company, the Indianapolis Natural Gas Company and the Indianapolis Gas Light and Coke Company were purchased by E. C. Benedict and others, of Philadelphia, and consolidated into the Indianapolis Gas Company, the latter name having been authorized by said decree of the Marion Circuit Court. The Indianapolis Gas Company appears to claim a direct succession from the original Electric Lighting, Gas Heating and Illuminating Company, the chartered duration of which was limited to expire in 1931. Other than as indicated the Indianapolis Gas Company does not appear to have had any franchise from the City of Indianapolis. On November 9, 1907, it appears that the capital stock was increased to $2,000,000.00. The Indianapolis Gas Company *eo nomine* does not appear to have had any franchise from the city of Indianapolis to operate an artificial gas plant but on May 12, 1890, it filed its acceptance of the general ordinance of June 27, 1887, concerning the use of streets and public places for supplying the city of Indianapolis and its inhabitants with natural gas. Since 1904 no company has supplied natural gas in Indianapolis.

(19).

"That on towit the 1st day of January, 1913, the defendant Indianapolis Gas Company was the owner of, and was operating a gas plant in said city of Indianapolis through which it supplied gas for fuel and illuminating purposes to the inhabitants of said city; that there and then said Indianapolis Gas Company's said plant included about 375 miles of mains and pipes of various sizes, theretofore laid and devoted to the distribution of natural gas and at the time existing by sufferance only, in the streets and alleys of said city, together with certain coal-gas and water-gas plants used in the manufacture of artificial gas for sale by said Indianapolis Gas Company; that a large part of said gas mains were old, much having been in the ground for twenty years and more, and large portions of them were in bad repair and rotten, and weakened by having been buried in the ground for such length of time, and by electrolysis; that said coal-gas and water-gas plant were obsolete and incapable of producing gas at a cost which would enable said company to sell said gas at a profit in competition with a plant efficiently constructed and equipped and operated according to modern methods, and selling within the price fixed by the laws of Indiana. That the condition of the system pursued by said Indianapolis Gas Company and the obsolete character of its plants and machinery were such that said company had not been able to do a profitable business for many years and it had not, at that time, been able to pay any dividends to its stockholders for twenty years and it had been compelled to borrow money with which to pay interest on its bonds and other fixed liabilities; that the capital stock of said company was $2,000,000.00 and its bonded indebtedness was stated to be $4,833,000.00, which capitalization and bonded indebtedness were largely in excess of the actual value of all the property of said company; that a fair and reasonable value of all the property, real and personal, of said gas company was $1,223,250.00 which included an office building of the fair and reasonable value of $400,000.00; that said office building is not used, nor useful, in the production of gas and it is subject to the lien of a preferred stock issue of $300,000.00, due to mature in December, 1931; that the total net value of all the property of said Indianapolis Gas Company, used and useful in the manufacture of gas, was not to exceed $923,250.00, and said

company was unable to liquidate its indebtedness and was insolvent; that at that time said E. C. Benedict of Philadelphia, Pennsylvania, commonly called "Commodore" Benedict, and his associates were in financial and administrative control of said Indianapolis Gas Company and Benedict was its president and he was thoroughly informed as to the said condition of said Company and as to the gas-production situation in said city of Indianapolis.

(20).

"That on towit said 1st day of January, 1913 one J. D. Forrest was the general manager of said Citizens Gas Company and, notwithstanding the subordinate title of his office, he was largely in actual control of all the affairs of said Citizens Gas Company and he was thoroughly informed as to the condition and methods of said Citizens Gas Company, and as to the condition and methods of said Indianapolis Gas Company and as to the gas production situation in said city of Indianapolis.

"That on towit, said 1st day of January, 1913 one Volney T. Malott, one Linneas C. Boyd and one Clarence L. Kirk were capitalists of said city of Indianapolis, who worked together and were commonly known in financial circles as the Malott interests, and each of them was thoroughly informed as to the gas situation in Indianapolis and as to the condition the plans, the purposes and methods of both said Citizens Gas Company of Indianapolis and said Indianapolis Gas Company.

"That on towit January 1, 1913, said Commodore Benedict and J. D. Forrest came to a mutual understanding and accord and thereupon they conspired, confederated and agreed together, pretending that said Benedict should retire from the gas competitive field of Indianapolis, leaving said territory wholly open to the use of said Citizens Gas Company and saving said Indianapolis Gas Company only from complete destruction, but, in fact, they planned that said Forrest should get advantages and emoluments arising upon putting into effect a financial composition involving many millions of dollars and that said Benedict should save to himself and his associates a nominal value out of the common stock of said Indianapolis Gas Company and the face value of a pretended mortgage, purporting to have been executed on October 1, 1902 to secure an authorized issue of $7,500,000.00 gold payment bonds bearing interest at 5 per

centum per annum and due fifty years after date and of which Ferdinand Winter and Trust Company of America were nominal trustees; that thereupon said Forrest-Benedict interests solicited and engaged said Malott-Boyd-Kirk interests to enter said conspiracy upon assurance that they should acquire at a preferential price the common stock of said Indianapolis Gas Company and that all interests should work together to destroy said Public Charitable Trust and divert the earnings of said Citizens Gas Company, and the revenues which properly belonged to said Public Charitable Trust, into the funds and holdings, by any possible course of direction or indirection, of said Malott-Boyd-Kirk interests; and to such effect said confederates then and there conspired and agreed together; that thereupon said trades were consummated and upon their consummation said confederates, through agencies of publicity and finance, took control of the policy of said Citizens Gas Company and of its officers, servants and representatives, including the said trustees of said Public Charitable Trust.

"That thereupon it was designed by said confederates that a public service commission should be created in and by the State of Indiana with plenary powers to circumvent the constitutional restrictions of the state and by those means destroy said Public Charitable Trust and substitute in its place and stead a plan and method whereby said Citizens Gas Company should be required to bear the burden of replacing said Indianapolis Gas Company as a going concern, invested with modern and efficient methods, all to the end that upon the termination of an alliance between said Citizens Gas Company and said Indianapolis Gas Company, the latter company would be in exclusive control of the territory of Indianapolis for all purposes of gas production and sale, and all without cost and expense to said conspirators, but wholly at the cost and expense of the inhabitants and taxpayers of said city of Indianapolis.

(Note: The matter indicated supra with distinguishable type is the matter which the court ordered be struck out of the complaint.)

"That thereupon and with the aid of publicity and large financial resources said confederates began to act, and they have so accomplished their said ends as that the following events and acts appear to their advantage, towit:

(21).

"On the 4th day of March, 1913 there was approved an act of the General Assembly of Indiana, to take effect on the 1st day of May, 1913, entitled 'An act concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission' (Acts 1913, 167).

(22).

"That on the 21st day of May, 1913, and pursuant of said conspiracy on the part of said Benedict-Forrest and said Malott-Boyd-Kirk interests, and in the carrying of said conspiracy into partial effect, said Citizens Gas Company of Indianapolis and said Indianapolis Gas Company pretended to agree together to unite, and accordingly they did unite, in a pretended petition in common to said Public Service Commission, to authorize said Indianapolis Gas Company, as lessor, to lease its plant and property to said Citizens Gas Company as lessee which petition, omitting the signatures and attestations of the proper officers of each of said companies, was in substance, towit:

• • • • • •

"(Here follows the joint petition of Citizens Gas Company of Indianapolis and The Indianapolis Gas Company to the Public Service Commission, previously set forth as part of Plaintiffs' Stipulation Exhibit 13)".
(Inserted pursuant to stipulation filed November 22, 1939.)

(23).

"The pretended finding and order of the commission purporting to approve and confirm said lease were made and entered of record on October 1, 1913. The order provided inter alia that before the lease should become effective the Indianapolis Gas Company should surrender its franchise with the City of Indianapolis and take an indeterminate permit from the Public Service Commission. And this was attempted to be done.

"The pretended contract of lease as entered into in accordance with the pretended order of the Public Service Commission, omitting its caption, signatures and attestations contained the following provisions:

* * * * * *

"(Here follows a copy of the Lease between Indianapolis Gas and Citizens Gas, a copy of which is attached to the bill as Exhibit B (I R. 51-80))".
(Inserted pursuant to stipulation filed November 22, 1939.)

(24).

"That said Citizens Gas Company of Indianapolis has well and truly performed all the obligations imposed upon it by said pretended lease and in so doing it has laid out and expended of the moneys, funds and property of the taxpayers of said city, among whom are included these plaintiffs, for the use and benefit of said Indianapolis Gas Company, a large sum, including interest thereon, towit, ten million dollars, which sum, except for this suit, will be wholly lost to said taxpayers and residents; that particular items which have entered into said payments, with interest thereon, are as follows, towit:

Year	Rental	Extensions	Taxes	Interest	Total
1920	$ 401,802.00	$	$ 145,242.70	$	$ 546,844.70
1921	401,350.43	178,113.60	105,228.68	32,810.68	717,503.39
1922	408,702.53	116,629.55	108,615.59	73,892.24	707,239.91
1923	417,838.89	131,888.90	124,515.09	81,051.06	755,293.94
1924	428,075.25	134,293.66	137,543.83	87,312.40	787,185.14
1925	437,187.65	183,961.14	150,004.06	93,500.98	864,653.83
1926	451,004.61	236,750.76	142,695.55	101,708.68	932,209.58
1927	456,040.95	21 [illegible]65.75	143,920.60	104,546.21	914,773.51
1928	463,226.76	[illegible]	146,594.79	99,418.97	841,628.37
1929	463,226.76	132,5[illegible]	146,594.79	95,032.26	837,139.63
	$4,328,295.83	$1,456,049.06	‡$1,350,955.68	‡$769,271.48	‡$7,904,572.05

"That said payments with interest thereon in their aggregate are more than ten times the entire value of all the property of said Indianapolis Gas Company and said Indianapolis Gas Company is insolvent; that said pretended petition by said Citizens Gas Company of Indianapolis and said Indianapolis Gas Company of May 21, 1913, is ultra vires said Citizens Gas Company, its officers, agents, servants and representatives, and of said trustees and it is wholly void; that said pretended lease of October 1, 1913, ordered and directed to be executed by said Public Service Commission is in contravention of the contract clause of the Constitution of the United States for that it impairs the charter of said Citizens Gas Company and it impairs, also, the said contract of August 25, 1905, by and between the City of Indianapolis by and

‡ Estimated.

through its Board of Public Works, and Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, approved on August 30, 1905, by General Ordinance No. 72 as exhibited in General Ordinance Record 12, page 244; wherein and whereby said Public Charitable Trust was created; that these plaintiffs specially set up and claim the protection in this their suit, of said contract clause of the Constitution of the United States and they ask the Court that their said claim of protection be heard and sustained herein; and likewise these plaintiffs specially set up and claim the protection in this their suit, of the contract clause of the constitution of the State of Indiana and they ask the Court that their said claim of protection be heard and sustained herein.

"And these plaintiffs further say that said act of the General Assembly of Indiana of March 4, 1913 pretending to create said Public Service Commission is void for that it is in contravention of the constitution of Indiana concerning the formation of corporations, in this, that said constitution withholds from the General Assembly all authority to authorize charters or substitute charters in the form of permits of any kind to any corporation except under general laws and such charters and permits never can be authorized nor granted upon the special petition of any person, firm or corporation; that forasmuch as said Public Service Commission is an unlawful body and wholly without any authority and power under the Constitution of Indiana its said pretended order of lease of October 1, 1913, is wholly void and it takes the property of these plaintiffs without due process of law and in the denial of the equal protection of the law in contravention of the fourteenth amendment of the Constitution of the United States, and these plaintiffs now specially set up and claim in this their suit the protection of the Fourteenth Amendment of the Constitution of the United States and they ask that the court hear and sustain their said claim herein.

(25).

"That all the defendants herein, were either parties to the said conspiracy in the beginning as formed by and between the said Benedict-Forrest interests and the Malott-Boyd-Kirk interests, or, if not so involved in the beginning, said persons thereafter made themselves parties to said conspiracy by acceptance, ratification and adoption and they are now engaged in and about carrying out details of

said conspiracy and making the same effective to the purposes for which it was created; that said Ferdinand Winter and the Trust Company of America were named, and their powers defined as trustees, in a certain pretended mortgage executed on, towit, October 1, 1902, by said Indianapolis Gas Company pretending to secure the payment of an authorized issue of $7,500,000.00, gold payment 5 per centum per annum bonds, due fifty years after date and of which authorized sum $4,833,000.00 may have been issued; that plaintiffs are not advised as to the consideration, if any, attending said issue of bonds, nor as to their existence at this time nor as to their legality, nor as to their value, sufficiently to admit the same and therefore, plaintiffs deny the existence, the legality and the value of said issue of bonds and the priority of said mortgage as against the claim and right of said Public Charitable Trust, and of said City of Indianapolis as trustee, and of said receiver to be appointed herein, for money laid out and expended, without consideration therefor, in and about the replacement, preservation and maintenance of said mortgaged property, and said mortgage trustees are made parties defendants herein to answer to their interest and to defend said mortgage against this suit to defeat the lien of said mortgage and to quiet title against the same, or on default said trustees to suffer the removal of said mortgage lien from said property, and the determination and adjudication that the lien of said mortgage should be and is junior and inferior in right and equity to the lien of said city as trustee, and of said Public Charitable Trust, and of the receiver to be appointed herein, for said moneys laid out and expended to replace, preserve and maintain said mortgaged property and that said mortgage should be determined and adjudged to be an unlawful cloud upon said Public Charitable Trust and that the title of said Public Charitable Trust and of said City of Indianapolis, as trustee, as against said pretended mortgage lien should be forever quieted and that said mortgage trustees should be summoned and required to answer accordingly herein.

"That said City of Indianapolis its officers and representatives never have taken, and they are not now taking, any affirmative action to preserve and rescue said Public Charitable Trust and to execute and carry the same into effect in the terms in which it was created and established but on the contrary the policy and conduct of said city, its officers and representatives has been and is to aid and assist to make effective the purposes and objects of said conspiracy

and to obstruct the execution of said trust in the terms in which it was created and the performance of the duties of trustee thereby imposed upon said municipal city, so that unless these plaintiffs, as inhabitants and taxpayers of said city, for their own use and benefit, and for the use and benefit of all other persons similarly situate, can maintain this suit, said Public Charitable Trust will be defeated and wholly destroyed, to the irreparable loss and injury of the cestuis que trustent of said trust, and for which they can have no adequate remedy at law; that the conduct and acts of said City of Indianapolis, its officers, agents, servants and representatives constitute, and is, in effect, a repudiation of said trust and a renunciation of said office of trustee.

(26).

"That on August 27, 1921, said Citizens Gas Company further in aid of said conspiracy herein described and acting under the control, and at the direction of the members thereof, filed with said Public Service Commission a pretended declaration of surrender of its said franchise with the City of Indianapolis, which said declaration was in substance towit:

" 'Declaration of Surrender of Licenses,
Permits and Franchises by
Citizens Gas Company of Indianapolis

" 'This Indenture Witnesseth, That Citizens Gas Company of Indianapolis, a corporation duly organized and existing under the laws of the State of Indiana, and which is the owner and operator of by-product gas plants in the City of Indianapolis, Indiana, and is a public utility, declares that it hereby surrenders each and every license, permit and franchise from the city of Indianapolis, Indiana, now owned or held by it and under or by virtue of which said Company is operating its gas utility or any part thereof, in said city; and hereby accepts indeterminate permits in lieu of said licenses, permits and franchises hereby surrendered as provided in the Act of the General Assembly of the State of Indiana entitled "An Act concerning public utilities creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission," approved March 4, 1913, and acts amendatory thereof or supplemental thereto; but if said act shall be repealed or annulled, then said Company shall be reinstated in the possession and enjoyment of all the licenses,

permits and franchises hereby surrendered as provided in said Act.

"'In Witness Whereof, the said Citizens Gas Company of Indianapolis has this 12th day of August, 1921, caused its name to be hereunto subscribed by its President and its corporate seal hereto affixed, attested by its Secretary duly authorized thereto by resolutions of the stockholders and directors of said Company, duly adopted at meetings of said stockholders and directors duly called and held.

"'Citizens Gas Company of Indianapolis,

"'By John R. Welch, President.

"'Attest: J. D. Forrest, Secretary.

"'Certificate.

"'This is to certify that on the 27th day of August, 1921, the Citizens Gas Company of Indianapolis filed in the office of the Clerk of the city of Indianapolis, Indiana, a declaration, of which the above is an exact copy.

"'Geo. O. Hutsell, Clerk of the City of Indianapolis.'

(27).

"That on December 12, 1921, said Public Service Commission entered its order pretending to approve the simulated declaration of surrender of franchise by said Citizens Gas Company of Indianapolis from said City of Indianapolis, which said order was in substance, towit:

"'The commission being fully advised in the premises finds that said Citizens Gas Company of Indianapolis, Indiana, has filed its written declaration, as provided by the public service commission act, surrendering all licenses, permits and franchises from the City of Indianapolis, Indiana now owned or held by the petitioner herein in accordance with the provisions of said act and that said Company receives in lieu thereof by operation of law an indeterminate permit to be held under all the terms, conditions and limitations of said act.

"'It is therefore ordered by the Public Service Commission of Indiana, that said declaration and all instruments in writing filed by said company in the matter shall be filed in the office of the secretary of the commission kept on file as a record of said surrender'.

"That said order of December 12, 1921, entered by said Public Service Commission and purporting to approve the declaration of surrender of franchise by said Citizens Gas

Company from said City of Indianapolis is unlawful and void for each of the reasons following, towit:—

"1. In and by the provisions of the constitution of Indiana the franchises of corporations are immutable and cannot be changed so as to affect existing rights, and the laws in relation thereto are inflexible; that a rule prescribed in the constitution of other states to the effect that corporation charters and franchises shall be issued subject to the right of the state to enact subsequent laws changing said charters and franchises of corporations does not prevail, and never has prevailed, in Indiana, but, on the contrary, all corporations must be formed and must operate under general laws made without participation by any corporation in the legislative endeavor and no permit, license nor privilege shall be granted to one corporation upon its own terms, or petition reciting special and particular facts which does not pertain to all corporations alike under general laws and no permit, license or privilege may be granted to affect retroactively a charter or franchise which has once issued; that forasmuch as the General Assembly is without power to grant any permit, license, or privilege to any one corporation which does not pertain to all corporations alike under general laws and is without power to grant any permit, license or privilege to affect retroactively any charter or franchise which has once issued, so the General Assembly is without power to authorize any person, subordinate to said General Assembly, to grant any permit, license or privilege to one corporation which does not pertain to all corporations alike under general laws and is without authority to grant any permit, license or privilege which shall affect retroactively any charter or franchise which has once issued; that in consideration of the premises said act of the General Assembly of the State of Indiana entitled 'An act concerning public Utilities, creating a Public Service Commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission', approved March 4, 1913, is unconstitutional and void in so far as it attempts to confer any authority on said commission to grant any permit, license or privilege to one corporation which does not pertain to all corporations alike under general laws; that the franchise which said Citizens Gas Company of Indianapolis simulated to surrender was local and it was specific in its provisions and it carried with it a Public Charitable Trust to which the inhabitants and taxpayers of said city were cestuis que trustent, so that the pretended

indeterminate permit granted by said Public Service Commission was special and did not pertain to all corporations alike, and said cestuis que trustent never assented thereto.

"2. In and by the constitution of Indiana, corporation franchises are immutable contracts and they cannot be impaired by the state because of the contract clause of the state constitution, towit, Article 1, section 24 of the constitution of Indiana; that the franchise which said Citizens Gas Company of Indianapolis simulated to surrender carried with it contractual provisions creating a Public Charitable Trust in which the inhabitants and taxpayers of said city of Indianapolis, including these plaintiffs were cestuis que trustent and which Public Charitable Trust was not perpetuated in said indeterminate permit; that said Public Charitable Trust came within the protection of said contract clause of the constitution of Indiana and was inviolate, and this right these plaintiffs now assert and claim, and they ask that it be adjudged and determined by this court in this suit, and they say that said cestuis que trustent never assented to the surrender of said franchise.

"3. In and by the constitution of Indiana, Article 6, section 6, municipal officers 'shall reside within their respective counties, townships, and towns and shall keep their respective offices at such places therein'; that at the time said constitution was adopted there were no cities in Indiana but the Supreme Court has construed the word 'town' to be generic and to include cities; that members of said Public Service Commission do not reside in said City of Indianapolis nor hold offices therein; that said order of said Public Service Commission is not a municipal ordinance and was not enacted nor published as a municipal ordinance and said order is in contravention of the constitution of Indiana and is void.

"4. In and by the Constitution of the United States corporation franchises are immutable contracts and they cannot be impaired by the state because of the contract clause of the Constitution of the United States, towit, Article I, section 10; that the franchise which said Citizens Gas Company simulated to surrender carried with it contractual provisions creating a Public Charitable Trust in which the inhabitants and taxpayers of said City of Indianapolis were cestuis que trustent and which said Public Charitable Trust was not perpetuated in said indeterminate permit; that said Public Charitable Trust came within the protection of said contract clause of the Constitution of the United States and was inviolate, and this right these plain-

tiffs now assert and claim and they ask that it be determined and adjudged by this court in this suit, and they say that said cestuis que trustent never assented to the surrender of said franchise.

"5. That on April 19, 1816, James Madison, as President of the United States of America, approved an act of the Congress entitled 'An act to enable the people of the Indiana territory to form a constitution and state government, and for the admission of such state into the Union on equal footing with the original states'; that the first section of said act was as follows, towit: 'Section 1. Be it enacted by the Senate and House of Representatives of the United States, in congress assembled: That the inhabitants of the territory of Indiana be, and they are hereby authorized, to form for themselves a constitution and state government, and to assume such name as they shall deem proper; and the said state, when formed, shall be admitted into the Union upon the same footing with the original states, in all respects whatever;' that said act of the congress carried with it an offer to said people that they should have the right to interpret their own institutions; that afterwards, on June 29, 1816, the representatives of the people of the territory of Indiana, in convention met at Corydon, on Monday the tenth day of June, 1816, adopted an ordinance of acceptance of the provisions of said act of Congress of April 19, 1816; that said act of Congress and said ordinance of acceptance together constituted a contract within the protection of the contract clause of the Constitution of the United States and said contract was ever thereafter inviolate; that following upon the adoption of said ordinance of acceptance said representatives of the people, met at Corydon, proceeded to carry out the terms of said compact founded upon said act of the Congress, and said offer to said people of their right to interpret their own institutions and accordingly they formed for themselves a constitution and state government in which constitution they reserved the power of amendment of the Constitution; that pursuant of such right of interpretation and of said reserved power of Amendment the people of the State of Indiana thereafter adopted their present state constitution, to take effect on November 1, 1851, superseding the constitution of 1816; that Article IV of the present Constitution is devoted to the law-making authority of the state which is vested in a general assembly, which is defined and its province prescribed, and therein is included a definition of what shall constitute 'the law' of Indiana, towit: 'Section 1. The

legislative authority of the state shall be vested in the General Assembly, which shall consist of a senate and house of representatives. The style of every law shall be: "Be it enacted by the General Assembly of the State of Indiana", and no law shall be enacted except by bill;' that thereafter the Federal government adopted the fourteenth amendment of its constitution, which became effective, according to the proclamation of the secretary of state, on July 28, 1868; that in said amendment provision is made in restraint of law of the state including: 'Nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law;' that at the time said Fourteenth Amendment was adopted the words 'equal protection of the law' and 'due process of law', each had a defined and accepted meaning in the jurisprudence alike of the United States and of the several states including the state of Indiana and thereby 'the law' was meant to be 'the law' as previously declared, and said fourteenth Amendment was adopted in acceptance of those meanings of 'the law', and those meanings cannot be changed by any authority less than the constitution itself, and this inviolability of the meaning of 'the law' these plaintiffs now set up and claim as a federal right and they ask this court to determine and adjudge the same in this suit, and to adjudge that said Public Service Commission is incompetent to declare 'the law' or to define 'the law' and that the promulgation of orders made after the fact by said Public Service Commission are null and void, and are wholly inadequate as a foundation, to support any revision or any supervening order by any governmental authority whatsoever; and this right to have the corporation laws of Indiana held to be and to have them maintained inviolate and not exposed retroactively to any change by the general assembly or by the Public Service Commission of Indiana, or by any other authority whatsoever, these plaintiffs now set up and claim as a right arising under the contract clause of the Federal Constitution and under the laws of the United States, and they ask that their said claim be determined and adjudged by this court in this case, and, that said act of March 4, 1913, be adjudicated to be unconstitutional and void and that each of the said orders of said Public Service Commission of Indiana herein set forth be held to be without any authority in law and void, including that said orders, and any of them are not competent in law to confer a right of revision upon any tribunal

or body whatsoever, whether of the state of Indiana, or of the United States.

"That said act of March 4, 1913, and each of the proceedings had and taken and each of the orders made and entered thereunder, constitute an unlawful cloud upon the title of said Public Charitable Trust which should be removed by the judgment and decree of this court in this suit and said title should be forever cleared of said cloud.

(28).

"That since the entry of said order of December 12, 1921, there have been various simulated petitions by said conspirators acting in the name of said Citizens Gas Company to said Public Service Commission concerning rates and in re-action to said petitions there have been various pretending orders made and promulgated by said Public Service Commission concerning said rates; that each and all said petitions were in aid and furtherance of said conspiracy herein described and each and all said pretended orders of said commission were unlawful and void; that each of said separate proceedings presents questions of law similar to the question which arises upon said proceedings which originated in said simulated petition of August 27, 1921 and because of their similitude it would be impertinent to burden this complaint with an iteration of the details of said subsequent proceedings, with this exception however, towit: On April 7, 1922, said Citizens Gas Company filed its simulated petition with said Public Service Commission for authority to increase its rate for gas, furnished to the inhabitants of said city, to $1.25 per unit of 1000 cubic feet which petition was docketed as cause No. 6969, and was denied; that upon the denial of said petition said conspirators acting in the name of said Citizens Gas Company filed its bill of complaint in the United States District Court for the District of Indiana in which bill said company stated the proceedings had before said Commission; averred that the order made by the commission was a confiscatory 'law' and in contravention of the Fourteenth Amendment of the Constitution of the United States and asked as relief that said commission be enjoined from interfering with the establishment of a rate of $1.25 per unit of 1000 cubic feet for gas furnished to the inhabitants of said City; that said Federal Court sustained said bill and granted the prayer thereof and entered an injunction restraining said commission from interfering with said rate of $1.25 per unit as aforesaid; that said proceedings in said

court were beyond its jurisdiction and were void because said Federal Court was asked to and it did grant a relief which superimposed the Fourteenth Amendment upon the contract clause of the Constitution of the United States to the effect of the latter's nullification; that there can be no confiscation, nor any taking of property without due process of law, nor in denial of the equal protection of the law, where the affected rights of the respective parties in interest are contractual; that a confiscation can occur only where rates are imposed by law, as distinguished from rates provided for by contract and then only the Fourteenth Amendment can have any application; that no rates ever had been imposed by law upon said Citizens Gas Company and the only lawful rates it ever could charge were those fixed by said franchise schedule of 1905; that forasmuch as said injunction of said United States District Court was without jurisdiction and void the said order of said Public Service Commission is void.

"That said proceedings in said United States District Court are of no effect and are void as to said Public Charitable Trust for the reason that said Public Charitable Trust was not a party to said proceedings and its rights in the premises were not presented to the Court nor heard and determined in said suit.

(29).

"That the said pretended agreement of lease made and entered into on September 30, 1913, by and between the Indianapolis Gas Company, as lessor, and the Citizens Gas Company of Indianapolis, as lessee, was ultra vires said Citizens Gas Company, its officers and representatives, and is unlawful and should be determined and adjudged in this suit to be, and to have been ab initio, void and said pretended lease should herein be determined and adjudged to constitute an unlawful cloud upon the title of said Public Charitable Trust and should be removed by the proper decree of this court in this suit.

"That said pretended agreement of lease made and entered into on September 30, 1913, by and between the Indianapolis Gas Company, as lessor, and the Citizens Gas Company of Indianapolis as lessee, was brought about and made effective, and has been maintained throughout, because of the wrongful conspiracy by and between said Benedict-Forrest interests, on the one hand, and said Malott-Boyd-Kirk interests and their respective and several allies and confederates as successors in interest, on the

other hand, by reason whereof said Citizens Gas Company of Indianapolis was and is corruptly and fraudulently deprived of and denied the good faith and fidelity of its own officers, servants and representatives, in council, in negotiations and in conduct, in and about all matters pertaining to said lease, by reason whereof said lease was in the beginning and ever has been and is now wrongful and unlawful and in this suit it should be determined and adjudged to be void and to constitute an unlawful cloud upon the title of said Public Charitable Trust and should be removed by the proper decree of this court in this suit.

"That said pretended agreement of lease made and entered into on September 30, 1913, by and between said Indianapolis Gas Company, as lessor, and said Citizens Gas Company, as lessee, was wrongfully and unlawfully brought about and imposed upon said Citizens Gas Company by the Public Service Commission of Indiana, that the order of said Public Service Commission approving said pretended lease and all the subsequent orders of said Commission pertaining thereto, impaired the contract of said Public Charitable Trust in contravention of the contract clause of the Constitution of the United States and of the contract clause of the Constitution of the State of Indiana, and in this suit should be determined and adjudged to be void.

"That because said pretended agreement of lease made and entered into September 30, 1913, by and between said Indianapolis Gas Company, as lessor, and said Citizens Gas Company of Indianapolis, as lessee, was unlawful and void, it furnishes no consideration for the moneys laid out and expended by said Citizens Gas Company for, and to the benefit and use of, said Indianapolis Gas Company and said moneys should be recovered through the instrumentality of a receivership, to be created in this suit, as moneys had and received by said Indianapolis Gas Company in the sum, to wit, ten million dollars.

(30).

"That said City of Indianapolis its officers and representatives and their confederates well knowing the condition of said Public Charitable Trust and the wrongs which had been committed against it, and designing how they could deceive the taxpayers and inhabitants of said city, who were and are the cestuis que trustent of said trust, caused and procured the General Assembly of the State of Indiana to pass an act entitled 'An act supplemental to

an act entitled "An act concerning municipal corporations" approved March 6, 1905,' approved March 11, 1929; that said act of March 11, 1929 is unconstitutional and void upon the same grounds that said act of March 4, 1913 purporting to create said Public Service Commission, is unconstitutional, viz. that it is in contravention of Article IV section 1 of the Constitution of Indiana in each of the several particulars towit: (1) That said act attempts to confer upon, and to ratify, approve and confirm in the Public Service Commission of Indiana, legislative authority; that said Public Service Commission is not composed of two houses, as provided in said section 1 of Article IV of the Constitution of Indiana and it is not elected by the people, but is appointed by the governor, and the members thereof are not appointed according to districts, but are appointed at large and capriciously by the governor and at least nine of the congressional districts of the state and at least eighty-seven counties of the state are wholly disfranchised in the selection of said commissioners, in contravention of Article I section 23 of the Constitution of Indiana; (2) That the pretended orders of said commission in the premises are not, nor is any one of them, styled 'Be it enacted by the General Assembly of the State of Indiana', nor is any one of said orders a law enacted by bill as provided and defined in said Article IV section 1; (3) Nor is any one of said orders preceded with a title to express the subject matter of said order and matters properly connected therewith, as provided in said Article IV section 19; (4) Nor is any one of said orders a general law as provided in said Article IV section 23; (5) Nor is any one of said orders published as provided in said Article IV section 28; (6) Nor is any one of said orders signed or vetoed by the governor as provided in Article V section 14 of the Constitution of Indiana, and said Public Service Commission is wholly without any authority whatsoever to speak for and represent the people of Indiana as a law making body; (7) That said Public Service Commissioners are not residents of any one and single county, township, or town within which they keep their office, as required concerning municipal officers by Article VI section 6 of the Constitution of Indiana.

"That the defendants, Sterling R. Holt, Thomas C. Howe, George J. Marott, A. Dallas Hitz and William J. Mooney, pretending to be the Board of Trustees for Utilities and Edward H. Kahn, Henry L. Dithmer, Eli Lilly,

Brodehurst Elsey, John J. Madden, Almus G. Ruddell and Guy A. Wainwright, pretending to be the Board of Directors for Utilities of said City of Indianapolis, are made defendants herein to answer to their interest; that said defendants pretend to hold office and to exercise authority pursuant of said act of the General Assembly of the State of Indiana entitled 'An act supplemental to an act entitled "An act concerning municipaf corporations" approved March 6, 1905,' approved March 11, 1929, but plaintiffs say that said pretenses are wholly without right and unlawful and they constitute a cloud upon the title of said Public Charitable Trust, which should be removed in this suit; and for that said act is, further in contravention of Article IV section 19 of the Constitution of Indiana; that said act consists of twenty sections bearing upon subjects wholly unrelated and not connected with one another and that neither of said subjects, and the matters properly connected therewith, is mentioned in the title of said act; that the title 'An act supplemental to an act' etc., is no title at all within the meaning of said Article IV section 19; that the statement that the act is 'Supplemental' is a mere conclusion of law and it has no proper place in the title of an act of the General Assembly; that said word 'supplemental' contains no verb and it states no object and no purpose; that the effect of a statute is a matter for juridical determination and applies alike to all statutes whether the object and purpose be 'to amend', 'to repeal', 'to authorize', 'to provide for', 'to establish', etc.; that the legislature has plenary power to declare its own objects and purposes, but it is for the judiciary to determine whether such object and purpose when declared has been attained; that if the legislature can by enactment establish its own accomplishments, it can thereby enact laws as to which judicial inquiry will be foreclosed, in contravention of Article III of the constitution. The legislature has from time to time attempted to declare that the different sections of a statute were independent of one another and that the failure of one section should not affect others; also, it has attempted to declare that a statute was 'declaratory' as in defining public offences, and thereby of restrictive meaning, or that it was 'remedial' as in defining liens of working men and therefore of liberal meaning, but in all such cases the legislative expression was in the body of the act and not in its title; that a public service commission is not an essential part of the government of a

first class city and therefore there has been no such void or deficiency in such city government as could be supplied and supplemented with a law imposing upon such city a public service commission; that it may be assumed, from the text of the act, that it relates to a public service commission although the title of said act of March 11, 1929 (Acts 1929 page 252) imparts no information as to whether it means to impose upon the city a supplement relating to garbage, parks, boundaries, sanitation, gypsies and peddlers, public improvements, dog-licenses, taxation, recreation centers or finance; that an amendment of said act of March 6, 1905, is not mentioned in the title of said act of 1929; that said acts of 1905 and 1929 have different and inconsistent standards of determination of the class of cities to which they respectively pertain in this, viz. That said act of 1905 pertains to first class cities, in a series of cities, having a population of 100,000 or more, and as they then existed, whereas said act of 1929, pertains to cities having a population of not less than 300,000 in the year 1929; i. the act of 1929 be a supplement to the act of 1905 then it must be so written as to come within the date of the act of 1905. But in 1905 there was no Indiana city which had a population of not less than 300,000; therefore there was in 1905 no Indiana city to which the act of 1929 can apply as a supplement.

"Nor can the act of 1929 be made to function effectively as an act creating an additional department of the city of Indianapolis because of Article XIII of the Constitution of Indiana; that at the time said act was passed the assessed valuation of property in Indianapolis was $666,461,290 which furnished a bonding capacity of $13,329,225.80 as against which there were outstanding the several issues of bonds towit:

City, general	$ 7,217,050.00
Sanitary district	3,655,500.00
Park district	3,130,000.00
Total	$14,002,550.00

"That at the time said sanitary and said park district bonds were issued, it was supposed by some persons, that said Sanitary district and said Park district were, respectively, municipal units separate and distinct from the municipal city of Indianapolis, but any such false impression was removed by the decision of the Supreme Court in *State Board* v. *State ex rel*, (1926) 198 Ind. 343, 350;

that at this present time the bonded debt of Indianapolis is at its summit and there is no financial capacity on the part of Indianapolis without the aid and assistance of the court as herein set forth, to take over said Citizens Gas Company, if to do so will require said municipal city to incur any debt, and this fact had been well known to the defendants herein since July 26, 1926, the date of said Supreme Court decision; that said act of March 11, 1929, cannot be interpreted and construed to have created a special assessment district, for the reasons following towit: (1) The title of said act does not state that the creation of such assessment district is the subject, or the purpose or the object of the act; (2) That said act contains no definition of the boundaries of any assessment district, nor the purposes thereof nor any procedure in respect thereto; that there is no method prescribed for fixing the value of property to be taken by assessment, nor of the value of the property to be assessed, nor is there any notice of valuation, assessment or maturity nor for the definition and administration of any lien such as would arise upon an assessment.

"Plaintiffs say that said act of March 11, 1929, can have no effect other than to hinder, delay, obstruct and defeat the taking over of said Citizens Gas Company by said City of Indianapolis without the aid and assistance of this court in this suit and that for this fact, as well as others present upon the record, this Honorable Court should sequester said Citizens Gas Company and take over all its property with a receivership in which authority should be granted to said receiver, and he should be directed and required, to issue his receivers certificates whose payments should be secured with a proper pledge of said property, with which to pay all determined debts and thereupon deliver said Citizens Gas Company, clear and free from any obligation whatsoever, through the administrative agency of this court in this suit, to said City of Indianapolis as trustee of said Public Charitable Trust, and unless this can be done these plaintiffs as inhabitants and taxpayers of said city, and all other persons similarly situate, all of whom are cestuis que trustent of said Public Charitable Trust, will be denied all remedy whatsoever and their property will be confiscated and taken without due process of law and in denial of the equal protection of the law, all in contravention of the Fourteenth Amendment of the Constitution of the United States; and this federal right these plaintiffs now expressly set up and

claim and they ask this court to determine and adjudge and sustain said claim in this suit.

"That said act of March 11, 1929, and each and every act of the defendants, and any of them, thereunder, should be determined and adjudged to be unlawful and to constitute a cloud upon the title of said Public Charitable Trust which should be removed by the proper decree of this court in this suit.

(31).

"That said conspirators are now contriving to have numerous suits brought to defeat said Public Charitable Trust; that it is the agreed and accepted policy of the defendants city of Indianapolis and its various officers, agents, servants and representatives of said Citizens Gas Company functioning as ever under the control of said conspirators, that no affirmative claim shall be made in any of said suits, and that no demand shall be made as an affirmative right that said Public Charitable Trust shall be preserved and the property of said Citizens Gas Company be turned over and delivered to said City of Indianapolis as trustee of said Public Charitable Trust and for the use and benefit of said inhabitants and taxpayers, including these plaintiffs; that a multiplicity of suits to destroy said Public Charitable Trust is threatened and the solvency of said Public Charitable Trust as a corporation sole is in imminent danger; that a receiver should be appointed to take over said Public Charitable Trust and protect and execute the same and that such receivership should include the sequestration and administration of the property of both said Citizens Gas Company and said Indianapolis Gas Company, and all appropriate relief should be granted.

(32).

"Wherefore plaintiffs demand judgment that the said franchise contract of August 25, 1905, by and between the City of Indianapolis by and through its board of public works and Alfred F. Potts, Frank D. Stalnaker, and Lorenz Schmidt, as approved by ordinance of the common council of the City of Indianapolis on August 30, 1905 be determined and adjudged to be, and to have been, acts sufficient to have created and that they did create a Public Charitable Trust for the uses and purposes therein set forth and that thereby the inhabitants and taxpayers of said City of Indianapolis including these plaintiffs be

came and they are now the cestuis que trustent of said Public Charitable Trust; and that said trust being for the use and benefit of said cestuis que trustent their acceptance of its terms and provisions will be implied and that the same thereupon became and ever since have remained inviolate; that the formation of said Citizens Gas Company and the transfer to it of said franchise contract of August 25, 1905, as approved by ordinance of the common council of said city on August 30, 1905, be determined and adjudged to have been acts in aid and advancement of said Public Charitable Trust and for the use and benefit of said cestuis que trustent and that their acceptance of the terms thereof will be implied and that thereby a contract was made and constituted which became inviolate under the Constitutions, respectively of the State of Indiana and of the United States, and that these plaintiffs are competent to have title of said Public Charitable Trust in this suit forever quieted and set at rest in the City of Indianapolis as trustee for the inhabitants and taxpayers of said city as against the said pretenses and claims, to the contrary, of these defendants and each of them; that the said pretenses of the defendants and each of them be determined and adjudged to be unlawful and without right; that the said pretended act of the General Assembly of Indiana entitled 'An act concerning Public Utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission.' Approved March 4, 1913, be determined and adjudged to be void and of no effect; that each and all the acts, orders and promulgations of said Public Service Commission purporting to affect, in any manner whatsoever, said Citizens Gas Company be determined and adjudged to be void; that said pretended agreement of lease of the property, franchise and effects of said Indianapolis Gas Company by said Citizens Gas Company of Indianapolis, dated September 30, 1913, and the pretended approval thereof by said Public Service Commission, dated October 1, 1913, be determined and adjudged to be void and of no effect and that the moneys laid out and expended, and paid on account thereof, are in equity the property of said Public Charitable Trust and as such are properly recoverable from said Indianapolis Gas Company as moneys by it had and received; that said Indianapolis Gas Company be determined and adjudged to be insolvent and that its insolvency and its inability to repay

the moneys had and received by it, towit, ten million dollars, from said Citizens Gas Company of Indianapolis renders said Citizens Gas Company of Indianapolis also, insolvent, or puts it in imminent danger of insolvency; that because of the insolvency of each of said corporations a receiver for them should be appointed in this suit; that if said receivership shall be docketed separately, as to each corporation, for better service of administration, the receivership of said Citizens Gas Company should be adjudged and defined as the major and dominant receivership and the receivership of said Indianapolis Gas Company should be adjudged and defined as the minor and subordinate receivership, the court reserving authority and right to transfer any claim and proceeding from one receivership to the other as justice may require, always, however, upon the condition that no action shall be taken in the receivership of said Indianapolis Gas Company which shall be controlling and not subject to review in the receivership of said Citizens Gas Company of Indianapolis, all to the end that there never shall be any conflict between said receivership interests which would obstruct the due administration of justice; that the complexity of rights and issues and the multiplicity of claims, rightfully to become the matter of judicial inquiry and determination, affecting each of said Gas Companies, are such that the assets of said companies are likely to become dissipated and wasted unless the court shall sequester said property with a receivership to be created in this suit, and to be subject to sequestration for administrative purposes as hereinbefore set forth; that in said receivership and receiverships, all conflicting claims and interests should be determined and adjudged and liquidation and payments should be made and enforced accordingly, to the end that complete justice may be done to all parties in interest, and that said Public Charitable Trust in behalf of the inhabitants and taxpayers of said City of Indianapolis may be preserved and enforced; that upon the completion of said liquidation the receiver of said Citizens Gas Company of Indianapolis, should, under the order of this court then to be made and entered, turn over and deliver all the property, rights, privileges, franchises and effects whatsoever of said Citizens Gas Company and of said receiverships, and each of them, to said City of Indianapolis as trustee of said charitable trust, and said City of Indianapolis should be ordered and required to accept said property and said Public Charitable Trust en-

tailed thereon, and to carry into effect and perform said trust as equity and justice shall command; that the defendants John W. McCardle, Francis T. Singleton, Howell Ellis, Calvin F. McIntosh and Jere West, and each of them, and their successors in office as said Public Service Commission of Indiana, should be restrained and enjoined from accepting and acting upon any petition for any order, and from acting upon their own initiative and motion in the contemplation of any order, now or hereafter to be made, entered and issued in any manner whatsoever affecting the property, franchises, privileges, rights and interests of each, and of either, of said corporations, viz: said Citizens Gas Company of Indianapolis and said Indianapolis Gas Company; that the defendants Sterling R. Holt, Thomas C. Howe, George J. Marott, A. Dallas Hitz, and William J. Mooney, and each of them, be restrained and enjoined from acting, and assuming to act, in any manner whatsoever, as the board of trustees of utilities pursuant of any authority and power purporting to be conferred by said pretended act of the General Assembly of Indiana entitled 'An act supplemental to an act entitled "An act concerning municipal corporations", approved March 6, 1905,' approved March 11, 1929; that said defendants Edward H. Kahn, Henry L. Dithmer, Eli Lilly, Brodehurst Elsey, John J. Madden, Almus G. Ruddell and Guy A. Wainwright, and each of them, be restrained and enjoined from acting, and assuming to act in any manner whatsoever, as the board of directors for utilities pursuant of any authority and power purporting to be conferred by said pretended act of the General Assembly of Indiana entitled 'An act supplemental to an act entitled "An act concerning municipal corporations," approved March 6, 1905,' approved March 11, 1929; that the defendants City of Indianapolis, a municipal corporation, Reginald H. Sullivan, as mayor of said City of Indianapolis; Henry O. Goett, as city clerk of said city of Indianapolis; E. Kirk McKinney, Louis C. Brandt and Charles O. Britton, as the Board of Public Works of said City of Indianapolis, and each and every of its officers, agents, servants and representatives be restrained and enjoined from any and every act and omission intended to give aid and comfort to any and every person whomsoever seeking to hinder, delay, obstruct, retard and defeat said Public Charitable Trust and the full, true and complete performance thereof and the taking over of said Citizens Gas Company of Indianapolis by said City of Indianapolis

as trustee of said Public Charitable Trust pursuant of the terms of said Public Charitable Trust as created and defined in said franchise contract of August 25, 1905, made and entered into by said City of Indianapolis, through its Board of Public Works, as one party, and Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, as the other party, and approved by the common council of said City of Indianapolis by ordinance enacted August 30, 1905, and as otherwise ratified, approved and confirmed; that said defendants Indianapolis Gas Company, Clarence L. Kirk, Frederick G. Rastenburg, Paul E. Crozier and each of them, their servants, agents, representatives and attorneys, and each of them, be restrained and enjoined from any and every act and omission, and from conspiring, confederating and agreeing together and with any other person whomsoever with the intent, by any act or omission, to hinder, delay, obstruct, retard and defeat said Public Charitable Trust and the full, true and complete performance thereof and the taking over of said Citizens Gas Company of Indianapolis by said City of Indianapolis, as trustee, of said Public Charitable Trust pursuant of the terms of said Public Charitable Trust as created and defined in said franchise contract of August 25, 1905, made and entered into by said City of Indianapolis, through its board of public works, as one party, and Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, as the other party, and approved by the common council of said City of Indianapolis by ordinance enacted August 30, 1905, and as otherwise ratified, approved, and confirmed; that said defendants Henry Kahn, Otto R. Lieber, Gustav A. Schnull, Thomas L. Sullivan, Frank C. Dailey, James I. Dissette, Gustav A. Efroymson, Edgar H. Evans, James H. Hooker, Henry H. Hornbrook, William H. Insley, Franklin Vonnegut, and John R. Welch and each of them be continued in office as the Board of Directors of said Citizens Gas Company until their several terms of service would otherwise expire; that they and each of them their agents, servants, representatives and attorneys and each of them be restrained and enjoined from any and every act and omission, and from conspiring, confederating and agreeing together, and with any other person whomsoever, with the intent, by any act or omission, to hinder, delay, obstruct, retard and defeat said Public Charitable Trust and the full, true and complete performance thereof and the taking over by said Citizens Gas Company of Indianapolis, as trustee, of said Public

Charitable Trust as created and defined in said franchise contract of August 25, 1905, made and entered into by said City of Indianapolis, through its board of public works, as one party, and Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, as the other party, and approved by common council of said City of Indianapolis by ordinance enacted August 30, 1905, and as otherwise ratified, approved and confirmed, and that said named defendants be ordered and required to aid and assist the receiver appointed by this court herein to carry forth and into final, true and complete performance each and every duty of his said trust herein as an officer of this court, in the revelation and disclosure of all the rights and equities of any and every person whomsoever and in bringing the same to the attention and information of the court by proper procedure, all to the end that complete justice may be done herein as a condition precedent to the turning over of said Citizens Gas Company of Indianapolis, its franchises, licenses, properties and effects of whatsoever kind and wheresoever situate, to said City of Indianapolis, as trustee; that said defendants Ferdinant Winter and Trust Company of America, as trustees, named in a certain pretended mortgage executed on to-wit October 1, 1902, by said Indianapolis Gas Company to secure the payment of an authorized issue of $7,500,000.00 bonds, payable in gold with interest at 5 per centum per annum and due fifty years after date, be ordered and required to bring said mortgage into court and to make full and complete disclosure concerning the same including the amount of said bonds issued, their legality and their value, and if need be to defend the same at the petition of the receiver herein to have said bonds and mortgage adjudged inferior and subsequent in equity and right to the claim of said Citizens Gas Company of Indianapolis for moneys by it laid out and expended, out of the proceeds and property of said Public Charitable Trust, to replace and preserve the physical property embraced in said pretended mortgage and to maintain and enhance its value for the use and benefit of said pretended mortgagees and their cestuis que trustent, and for all which said Citizens Gas Company of Indianapolis has received no lawful consideration whatsoever, and to require said trustees to defend said mortgage against this suit to have said mortgage lien adjudged to be an unlawful cloud upon the title to said property and to have said cloud removed by the judgment of this court herein; that a receiver be

appointed herein, upon ten days' notice to be hereafter given, who shall be neither a party, nor attorney, nor other person in this suit, and who before entering upon his duties shall be sworn to perform them faithfully, and with sureties approved by the court, unless otherwise qualified, execute a written undertaking, payable to such person as the court, or the judge thereof in vacation, shall direct, to the effect that he will faithfully discharge the duties of receiver in this suit and obey the orders of the court or judge thereof and who shall have power under control of the court, or of the judge, thereof, in vacation, to bring and defend actions, to take and keep possession of the property, to receive rents, collect debts, in his own name as receiver, and generally to do such acts respecting the property as the court or judge thereof may authorize; that the injunction as severally herein prayed for, shall be issued upon hearing respectively after five days' notice to the party and parties concerned; that said injunction shall be issued in the first instance as a temporary injunction and shall continue as such until the trial of the cause when they each shall be continued and made perpetual injunctions.

"And plaintiffs pray for all proper relief."

(Verification.)

1158 PLAINTIFFS' STIPULATION EXHIBIT 36.

Supplemental Complaint in Williams Case.

This supplemental complaint is copied on pages 228-230, inclusive, of the Appellants' Brief in the Supreme Court of Indiana in the case of *Williams* v. *Citizens Gas Company, et al.*, Plaintiffs' Exhibit 3 for Identification, which original exhibit is included in this transcript by order of the Court.

"Allen G. Williams, as a Resident and Taxpayer etc., plaintiff, reaffirms the averments of the complaint herein and says as a supplement thereto:

"(1). That John J. Madden, a defendant named in the complaint as a member of the Board of Directors for Utilities of said City of Indianapolis, has departed this life since the complaint herein was filed and that the vacancy caused by his death has not been filled.

"(2). That the present bonded indebtedness of said City of Indianapolis is towit:

City of Indianapolis, proper	$11,245,220.00
Sanitary District	3,511,000.00
Par Commissioners	3,354,050.00
	$18,110,270.00

That the City's assessed valuation of property for taxation is $691,336,210.00

(3). That on Monday the 18th day of May, 1931, the Supreme Court of the United States denied petitions for writs of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit in the Cases of *Todd* v. *Citizens Gas Company of Indianapolis et als.*, and in *Cotter* v. *Citizens Gas Company of Indianapolis et als.*, being Nos. 885 and 886 respectively, October Term, A. D., 1930 and the docket of the Supreme Court of the United States; that these causes had their origin in the United States District Court for the Southern District of Indiana, Indianapolis Division, and while said causes were there pending an order was entered in said causes restraining this plaintiff from further prosecuting this cause in this court during the pendency of said suits in the courts of the United States; that the said ruling of said Supreme Court in denying said petition for writs of certiorari absolves this plaintiff and this court from any and every restraint whatsoever in the further prosecution of this suit in this court.

"(4). That the present value of the indebtedness of the Indianapolis Gas Company for moneys had and received by it for replacement, extensions, taxes and other items is $8,714,687.66 to which may be added an annual fee of 10 per cent on the amount, for supervision etc., and in the aggregate $9,585,155.00; that said indebtedness is owing because of the diversion of funds from the Public Charitable Trust represented by said Citizens Gas Company and in which this plaintiff and all persons similarly situate have an interest and which they are entitled to recover herein for and in behalf of said Public Charitable Trust.

"Wherefore plaintiff demands judgment that this memorandum be admitted to the record as a supplement to the pending complaint and that upon said complaint as supplemented he have judgment and the full measure of relief demanded in said original complaint."

1159 PLAINTIFFS STIPULATION EXHIBIT 37.

State of Indiana, } ss.
County of Marion. }

IN THE MARION SUPERIOR COURT.

Allen G. Williams, et al.,
vs.
Citizens Gas Company of Indianapolis, et al. } No. A-53965.

SEPARATE AND SEVERAL MOTION OF CERTAIN DEFENDANTS, CITIZENS GAS COMPANY OF INDIANAPOLIS, ET AL., TO STRIKE OUT PARTS AND PORTIONS OF PLAINTIFFS' COMPLAINT.

Come now Citizens Gas Company of Indianapolis, a corporation; Henry Kahn, Otto R. Lieber, Gustav A. Schnull, Thomas L. Sullivan, Frank C. Dailey, James I. Dissette, Gustav A. Efroymson, Edgar H. Evans, James H. Hooker, Henry H. Hornbrook, William H. Insley, Clarence L. Kirk, Franklin Vonnegut, John R. Welch, Frederick G. Rastenburg, Paul E. Grosier, City of Indianapolis in the State of Indiana, a Municipal Corporation; Reginald H. Sullivan, as Mayor of said City of Indianapolis; Henry O. Goett, as City Clerk of said City of Indianapolis, E. Kirk McKinney, Louis C. Brandt, Charles O. Britten, as the Board of Public Works of said City of Indianapolis, Sterling R. Holt, Thomas C. Howe, George J. Marott, A. Dallas Hitz, William J. Mooney, as the Board of Trustees for Utilities of said City of Indianapolis, Edward H. Kahn, Henry L. Dithmer, Eli Lilly, Brodehurst Elsey, Almus G. Ruddell and Guy A. Wainright, as the Board of Directors for Utilities of said City of Indianapolis, defendants in the above entitled cause, and separately and severally move the court to strike out the following parts and portions of plaintiffs' complaint:

1. Subdivision 28 of plaintiffs' complaint which is as follows:

1160 (Here subdivision 28 of the complaint in the above entitled action was copied in full. A correct copy of said complaint is identified in Stipulation No. 1 in each of these causes as Exhibit 35 thereto.)

For each of the following reasons:

First. The above subdivision of plaintiffs' complaint attacks as without jurisdiction and void a final decree entered by the United States District Court for the District of Indiana and not reversed, modified, or set aside, but finally affirmed, in a case brought by the Citizens Gas Company of Indianapolis against the Public Service Commission of Indiana in which suit an order of the Public Service Commission was held to be violative of rights guaranteed to the Citizens Gas Company under the Fourteenth Amendment to the Federal Constitution in that said order was confiscatory. It appears that the District Court of the United States had jurisdiction of both the subject matter and the parties to that action and plaintiff can not in a collateral proceeding attack the decree there entered.

Second. The proceeding before the Public Service Commission to procure compensatory rates for gas furnished by the Citizens Gas Company to its consumers was a proper one. So far as the rates are concerned the city could not by contract fix a rate which would deprive the General Assembly of authority to authorize the collection of higher rates through the medium of the Public Service Commission, acting under legislative authority, failed to prescribe just and reasonable rates the company was entitled to maintain a confiscation case in the Federal Court and the ruling of that court could be attacked only by an appeal.

1161 Third. The plaintiff is attempting to re-litigate in the State Court issues decided in a case in the Federal Court which had jurisdiction of the parties and the subject matter and this the plaintiff has no right to do.

Fourth. The United States District Court for the District of Indiana has power, notwithstanding the provisions of U. S. R. S. Section 720, to restrain the prosecution of an action in the State Court which would interfere with a valid decree entered in the Federal Court in a case in which that court had jurisdiction of the subject matter and the parties. This court should therefore, in order to avoid any conflict in jurisdiction, strike from this emoplaint any averments which seek to reopen judicial questions finally disposed of by a final and valid decree of the Federal Court.

2. To strike out from plaintiffs' complaint the following portion thereof being a part of paragraph 20 and reading as follows:

"That thereupon it was designed by said confederates

that a public service commission should be created in and by the State of Indiana with plenary powers to circumvent the constitutional restrictions of the state and by those means destroy said public charitable trust and substitute in its place and stead a plan and method whereby said Citizens Gas Company should be required to bear the burder of replacing said Indianapolis Gas Company as a going concern, invested with modern and efficient methods, all to the end that upon the termination of an alliance between said Citizens Gas Company and said Indianapolis Gas Company, the latter company would be in exclusive control of the territory of Indianapolis for all purposes of gas production and sale, and all without cost and expense to said conspirators, but wholly at the cost and expense of the inhabitants and taxpayers of said City of Indianapolis."

For the following reason:

1162 There can not be in law any such thing as a conspiracy to bring about the enactment of a valid public statute. The averment that certain persons confederated to cause the creation of the Public Service Commission Act to circumvent constitutional restrictions is without any effect and attempts to present an issue to this court which it has no right or authority to determine.

3. Subdivisions 22, 23, and 29 of plaintiffs' complaint, which are as follows:

(Here subdivisions 22, 23 and 29 of the complaint in the above entitled action were copied in full. A correct copy of said complaint is identified in Stipulation No. 1 in each of these causes as Exhibit 35 thereto.)

For each of the following reasons:

First. These subdivisions of the plaintiffs' complaint challenge a lease executed by Citizens Gas Company and Indianapolis Gas Company and approved by the Public Service Commission of Indiana. The Public Service Commission of Indiana has express authority to approve leases between two operating public utilities, and it appearing from the averments of the complaint that such lease did have the approval of the Public Service Commission, the action of that Commission can not be collaterally attacked.

Second. There is no averment in the complaint which shows any ground on which the plaintiff can successfully attack collaterally the order of the Public Service Commission approving said lease. There is no showing in

the complaint that the Commission was without jurisdiction to approve the lease between the Indianapolis Gas Company and the Citizens Gas Company or that it exceeded its jurisdiction or that the approval of the lease was procured by any fraud.

1163 Third. It appearing that the lease so approved by the Public Service Commission has been in full force and effect for nearly 17 years and that many millions of dollars have been expended in reliance upon its validity, all persons including plaintiffs (if they have any standing under any circumstances) are estopped to question the validity of the same.

4. To strike out those portions of the plaintiffs' complaint constituting subdivisions 18 and 19, which are as follows:

(Here subdivisions 18 and 19 of the complaint in the above entitled action were copied in full. A correct copy of said complaint is identified in Stipulation No. 1 in each of these causes as Exhibit 35 thereto.)

And that part of subdivision 20 reading as follows:

• • • • • •

"Here is quoted the first three grammatical paragraphs of subdivision (20) of the complaint in the Williams case, which complaint is set forth as Plaintiff's Stipulation Exhibit ~~33~~ 35)".

(Inserted pursuant to stipulation filed November 22, 1939.)

1164 For each of the following reasons:

First. Such portions of said complaint relate to the organization of the Indianapolis Gas Company, the history of its operations, the character and extent of its property at and prior to the making of the lease to the Citizens Gas Company referred to in the complaint and to the alleged conspiracy between certain individuals to bring about the protection and betterment of the property of the Indianapolis Gas Company through the lease thereof to the Citizens Gas Company. None of these allegations have any relevancy except as they relate to the lease of said property to the Citizens Gas Company. Inasmuch as said lease was duly approved by the Public Service Commission of Indiana, pursuant to the power given it by law the plaintiff is in no position to attack the same, for the reasons heretofore given.

1165 Second. The lease of the property of the Indianapolis Gas Company to the Citizens Gas Company having been validly made, the actions of any individuals leading up to such lease are wholly immaterial.

Third. The validity of the public charitable trust set up in the complaint is in no wise affected by the validity of such lease. If the lease is valid the leasehold interest created thereby constitutes a part of the public charitable trust and is subject to be administered in the same way as property owned by the Citizens Gas Company in its own right. If for any reason the lease is invalid, it would fall without the scope of the trust.

5. To strike out that part and portion of plaintiffs' complaint in Subdivision 24 thereof reading as follows:

(Here subdivision 24 of the complaint in the above entitled action was copied in full, with the exception of that portion of subdivision 24 set forth in subdivision C of the within motion, being the last complete paragraph of said subdivision 24. A correct copy of said complaint is identified in Stipulation No. 1 in each of these causes as Exhibit 35 thereto.)

For each of the following reasons:

First. Said portion of the plaintiffs' complaint refers to certain expenditures made by the Citizens Gas Company for the alleged use and benefit of the Indianapolis Gas Company, but shows that all of said expenditures were made pursuant to the lease between the two companies approved by the Public Service Commission of Indiana.

Second. In the absence of any possible valid objection to the jurisdiction of the Public Service Commission of Indiana in approving the execution of said lease, the plaintiff is not entitled to present to this court for
1166 its consideration any question as to the expenditures made under such lease so approved by the Public Service Commission.

6. To strike out all that part and portion of subdivision 24 of the plaintiffs' complaint reading as follows:

* * * * * *

"(Here is quoted the last grammatical paragraph of subdivision (24) of the complaint in the Williams case,

which complaint is set forth as Plaintiffs' Stipulation Exhibit 35)".
(Inserted pursuant to stipulation filed November 22, 1939.)

For each of the following reasons:

First. The Act of March 4, 1913, with the amendments thereto, creating the Public Service Commission of Indiana is a valid law and is not contrary to any provision either of the Constitution of the State of Indiana or of the Federal Constitution.

Second. The validity of Public Service Commission Acts in their general provisions has been so long established by repeated adjudications of both the State and Federal Courts that the attack upon the Indiana Act should not be considered by the court as an issuable question in this cause.

1167 Third. The business of public utilities is touched with a public interest and is subject to state regulation which may be exerted directly by legislative authority or by administrative bodies duly constituted with power to that end and the Indiana statute creating the Public Service Commission is valid.

7. Subdivisions 26 and 27 of plaintiffs' complaint which are as follows:

(Here subdivisions 26 and 27 of the complaint in the above entitled action were copied in full. A correct copy of said complaint is identified in Stipulation No. 1 in each of these causes as Exhibit 35 thereto.)
For each of the following reasons:

First. Said subdivisions of plaintiffs' complaint challenge the validity of the surrender by the Citizens Gas Company of its franchise, of the law under which such surrender was permitted and generally the validity of the Public Service Commission statute.

Whatever the effect of the surrender of the franchise, the right of the Citizens Gas Company to surrender its franchise and take out an indeterminate permit has been conclusively established by the Supreme Court of Indiana. The Statute authorizing such surrender amounted to nothing more than an offer to the Citizens Gas Company to surrender its franchise and take out a permit and the statute was a perfectly valid one.

Second. For the reasons assigned in the last preceding subdivision the law creating the Public Service Commission of Indiana is valid and is not open to attack.

8. That part of Subdivision 25 of plaintiffs' complaint reading as follows:

1[illegible] • • • • • •

"(Here is quoted the last grammatical paragraph of subdivision (25) of the complaint in the Williams case (Plaintiffs' Stipulation Exhibit 35))".
(Inserted pursuant to stipulation filed November 22, 1939.)

Also, that part of Subdivision —— (on pages 101 and 102 of plaintiffs' complaint) reading as follows:

• • • • • •

"(Here is quoted all of subdivision (31) of the bill of complaint in the Williams case (Plaintiffs' Stipulation Exhibit 35))".
(Inserted pursuant to stipulation filed November 22, 1939.)

1169 For each of the following reasons:

First. There is no showing in the complaint that the certificate holders of the Citizens Gas Company have been paid in full the amounts due them under their certificates and the ordinance set out in the complaint shows that such certificates must be paid in full before the property can be conveyed to the City of Indianapolis.

Second. There is no averment in these portions of the plaintiffs' complaint or elsewhere that the Citizens Gas Company of Indianapolis and the City of Indianapolis have not resisted and are not resisting vigorously the asserted right of the benefit certificate holders to take over this property. No such averment could truthfully be made and this explains its absence.

Third. The plaintiffs show no ground on which they can invoke the jurisdiction of this court with respect to a public charitable trust and no right to have a Receiver appointed to administer the property of the Gas Company.

Fourth. The Attorney General of the State of Indiana is the sole and exclusive officer who has the right to call upon a court of equity to administer a public charitable trust in the event of misapplication of the trust res by

the trustee. There is no showing of inaction on the part of the Attorney General, and he is not made a party to this suit.

Fifth. It has been finally adjudicated by Courts of competent jurisdiction, that a public charitable trust exists in the property of the Gas Company: *Todd* v. *Citizens Gas Company*; *Cotter* v. *Citizens Gas Company*, 46 Fed. (2nd) 855.

9. To strike out all that part of subdivision 25 of plaintiffs' complaint reading as follows:

1170 • • • • • •

"(Here is quoted the first grammatical paragraph of subdivision (25) of the complaint in the Williams case (Plaintiffs' Stipulation Exhibit 35))".
(Inserted pursuant to stipulation filed November 22, 1939.)

For the following reasons:

This portion of the plaintiffs' complaint seeks to attack the validity of an issue of bonds by the Indianapolis Gas Company and shows upon its face that the plaintiff
1171 has no knowledge as to their legality, but having no knowledge, denies such legality. These defendants can not be called upon to litigate the legality of said bond issue upon such insufficient averments.

10. To strike out that portion of Subdivision 30 of the complaint reading as follows:

• • • • • •

"(Here is quoted the next to the last paragraph of subdivision (30) of the complaint in the Williams case (Plaintiffs' Stipulation Exhibit 35))".
(Inserted pursuant to stipulation filed November 22, 1939.)

For the following reason:

This averment asks this court to sequester the property of the Citizens Gas Company and issue Receiver's Certificates with which to pay all determined debts of the Citizens Gas Company and thereupon to turn the property of the Gas Company over free and clear of any obligation whatever to the City of Indianapolis.

1172 The plaintiffs have no right to invoke the juris-

diction of this court in seeking to sequester the property of the Citizens Gas Company.

Respectfully submitted,

Edward H. Knight,
Corporation Counsel.
Wm. H. Thompson,
Albert L. Rabb,
Thomas D. Stevenson,

Attorneys for defendants, City of Indianapolis in the State of Indiana, a Municipal Corporation, Reginald H. Sullivan, as Mayor of said City of Indianapolis; Henry O. Goet., as City Clerk of said City of Indianapolis, E. Kirk McKinney, Louis C. Brandt, Charles O. Britten, as the Board of Public Works of said City of Indianapolis, Sterling R. Holt, Thomas C. Howe, George J. Marott, A. Dallas Hitz, William J. Mooney, as the Board of Trustees for Utilities of said City of Indianapolis, Edward H. Kahn, Henry L. Dithmer, Eli Lilly, Brodehurst Elsely, Almus G. Ruddell and Guy A. Wainright, as the Board of Directors for Utilities of said City of Indianapolis.

Smith, Remsler, Hornbrook & Smith,
Henry Hornbrook,

Attorneys for defendants, Citizens Gas Company of Indianapolis, a corporation, Henry Kahn, Otto R. Lieber, Gustav A. Schnull, Thomas L. Sullivan, Frank C. Dailey, James I. Dissette, Gustav A. Efroymson, Edgar H. Evans, James H. Hooker, Henry H. Hornbrook, William H. Insley, Clarence L. Kirk, Franklin Vonnegut, John R. Welch, Frederick G. Rastenburg, Paul E. Crosier.

CLERK'S COPY.

Vol. III

P.V. 164

TRANSCRIPT OF RECORD

469281 L.C.

Supreme Court of the United States

OCTOBER TERM, ~~1940~~ 1941

No. ~~421~~ 10

CITY OF INDIANAPOLIS, ET AL., PETITIONERS,

vs.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., ET AL.

No. ~~422~~ 11

CITY OF INDIANAPOLIS, ET AL., PETITIONERS,

vs.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., ET AL.

No. ~~423~~ 12

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., PETITIONER,

vs.

CITIZENS GAS COMPANY OF INDIANAPOLIS, ET AL.

No. ~~424~~ 13

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., PETITIONER,

vs.

THE INDIANAPOLIS GAS COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONS FOR CERTIORARI FILED SEPTEMBER 12, 1940.

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For the Seventh Circuit

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC.,
Plaintiff-Appellant,

7143 *vs.*

CITIZENS GAS COMPANY OF INDIANAPOLIS, ET AL.,
Defendants-Appellees.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC.,
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1173 PLAINTIFFS' STIPULATION EXHIBIT 38.

Demurrer of City of Indianapolis et al., in Williams Case.

This demurrer and the supporting memorandum is copied on pages 232-235, inclusive, of the Appellants' Brief in the Supreme Court of Indiana in the case of Williams *vs.* Citizens Gas Company, et al., Plaintiffs' Exhibit 3 for Identification, which original exhibit is included in this transcript by order of the Court.

Come now defendants, Citizens Gas Company of Indianapolis, a corporation; Henry Kahn, Otto R. Lieber, Gustav A. Schnull, Thomas L. Sullivan, Frank C. Dailey, James I. Dissette, Gustav A. Efroymson, Edward H. Evans, James H. Hooker, Henry H. Hornbrook, Williama H. Insley, Clarence L. Kirk, Franklin Vonnegut, John R. Welch, Frederick G. Rastenburg, Paul T. Crosier; City of Indianapolis in the State of Indiana, a Municipal Corporation; Reginald H. Sullivan, as Mayor of said City of Indianapolis; Henry O. Goett, as City Clerk of said City of Indianapolis; E. Kirk McKinney, Louis C. Brandt, Charles O. Britton, as the Board of Public Works of said City of Indianapolis; Sterling R. Holt, Thomas C. Howe, George J Marott, A. Dallas Hitz, William J. Mooney, as the Board of Trustees for Utilities of said City of Indianapolis; Edward H. Kahn, Henry L. Dithmer, Eli Lilly, Brodehurst Elsey, Almus G. Ruddell and Guy A. Wainwright, as the Board of Directors for Utilities of said City of Indianapolis and separately and severally demur to plaintiff's complaint herein, and for ground of demurrer say that said complaint does not state facts sufficient to constitute a cause of action; and said defendants file herewith a memorandum, stating wherein said complaint is insufficient for want of facts, and make said memorandum a part thereof.

Tr. p. 313.

The memorandum filed with the demurrer of said Citizens Gas Company et al.s., was in substance, towit:

"The complaint herein is insufficient in each of the following particulars, towit:

"1. The plaintiff who sues only as a citizen and taxpayer has no right, either alone or as a representative of other private citizens, to maintain an action seeking to enforce a Public Charitable Trust in the property of the

defendant, Citizens Gas Company of Indianapolis, or to attempt to prevent claimed diversions therefrom, or to procure the appointment of a receiver therefor.

"2. It having been judicially established that the property of the Citizens Gas Company is a valid Public Charitable Trust, neither the plaintiff nor any other private citizen or taxpayer has any authority in law to maintain an action to sequester the property of said trust, to procure the appointment of a receiver therefor, or to prevent alleged diversions of said trust property. Such a suit can only be maintained by the proper public officer authorized to represent the interests of the public in said Public Charitable Trust.

"3. No interest is shown to exist in the plaintiff, or in the class on whose behalf he attempts to sue, sufficient to justify the maintenance of this action by plaintiff.

"4. Where as here, there is a valid subsisting Public Charitable Trust being administered by the duly constituted Trustee, no suit can be maintained for the purpose of sequestering the trust property, appointing a receiver thereof, attempting to prevent alleged diversions from said trust, attempting to require the restoration of funds and property claimed improperly to have been diverted from said trust or generally to enforce said trust except by a public officer duly authorized to represent the public interest in such trust. The Prosecuting Attorney of the Nineteenth Judicial Circuit or the Attorney General of Indiana are the only public officers having the right to represent the public in this connection and the plaintiff therefore has no right to maintain this action merely as a private individual and taxpayer either on behalf of himself or others of the same class.

"5. No facts are alleged showing any ground whatever for the appointment of a receiver for the property of the defendant, Citizens Gas Company of Indianapolis, which constitutes a valid Public Charitable Trust.

"6. No facts are alleged showing or tending to show that a cloud exists on the interest of the Public Charitable Trust in the plant and property of defendant, Citizens Gas Company of Indianapolis.

"7. It appears that the existence of a Public Charitable Trust in the plant and property of defendant, Citizens Gas Company of Indianapolis, has been finally and conclusively established by a court of competent jurisdiction in a suit to which said Citizens Gas Company of Indianapolis and the City of Indianapolis were parties, and

neither the plaintiff nor any other person has any right to relitigate the question of the existence or the validity of such Public Charitable Trust."

1174 PLAINTIFFS' STIPULATION EXHIBIT 39.

Allen G. Williams *vs.* Citizens Gas Company.

Demurrer and Supporting Memorandum of The Indianapolis Gas Company and the Mortgage Trrustee.

"The defendants, Indianapolis Gas Company, a corporation, and Ferdinand Winter and Trust Company of America, as trustees under a mortgage executed by said Indianapolis Gas Company, separately and severally demur to plaintiff's complaint herein and for ground of demurrer say that said complaint does not state facts sufficient to constitute a cause of action; and said defendants file herewith a memorandum stating wherein said complaint is insufficient for want of facts, and make said memorandum a part hereof.

"The complaint herein is insufficient in each of the following particulars, to wit:

"1. The plaintiff who sues only as a citizen and tax payer has no right, either alone or as a representative of other private citizens to maintain an action seeking to enforce an alleged charitable trust in the property of the defendant Citizens Gas Company of Indianapolis, or to attempt to prevent claimed diversions therefrom or to procure the appointment of a receiver for any corporation on account thereof.

"2. In so far as this is a suit by one of the general public to declare and enforce a Public Charitable Trust, or to sequester the property of such trust, to procure the appointment of a Receiver therefor, or to prevent alleged diversions of such trust property, it cannot be maintained, except only by the proper public officer authorized to represent the interests of the public in said Public Charitable Trust.

"3. No necessity is shown to exist in the plaintiff or in the class on whose behalf he attempts to sue, sufficient to justify the maintenance of this action by the plaintiff.

"4. Upon the allegations that there is a valid subsisting Public Charitable Trust being administered by the

duly constituted trustee pending its transfer to the City of Indianapolis as a subsequent trustee, no suit can be maintained for the purpose of sequestering the trust property, or appointing a receiver for such purpose, or attempting to prevent alleged diversions from said trust, or attempting to require the restoration of funds and property claimed to have been improperly diverted from said trust or generally to enforce said trust except by a public officer duly authorized to represent the public interest in such trust, and the prosecuting attorney of the 19th Judicial Circuit or the Attorney General of Indiana are the only public officers having the right to represent the public in such an action and the plaintiff, 1175 therefore, has no right to maintain this action merely as a private individual and taxpayer either on behalf of himself or of others of the same class.

"5. No facts are alleged showing any ground whatever for the appointment of a receiver for the property of the defendant Indianapolis Gas Company, whether as constituting a portion of the assets of a Public Charitable Trust or otherwise.

"6. It appearing from the facts alleged in the complaint that the lease by the Indianapolis Gas Company of its property to the Citizens Gas Company was duly approved by the Public Service Commission and that the Citizens Gas Company has held the leased property thereunder for more than fifteen years and is still holding and enjoying the use of the same, such lease is not open to collateral attack at the suit of a private citizen and taxpayer who has no interest in either company except as an alleged beneficiary under the Public Charitable Trust which attaches to the property of the lessee.

"7. Neither the lessee under the Indianapolis Gas Company lease nor any person claiming by, through or under it as the beneficiary of a trust therein, or otherwise, can attack the validity of such lease while continuing to hold and operate the lessor's property thereunder.

"8. The lapse of fifteen years since the execution of the lease by the Indianapolis Gas Company to the Citizens Gas Company is a bar to any action by a person claiming through or under the lease to set aside such lease or quiet title as against the claims of the lessor thereunder."

1176 PLAINTIFFS' STIPULATION EXHIBIT 40.

State of Indiana, } ss:
County of Marion. }

IN THE MARION SUPERIOR COURT, ROOM 2.

Allen G. Williams, *et al.*, *Plaintiffs*,
vs.
Citizens Gas Company of Indianapolis, a corporation, *et al.*, *Defendants.* } No. A-53965.

DEMURRER.

Comes now the defendants, John W. McCardle, Francis T. Singleton, Howell Ellis, Calvin McIntosh, Jere West, as members of the Public Service Commission of Indiana and by way of demurrer to the complaint of the plaintiffs herein allege and say:

That the complaint does not state facts sufficient to constitute a cause of action against these defendants.

(signed) James M. Ogden,
Attorney General.
(signed) G. W. Hufsmith,
Assistant Attorney General.
Attorneys for Defendant,
Public Service Commission.

1177 MEMORANDUM.

I.

After alleging on page 3, paragraph 5 that the defendants, John W. McCardle, Francis T. Singleton, Howell Ellis, Calvin McIntosh and Jere West, are made defendants herein in their capacity as members of the Public Service Commission of Indiana, the next allegation of said complaint touching upon these defendants just hereinbefore named is found on page 25 of said complaint, in the next to the last paragraph of subdivision 20, wherein it is alleged in substance that certain defendants herein not including any of the defendant members of said com-

mission designed to have created a Public Service Commission in the State of Indiana. And in the last paragraph of said subdivision 20, page 25 of said complaint, it is alleged in substance that said confederates began to act and did accomplish the creation of said commission.

A.

There can be in law nothing which will constitute a conspiracy to bring about the enactment of a valid public statute. Any and all of the averments of the complaint alleging that certain persons, not members of the Public Service Commission, confederated to cause the creation of the Public Service Commission of Indiana, are without any weight in law and attempt to present an issue to this court which it has no right or jurisdiction to determine. There are no allegations or averments in said complaint that these defendants as members of the Public Service Commission of Indiana or their predecessors in office conspired to bring about the enactment creating the Public Service Commission.

1178

B.

There is no allegation in said complaint that these defendants as present members of the Public Service Commission of Indiana or any of their predecessors in office since the creation of the commission in 1913, were participants in any conspiracy with a view of creating said commission.

II.

Page 25 of said complaint, subdivision 22 alleges in substance that a petition was filed with said commission in May of 1913, praying for the approval of said commission to a certain lease executed by and between the Indianapolis Gas Company as Lessor and to said Citizens Gas Company as Lessee, and sets out in full a copy of said petition.

Subdivision 23, page 26 of said complaint in substance avers the approval of said commission with certain limitations of said petition and sets out in detail the provisions and terms of the lease as approved by said commission.

A.

The said order of the commission cannot be attached in a collateral proceeding, such as this action purports to do, except for fraud.

B.

That if the said order of the commission approving the lease was subject to a review by the courts, such review could only be had under the provisions of section 79 of the Shively-Spencer Act, (Burns' 1926, Section 12750).

1179

C.

There can be no review of a discretionary act of the Public Service Commission in a collateral attack except upon the grounds of fraud and there are no allegations that said commission acting fraudulently in the approval of said Lease or that any review was heard of said order of the commission under the provisions of said section 79, supra.

III.

Page 44 of said complaint, subdivision 6, it is alleged that in furtherance of said conspiracy, the Citizens Gas Company in August, 1921, filed its declaration of surrender of its franchise with the City of Indianapolis seeking to obtain an indeterminate permit under the provisions of the Shively-Spencer Act and on page 45, subdivision 27 of said complaint, it is averred that on December 12, 1921, said Public Service Commission entered its order approving the surrender of the franchise and the granting of an indeterminate permit. Such action of the commission is alleged to be unlawful and void as indicated in paragraphs' 1, 2, 9, 4 and 5 on pages 46, 47 and 48. Said complaint alleges that said order is unconstitutional in that it contravenes the provisions of article 1, section 24 of the Indiana Constitution by impairing the right of contract; that the act creating the Public Service Commission, known as the Shively-Spencer Act is unconstitutional and void, insofar as it attempts to confer authority upon the commission to grant an indeterminate permit and accept the surrender of a franchise; that the commission as a body could not enact legislation in

that its members did not reside in the City of Indianapo-
lis and are not chosen under the provisions of law
1180 designating the manner of choosing members of the
Indiana legislature.

A.

The Legislature acted within its constitutional limitations in delegating that part of its police power to the Public Service Commission of Indiana in giving to said commission the right to approve the surrender of franchises theretofore existing and grant in lieu thereof an indeterminate permit.

B.

That said act of the Public Service Commission in granting the indeterminate permit alleged in the complaint acted within its jurisdiction.

C.

It is not alleged in said complaint that said commission in approving the said surrender of the franchise and the issuance of an indeterminate permit in lieu thereof acted fraudulently.

D.

That the allegations of said complaint testing the legality of said order of the commission constituting a collateral attack upon the order of the Public Service Commission and can not prevail unless it is alleged that said order was fraudulently entered by said commission.

E.

Said order of the commission does not impair the provisions of article 1, section 24 of the Indiana Constitu-
tion and does not abridge the right of contract;
1181 that the Public Service Commission of Indiana has
authority to accept the surrender of franchises and issue indeterminate permits in lieu thereof; that said Public Service Commission's members need not be chosen as legislators in Indiana are chosen but may be appointed as provided by law without contravening any provision of the state or federal constitution.

IV.

Page 48, subdivision 28 of said petition alleges that the Public Service Commission in 1922 denied the petition of the Citizens Gas Company to establish a rate of $1.25 per unit of 1,000 cubic feet, and that said commission was restrained by the United States District Court for the District of Indiana, from preventing the said Citizens Gas Company from collecting said rate of $1.25 per thousand cubic feet on the ground that said order of the commission was confiscatory and in contravention of the 14th amendment of the constitution. Said order of the commission being passed upon and restrained by our Federal Court, estops these plaintiffs from presenting in the state court in this action any question involving the legality of said order, it having been fully adjudicated in the federal court.

A.

State courts cannot review the same subject matter previously submitted to and decided by a federal tribunal.

B.

That any and all allegations in said complaint
1182 attacking this order of the Public Service Commission constitute a collateral attack upon said order and do not allege that said order was fraudulently entered by said commission and therefore does not constitute a valid attack upon said order of the commission.

V.

That any and all of the averments of said complaint directed to these defendants, as members of the Public Service Commission either attack the constitutionality of the creation of the commission by and through the Shively-Spencer Act or the orders of the commission, after its creation.

Said Shively-Spencer Act creating the Public Service Commission is constitutional and delegates to said commission such exercise of the police power as is not therein delegated to municipalities; that the commission had jurisdiction to enter and promulgate any and all orders

in said complaint attacked by the plaintiffs herein; that all of said orders in said complaint attacked are valid and lawful orders of said Public Service Commission; that said complaint herein is a collateral attack upon said orders of the commission and no allegations are contained in said complaint alleging that any of said orders complained of were fraudulently entered by said commission and therefore do not constitute in law a valid attack upon said orders of the commission in said complaint complained of.

That if said complaint in fact is not a collateral attack upon the orders of the commission said orders of the commission duly entered may only be reviewed under the provisions of section 78 of the Shively-Spencer Act as originally enacted or under the provisions of section 78 of the Shively-Spencer Act as amended in chapter 258, Acts of 1927, page 747, or under the provisions
1183 of an act of the 1929 legislature, pages 530 to 534, inclusive.

Said complaint does not show on its face or does not contain allegations of fact bringing said complaint within any of the provisions of the foregoing sections and that said complaint is not filed within the time designated in said provisions of the law for a review of an order of the commission and the plaintiffs herein are thereby estopped from reviewing the orders of the commission complained of in their petition.

(signed) James H. Ogden,
Attorney General.

(signed) G. W. Hufsmith,
Assistant Attorney General.
Attorneys for Defendant,
Public Service Commission.

1184 PLAINTIFFS' STIPULATION EXHIBIT 47.

Resolution of Board of Directors for Utilities Re Offering of Gas Plant Revenue Bonds Adopted May 7, 1935

"A Resolution (No. 2—1935) for the Issuance of Gas Plants Revenue Bonds. Adopted May 7, 1935.

"Resolved, by the Board of Directors for Utilities of the City of Indianapolis, Indiana:

"That for the purpose of obtaining funds for the taking over of certain property owned by Citizens Gas Com-

pany of Indianapolis and/or in which it has an interest, including moneys required to be paid for the redemption or extinguishment of its capital stock and/or for the payment of certain of its obligations and for the necessary expenses incurred in connection therewith, including the expenses of the City incident to obtaining such funds, as well as for the purpose of making certain betterments, improvements, extensions and additions to such property, the City of Indianapolis shall issue bonds which are to be paid solely and exclusively from the income and revenues of such utility property and not otherwise and shall not in any respect be an indebtedness of such City payable out of taxes.

"Such bonds shall be aggregate principal amount of Eight Million Dollars ($8,000,000).

"They shall be issued in denominations of One Thousaid Dollars ($1,000) each.

"They shall be numbered consecutively, commencing with No. 1.

"They shall become due at such time or times, and in such manner with such accompanying pertinent provisions, as shall be specified by the terms of the accepted bid as hereinafter more specifically referred to; but there shall be as bonds maturing in less than two (2) nor more than forty (40) years from the date of issuance.

1185 "The interest rate upon said bonds shall be that fixed by the terms of the accepted bid therefor, as hereinafter mentioned; and each bond shall bear interest at said rate, (which shall not exceed five and one-half per cent per annum) evidenced by coupons attached to said bonds, payable semi-annually commencing six months after the date of said bond until said bond is due and payable.

"Both bonds and interest coupons shall be payable at the office of the Treasurer of Marion County, Indiana, or at the office of such official as shall have the duties of the Treasurer of the City of Indianapolis, and/or at such bank or trust company or office, whether in Indianapolis, and/or in Chicago, Illinois and/or New York City, or elsewhere as may be agreed upon between this Board and the successful bidder for said bonds, or in the absence of such an agreement, to be specified by this Board, and such bonds and interest coupons shall be payable in such funds as on the respective dates of payment are legal tender in the United States of America for such purpose.

"Said bonds shall be dated as of such date as may be

agreed upon between this Board and the successful bidder, not inconsistent with law.

"Said bonds shall be signed by the Mayor of said City and attested by its City Controller and by its City Clerk who shall affix the seal of the City thereto; and if any person whose signature appears on such bonds or coupons as Mayor or City Controller or City Clerk shall cease to be such officer before delivery of such bonds or any of them, such signature shall nevertheless be valid and sufficient for all purposes as if such officer had remained in office until such delivery.

1186 "Said bonds shall have the qualities of negotiable instruments in the hands of good faith holders.

"Said bonds shall be negotiable by delivery unless registered. Upon presentation of any such bonds to the City Controller of said City for registration, said City Controller shall cause such bond or bonds to be registered as to principal without charge or expense for registration, and such registration shall be noted on such bond or bonds and on the books of the City; after which no transfer thereof shall be valid unless made by the registered holder or his legal representative and similarly noted on the bond or bonds. But any such bond so registered as to principal may be discharged from such registration by appropriate notation on the books of the City at the request of the registered holder, after which such bond shall be transferable by delivery but may again be registered as to principal as before. The registration of any bond as to principal shall not affect the negotiability of the interest coupons attached thereto, but such coupons shall be transferable by delivery merely.

"Said bonds shall be exempt from taxation as to principal and income, as prescribed by the statutes of the State of Indiana.

"The form and tenor of said bonds and of the interest coupons to be attached thereto and of the registry indorsements thereon (exclusive of provisions fixing the date, the interest rate, provisions for maturity, and/or call, and/or sinking fund which are to be determined by the terms of the accepted bid and exclusive of provisions to be determined by the City or by agreement between the successful bidder and this Board, consistently with law) shall be substantially as follows, to-wit:

1187 "No. ..... $.....

City of Indianapolis Gas Plant Revenue Bond
City of Indianapolis, Marion County,
State of Indiana.

"The City of Indianapolis in the County of Marion and State of Indiana, for value received, hereby promises to pay to the bearer, or if this bond be registered, then to the registered holder, solely out of the revenue derived from the operation of its gas system, the principal amount of One Thousand Dollars on the ..... and to pay interest thereon from the date hereof until the principal is paid at the rate of ..... per cent, per annum, payable on the ..... day of ....., 193...., and semi-annually thereafter on the ..... in each year, upon presentation and surrender of the annexed coupons as they severally become due. Both principal and interest of this bond are payable at ..... in ..... and ..... in ..... in such funds as are on the respective dates of payment of the principal of and interest on this bond, legal tender in the United States of America for such purposes.

"This bond is one of a total issue of ..... bonds of the City of Indianapolis of like date and tenor, except as to numbers and dates of maturity, in the total amount of $8,000,000.00, issued for the purpose of providing funds for the purpose of taking over property owned by Citizens Gas Company of Indianapolis and/or in which it has an interest, including moneys required to be paid for the redemption or extinguishment of its capital stock and/or for the payment of certain of its obligations and for the necessary expenses incurred in connection therewith,
1188 including the expenses of the City incident to obtaining such funds, as well as for the purpose of making certain betterments, improvements, extensions and additions to such property; pursuant to a resolution adopted by the Board of Directors for Utilities of the City of Indianapolis, Indiana, on the 7th day of May, 1935, entitled: "A Resolution (No. 2-1935) for the Issuance of Gas Plant Revenue Bonds" and in compliance with all applicable provisions of law, including the provisions of Chapter 77 of the Acts of 1929, Chapter 27 of the Acts of 1931, and Chapter 125 of the Acts of 1933, as amended

by Chapter 311 of the Acts of 1935 of the General Assembly of the State of Indiana.

"The payment of the principal and interest of this and of all other bonds of this issue is secured by a charge upon all the revenue from the operation of all of the gas system owned and/or operated by the City of Indianapolis. This bond shall not in any respect be an indebtedness of the City of Indianapolis payable out of taxes. The City covenants to fix, maintain and collect reasonable and just charges for gas service and faithfully to comply with all pertinent provisions of law, including the requirement of Chapter 190 of the Acts of 1933 of the General Assembly of the State of Indiana, viz.: that a reasonable and just charge shall be such as produces sufficient revenue to pay, among other things, interest upon bonds, provided a sinking fund for liquidation of bonds, maintenance costs, operating charges, adequate funds for working capital, repairs and upkeep.

"This bond and all other bonds of said issue shall have the qualities of negotiable instruments in the hands of good faith holders.

"This bond shall be exempt from taxation as to principal and income, as prescribed by the Statutes of the State of Indiana.

1189 "This bond may be registered as to principal in the name of the holder, but unless so registered it shall pass by delivery. The interest coupons annexed hereto shall at all times pass by delivery.

"It is hereby certified that all acts required by law to be done precedent to and in the execution, issuance and delivery of this bond have been done in regular and due form as provided by law.

"In Witness Whereof the City of Indianapolis, in Marion County, Indiana, has caused this bond to be signed in its corporate name by its Mayor and attested by its City Controller and City Clerk and the Corporate seal of the City affixed as of the ..... day of ....., 193.....

City of Indianapolis, Indiana,
By_____
Its Mayor.

Attest:

.....
Its City Controller.

.....
(Seal) *Its City Clerk.*

1190 "(Interest Coupon)

Coupon No. ..... $.....

"On ....., 193.., the City of Indianapolis, Marion County, Indiana, will pay to bearer at ..... or at ..... out of its Gas Plant Revenue funds, in such funds as are legal tender in the United States of America, for such purpose; being six (6) months interest on the Bond to which this coupon is annexed; Bond No. .....

City of Indianapolis, Indiana,
By .....
Its Mayor.

Attest:

.....
Its City Controller.

(Registration Indorsement)

"Upon presentation of this bond at the office of the City Controller of the City of Indianapolis, Indiana, for registration, this bond shall be registered as to principal without charge or expense to the holder; after which no transfer shall be valid unless made by the registered holder or by his legal representative; but this bond may be discharged from registration by appropriate notation on the books of the City at request of the registered holder, after which this bond may be transferred by delivery and may again be registerable. Registration of this bond shall not affect the negotiability of the
1191 interest coupons attached hereto and such coupons shall remain payable to bearer.

Date of Registry:	In Whose Name Registered:	City Controller:

* * * * * *

"(Here follow detailed provisions in accordance with the applicable Indiana statutes as to advertising for, making, and acceptance of bids for the City's Gas Plant Revenue Bonds)".

(Inserted pursuant to stipulation filed November 22, 1939.)

1199 "The City agrees to take all necessary or desirable steps promptly to acquire the said property of the Citizens Gas Company of Indianapolis, and also agrees that when it has obtained the possession of the property operated by Citizens Gas Company of Indianapolis, it will cause the same to be continually operated as a gas system in an efficient manner and at reasonable cost, and maintained in good operating condition; and it will use all reasonable efforts to resist competition and maintain the exclusive right to serve gas in the City of Indianapolis and in Marion County, Indiana, and the towns therein.

"The City agrees that it will cause to be deposited with a national bank in Indianapolis, Indiana (reserving the right to transfer such account or any part thereof to any other one or more responsible banks or trust companies) in a special account, under such conditions as that moneys cannot be withdrawn from such account or accounts except for the payment of interest on and principal of said bonds in connection with agreed provisions for maturities and/or retirements, on the 15th day of each month during the operation of said gas system by the City, out of the revenues derived from the operation of said gas system, a sum equal to one-sixth of the amount due and payable for principal, if any, if principal payments are due semi-annually, or a sum equal to one-twelfth of the amount due and payable for principal, if any, if principal payments are due annually, plus a sum equal to one-sixth of the amount due and payable for interest, on the next succeeding interest paying date of said bonds.

"The City shall keep appropriate books of account and record, which shall correctly reflect the operations
1200 of and revenues from said gas system, and all disbursements made therefrom, and all transactions relating thereto. Upon request of the original purchaser of said bonds there shall be furnished it, so long as it holds any of said bonds, and, upon written request, to any holder of any of said bonds quarterly or annual statements showing in reasonable detail the operations, income and expenditures of and in connection with such gas system. The City Controller shall keep in file copies of all such statements which holders of such bonds shall have the right at any reasonable time to inspect.

"So long as any of said bonds are outstanding and unpaid, the City shall maintain insurance on the insurable

parts of said gas system of a kind and in an amount as would normally be carried by privately owned companies engaged in a similar and comparable business; which insurance shall be placed and maintained in responsible companies qualified to do business under the laws of the State of Indiana; and the proceeds of such insurance shall be used in replacing, repairing, or rehabilitating the property destroyed or damaged or in extensions, additions and/or betterments; and if not so used, shall be used in the purchase and retirement of outstanding bonds.

"So long as any of said bonds are outstanding and unpaid the City shall not sell, mortgage or dispose of said gas system or any substantial and useful part thereof; provided, however, that the City shall have the right to mortgage said gas system or any substantial and useful part thereof for the purpose of refunding said bonds and the City shall have the right to sell or dispose of said gas system or any substantial and useful part thereof if the proceeds of such sale or disposition 1201 are sufficient for and are used for the payment in full of the principal and interest of the then outstanding and unpaid bonds and the City shall have the right to sell or dispose of any part of said system if the proceeds thereof are used for betterments, extensions or additions to said gas system in such manner as that the efficiency of said gas system is not thereby impaired.

"The right to lease such utility property and gas system, on terms and in manner consistent with law and which do not adversely affect the rights and interests of the holders of such bonds, is expressly reserved to the City; and the City agrees to give notice by one publication in one newspaper, printed in the English language, of general circulation in the City of Indianapolis, Indiana; in the City of Chicago, Illinois; and in the City of New York, New York, at least four (4) weeks prior to the execution of any lease, of its intention to execute any such lease.

"So long as any of said bonds are outstanding and unpaid, the City shall not issue additional bonds or other obligations payable out of the revenues of said gas system except for refunding said outstanding bonds, or for the acquisition of revenue producing property, betterments, extensions, and/or additions.

"So long as said gas system is not liable for taxes for City purposes, there shall be paid to the Treasurer of Marion County for the benefit of the City of Indian-

apolis, out of revenues derived from the operation of said system, to be distributed as taxes are distributed, a sum equal to the taxes which would be assessed for City purposes upon said gas system were said gas system privately owned; such payments to be made at such times during each calendar year as this Board may
1202 in its discretion determine but not to the prejudice of the payments hereinbefore provided.

"The City shall pay at prevailing rates for any gas obtained by it from the operation of said gas system.

"The provisions of this resolution shall constitute a contract by and between the City of Indianapolis, Indiana, and the holders of the bonds herein authorized; and after the issuance and delivery of such bonds this resolution shall not be revoked or amended in any respect which will adversely affect the rights and interests of the holders of said bonds." (Pages 67-85, inclusive, of the Minute Book, Volume I.)

1203 PLAINTIFFS' STIPULATION EXHIBIT 48.

Resolution of Board of Directors for Utilities of the City of Indianapolis.

Adopted August 9, 1935.

"Resolution with Respect to Payment of Citizens Gas Mortgage Bonds.

"Resolved, by the Board of Directors for Utilities of the City of Indianapolis:

"That as a step in the acquisition of the property of Citizens Gas Company of Indianapolis by the City of Indianapolis pursuant to provisions contained in the Articles of Incorporation of said company, that the first and refunding mortgage bonds of Citizens Gas Company dated July 1st, 1912, shall be paid on or after August 12, 1935, at the office of the Controller of the City of Indianapolis, in the City Hall, Indianapolis, Indiana; said bonds to be paid at par plus accrued interest to September 15, 1935.

"Said bonds shall be presented for payment at the office of the Controller of the City of Indianapolis in the City Hall, Indianapolis, Indiana, with the January 1st, 1936, and subsequent coupons attached. The July 1st, 1935, interest coupon will be paid if detached and presented for payment in the usual manner.

"Interest on said bonds will cease from and after said 15th day of September, 1935, and all coupons for interest maturing subsequent to said date shall be void. That to provide the funds to pay said first and refunding mortgage bonds the sum of $ shall be segregated from the proceeds of the sale of the City of Indianapolis Gas Plant Revenue bonds of the issue dated June 1st,
1204 1935, and set up a trust fund therefor; that for this purpose Henry L. Dithmer and Brodehurst Elsey are authorized and directed as President and Treasurer, respectively, of this Board to take all steps necessary to make such segregation and create such fund and they are specifically authorized and directed on behalf of this Board either to issue an appropriate voucher or vouchers to Walter C. Boetcher as City Controller of the City of Indianapolis for said entire sum or to issue from time to time checks on such fund to the persons surrendering said bonds for payment. Said fund to be used for no other purpose except the payment of the principal and interest of said bonds.

"A certified copy of this resolution shall be sufficient evidence of their authority to cause such check or checks to be issued.

"And Be It Further Resolved that said officers are further authorized and directed to cause to be issued an appropriate notice to the holders of said first and refunding mortgage bonds dated July 1st, 1912, of the fact that payment therefor will be made and to cause publication to be made thereof in the Indianapolis Star, the Indianapolis Times and the Indianapolis News, and such other paper or papers in New York and/or Chicago as they may select, said notice to be in substantially the following form:

1205 • • • • • •

"(Here follows a form of 'Notice of Payment of Citizens Gas Company Mortgage Bonds', which form of Notice is identical with the Notice set forth as Plaintiffs' Stipulation Exhibit 49)".

(Inserted pursuant to stipulation filed November 22, 1939.)

(Pages 163-165 of the Minute Book)

1206 PLAINTIFFS' STIPULATION EXHIBIT 49.

"Notice of Payment of Citizens Gas Company Mortgage Bonds.

"To the Holders of First and Refunding Mortgage Sinking Fund Gold Bonds of Citizens Gas Company of Indianapolis:

"Notice is hereby given that as a step in the acquisition of the property of Citizens Gas Company of Indianapolis by the City of Indianapolis pursuant to provisions contained in the articles of incorporation of said Company, funds are now available for payment of the principal and unpaid accrued interest on the bonds outstanding in the hands of the public issued by said Company under the First and Refunding Mortgage dated July 1, 1912, and holders of said bonds are hereby notified to surrender the same for payment on or after August 12th, 1935, at the office of the Controller of the City of Indianapolis in the City Hall, Indianapolis, Indiana, with the January 1, 1936, and subsequent coupons attached. The July 1, 1935, interest coupon will be paid if detached and presented for payment in the usual manner.

"Said bonds will be paid at par, plus accrued interest to September 15, 1935.

"Interest on said bonds will cease from and after said September 15, 1935, and coupons for interest maturing subsequent to said date shall be void.

"Department of Utilities of the
City of Indianapolis,
By Henry L. Dithmer,
President of Its Board of Directors."

"Dated at Indianapolis, Indiana,
August 10th, 1935."

1207 PLAINTIFFS' STIPULATION EXHIBIT 50.

"Notice of Payment of Citizens Gas Company Mortgage Bonds.

"To the Holders of First and Refunding Mortgage Sinking Fund Gold Bonds of Citizens Gas Company of Indianapolis:

"Notice is hereby given that on September 9, 1935, the City of Indianapolis acquired the property of Citizens Gas

Company of Indianapolis; and that the City recognizes the payment of the principal of the bonds issued by said Company under its First and Refunding Mortgage dated July 1, 1912, as having been accelerated as an incident of such acquisition by the City, and that such bonds are now due and payable at par, with accrued interest. The City of Indianapolis will accordingly pay such bonds at par, with interest to September 15, 1935, upon presentation of such bonds at the office of the Controller of the City of Indianapolis, Indiana, with the coupons for January 1, 1936, and subsequent dates, attached.

"The City will not pay interest on such bonds after September 15, 1935.

"This is not a call of such bonds, and no premium will be paid thereon.

"Department of Utilities of the City of
Indianapolis, Indiana,
By Henry L. Dithmer,
President of its Board of Directors."

"Dated at Indianapolis, Indiana,
September 9, 1935."

1208 PLAINTIFFS' STIPULATION EXHIBIT 55.

"Deed of Conveyance of Real Estate.

"This Indenture Witnesseth,

* * * * * *

"(Here follow 4 paragraphs which are identical with the first 4 paragraphs of the Assignment of Lease attached to the bill of complaint as Exhibit F (I R. 127-9))".
(Inserted pursuant to stipulation filed November 22, 1939.)

1209 "Now, Therefore, in consideration of the premises and for the purpose of carrying out and executing the public charitable trust as aforesaid, the Citizens Gas Company of Indianapolis, a corporation organized and existing under the laws of the State of Indiana, hereby conveys and releases to the City of Indianapolis, a municipal corporation organized and existing under the laws of the State of Indiana, all the said Company's right, title and interest in and to the following described real estate situated in the County of Marion, State of Indiana, to-wit:

• • • • • •

"(Here follows a detailed description by metes and bounds of the Citizens Gas Company property)".
(Inserted pursuant to stipulation filed November 22, 1939.)

1212 "To Have and to Hold the said described real estate, with all the rights, easements, and appurtenances thereto belonging, to the said City of Indianapolis, to its use forever.

"This conveyance is made pursuant and subject to, and in conformity with the terms, conditions, and agreements contained in the original and amended articles of incorporation of Citizens Gas Company of Indianapolis, the franchise agreement entered into between said Company's assignors and the City of Indianapolis, under date of August 25th, 1905, as aforesaid, and Chapter 78 of the Acts of 1929 of the General Assembly of the State of Indiana.

"This conveyance is made subject also to the mortgage executed by Citizens Gas Company of Indianapolis, to Bankers Trust Company of New York, Primary Trustee, and The Union Trust Company of Indianapolis, Ancillary Trustee, under date of July 1, 1912, and recorded in Mortgage Record 593, page 399, in the office of the Recorder of Marion County, Indiana, securing an authorized issue of bonds in the principal amount of $10,000,000, and to all other existing liens, incumbrances and assessments of any nature whatsoever.

"This conveyance is made subject also to all other legal obligations of the Citizens Gas Company of Indianapolis.

"In Witness Whereof, the said Citizens Gas Company of Indianapolis has caused this instrument to be executed by its Vice-President and the due execution thereof to be attested by its Secretary and by its corporate seal hereto affixed, this 9th day of September, 1935.

"Citizens Gas Company of Indianapolis,
By Franklin Vonnegut (sgd.),
Vice-President.

(Seal)

Attest:
F. G. Rastenburg (sgd.),
Secretary."

1213 • • • • • •

"(Acknowledgment omitted in printing)".
(Inserted pursuant to stipulation filed November 22, 1939.)

1214 PLAINTIFFS' STIPULATION EXHIBIT 56.

"Assignment of Lease.

* * * * * *

"(Here follow 4 paragraphs which are identical with the first 4 paragraphs of the Assignment of Lease attached to the bill of complaint as Exhibit F (I R. 127-9))".
(Inserted pursuant to stipulation filed November 22, 1939.)

1215 "Now, Therefore, in consideration of the premises and for the purpose of carrying out and executing the public charitable trust as aforesaid, the Citizens Gas Company of Indianapolis, a corporation organized and existing under the laws of the State of Indiana, hereby assigns and conveys unto the City of Indianapolis, a municipal corporation organized and existing under the laws of the State of Indiana, all the said Company's right, title and interest in and to the certain lease bearing date the 18th day of July, 1933, made by John J. Reilly, Receiver of Majestic Building Company, to Citizens Gas Company of Indianapolis, a corporation organized and existing under the laws of the State of Indiana, to have and to hold the
1216 same unto the said City of Indianapolis from the date of this instrument, for and during the residue of the term mentioned in said lease, subject nevertheless to the rents, covenants, conditions and provisions therein mentioned.

"1. This transfer and assignment is made pursuant and subject to, and in conformity with, the terms, conditions and agreements contained in the original and amended articles of incorporation of Citizens Gas Company of Indianapolis, the franchise agreement entered into between said Company's assignors and the City of Indianapolis, under date of August 25th, 1905, as aforesaid, and Chapter 78 of the Acts of 1929 of the General Assembly of the State of Indiana.

"2. This transfer and assignment is made subject also to the mortgage executed by Citizens Gas Company of Indianapolis, to Bankers Trust Company of New York, Primary Trustee, and The Union Trust Company of Indianapolis, Ancillary Trustee, under date of July 1, 1912, and recorded in Mortgage Record 593, page 399, in the office of the Recorder of Marion County, Indiana, in the principal amount of $10,000,000, and to all other existing liens, incumbrances and assessments of any nature whatsoever.

"3. This assignment is also made subject to all other legal obligations of said Citizens Gas Company of Indianapolis.

"In Witness Whereof, the said Citizens Gas Company of Indianapolis has caused this instrument to be executed by its Vice-President and the due execution thereof to be attached by its Secretary and by its corporate seal hereto affixed, this 9th day of September, 1935.

"Citizens Gas Company of Indianapolis,
By Franklin Vonnegut,
Vice-President.

Attest:
F. G. Rastenburg,
Secretary."

1217 • • • • • •

"(Acknowledgment omitted in printing)".

(Inserted pursuant to stipulation filed November 22, 1939.)

1218 PLAINTIFFS' STIPULATION EXHIBIT 58.

July 23, 1935.

Indianapolis Gas Company,
Indianapolis.

Gentlemen:

The Department of Utilities of the City of Indianapolis will, early in September, take over the property which has been operated by Citizens Gas Company of Indianapolis.

On September 30, 1913, Citizens Gas Company and Indianapolis Gas Company entered into a lease which was approved by the Public Service Commission of Indiana, by which Indianapolis Gas Company leased its gas system to Citizens Gas Company for a term of ninety-nine years.

Under the authority of an Act of the Indiana General Assembly approved March 11, 1929, the City, in acquiring the property of Citizens Gas Company, does not become liable for the obligations of that Company.

Various provisions of this lease appear to be inappropriate and burdensome to the City when it assumes operation of the gas system. The City, through its Department of Utilities, is willing to enter into negotiations with you looking toward a revision of this lease to meet the new conditions that will result from municipal operation, if you so desire.

Very truly yours,
Thompson Rabb & Stevenson.

1219 PLAINTIFFS' STIPULATION EXHIBIT 59.

August 31, 1935.

Mr Arthur V. Brown,
Indianapolis.
Mr. Louis E. Ewbank,
Indianapolis.

Gentlemen,—

With further reference to the recent conversation which representatives of the City had with you as officers or directors of The Indianapolis Gas Company:

The specific question which the City desires answered before September 9, 1935, by The Indianapolis Gas Company, is this:

Will The Indianapolis Gas Company, permit the City of Indianapolis to use its property at present under lease to Citizens Gas Company of Indianapolis, for a period of six months next following the take-over of the property of Citizens Gas Company by the City of Indianapolis (at present scheduled for September 9, 1935), in order to prevent interruption of service to gas consumers; the City to make, during such period, the payments to and on behalf of The Indianapolis Gas Company contemplated by said lease; but the City not to presently assume said lease, or accept an assignment of it, nor to be considered as so doing by such user; and the City and The Indianapolis Gas Company meantime to endeavor in good faith to agree upon terms for the adoption or modification of such lease or for continued user of such property.

Will you please let us have an answer on behalf of The Indianapolis Gas Company prior to September 9, 1935?

Very truly yours,
Thompson Rabb & Stevenson.

Copy to:

Mr. Henry L. Dithmer,
President, Board of
Directors for Utilities,
City of Indianapolis.

1220 PLAINTIFFS' STIPULATION EXHIBIT 66.

1004 Majestic Building,
Indianapolis, Indiana,
September 30, 1935.

Thompson, Rabb & Stevenson,
115 North Pennsylvania Street,
Indianapolis, Indiana.

Gentlemen:

Your letters of July 23, August 31, and September 16, 1935, have been brought to the attention of the Board of Directors of The Indianapolis Gas Company. An earlier meeting of the Board was prevented by the absence of many of its members.

In acknowledging these letters, I am directed by the Board of Directors to say that the Board assumes the validity of the lease entered into by it with the Citizens Gas Company of Indianapolis on September 10, 1913, which was approved by the Public Service Commission of Indiana, and that all of its provisions continue to have binding force.

If the Department of Public Utilities of the City of Indianapolis desires to discuss with The Indianapolis Gas Company any of the provisions of that lease, or any questions relating thereto, The Indianapolis Gas Company will, of course, be glad to take part in such a discussion at a time and place mutually agreeable to the representatives of the Company and the Department of Utilities.

Pending the determination of the questions which you may desire to consider, The Ind...napolis Gas Com-
1221 pany, not desiring to disrupt or inconvenience the public service, will be glad to enter into a mutual stipulation with you, if you so desire, that compliance with the terms of the lease shall be without prejudice to the legal rights and claims either of the Department of Utilities or of The Indianapolis Gas Company.

Very truly yours,
The Indianapolis Gas Company
By Way Yule
Secretary.

1222 PLAINTIFFS' STIPULATION EXHIBIT 67.

September 30, 1935.

The Indianapolis Gas Company,
1004 Majestic Bldg.,
Indianapolis.

Gentlemen:

As we have heretofore advised you, we are willing to undertake to negotiate the terms of a new lease from you to the City of Indianapolis which will be both appropriate and fair, and would be pleased to have you indicate an early date for a conference.

Very truly yours,
Board of Directors for Utilities
of the City of Indianapolis,
By Thompson Rabb & Stevenson
Its Counsel.

1223 PLAINTIFFS' STIPULATION EXHIBIT 75.

1004 Majestic Building,
Indianapolis, Indiana,
February 8, 1936.

Board of Directors for Utilities of the
City of Indianapolis.

Attention: Thompson, Rabb & Stevenson, Counsel.

Gentlemen:

In view of the near approach of March 9th, at which time our tentative arrangement will expire, and in order to reach if possible some basis of negotiation looking toward an adjustment of the differences between us in relation to the property of The Indianapolis Gas Company which you are operating, but without waiving any rights, legal or equitable, which The Indianapolis Gas Company has in or to any property or contracts relating thereto, permit us to request that without any waiver of rights on your part or any surrender of property or rights by either party pending the making of an agreement between us, you submit to The Indianapolis Gas Company for consideration by its directors, stockholders and creditors, a proposition embracing the prices, terms and conditions upon and pursu-

ant to which you are willing to take over the property and franchises of The Indianapolis Gas Company.

Very truly yours,
The Indianapolis Gas Company
By Way Yule
Secretary.

1224 PLAINTIFFS' STIPULATION EXHIBIT 76.

The Indianapolis Gas Company,
Indianapolis.

Gentlemen:

In accordance with your request we submit herewith for your consideration a proposal to purchase the entire plant and property of your Company used or useful in manufacturing or furnishing gas or by-products in the City of Indianapolis on the following terms and conditions:

1. We will pay you the sum of $7,500,000 for such property, which will be paid out of the proceeds of the sale of revenue bonds.

2. We will pay you interest on said sum of $7,500,000 at the rate of 3 per cent per annum, from and after March 9, 1936, to the time when the bonds hereinafter referred to have been sold and the proceeds of such bond issue paid to the City of Indianapolis.

3. You are to transfer or cause to be transferred to the City of Indianapolis upon tender of the price therefor a good legal title to said property (free and clear of all liens and encumbrances other than taxes as hereinafter specified) subject to the approval of our attorneys, and, at your own expense, to bring and maintain any and all proceedings which may be necessary to accomplish that result.

4. If title to the property referred to is not conveyed to the City of Indianapolis on or before November 1st, 1936, the City shall have the right at its option to decline to proceed with the transaction.

1225 5. It will be necessary for the City of Indianapolis, in order to obtain a major portion of the consideration hereby agreed to be paid to you, to issue and sell revenue bonds. You therefore are to agree:

(a) When the City of Indianapolis offers revenue bonds for sale in the aggregate par value of not less than $7,000,000 or more than $7,500,000 you will cause to be made a firm bid for such revenue bonds at par plus the interest

accrued thereon (from the date of the coupon first maturing to the date of the delivery of such bonds to you).

(b) The bonds are to run for a period of thirty years from the date of issuance thereof bearing interest at the rate of three per cent payable semi-annually and in addition to the interest charge thereon the City is to agree to pay annually an additional sum which will be sufficient over the period of the bond issue to retire and redeem one-fourth of the total amount thereof; these redemptions may be by the creation of a sinking fund and retirements by call or serially upon the principal at your option. In all other respects not herein specifically stated the bonds are to be of like tenor and effect to the $8,000,000 par value of revenue bonds heretofore sold by the City of Indianapolis.

(c) The City of Indianapolis will pay the ordinary and usual expenses incident to such bond issue, such as advertising, cost of printing and delivery of the bonds; and will furnish the opinion of its counsel that the bonds are in accordance with their terms valid obligations to be paid out of gas revenues of the City; but the City will not pay and shall not be obligated to assume any discount on the bonds or the cost of any opinion from the attorneys 1226 for the purchaser.

6. By mutual agreement the lease executed by The Indianapolis Gas Company to the Citizens Gas Company under date of September 30, 1913, is to be cancelled and terminated on and as of March 9, 1936, and neither party thereto is to have any claim, right or cause of action against the other under or by virtue of said lease or for any claimed violations of the terms thereof or otherwise and each party shall execute a complete release to the other; and the City may use the property covered by such lease without any obligation to The Indianapolis Gas Company other than the payment specified in Paragraph 2 hereof.

7. The City of Indianapolis shall in no event be obligated to pay any taxes (other than the property taxes on the real estate and personal property belonging to The Indianapolis Gas Company, all of which will be assumed if this transaction is consummated), or any attorneys' fees or other expenses or costs as provided either in The Indianapolis Gas Company mortgage or said lease of September, 1913.

8. You are to assign to the City at the time of the transfer of the property all your franchises, grants, indeterminate permits and licenses that pertain to such property or to the manufacture or distribution of gas.

9. This proposition is conditioned upon the approval of any public official or officials whose approval may be legally necessary.

In the making of this proposal and the conducting of any negotiations which may ensue subsequent thereto
1227 neither you nor are we to be prejudiced in any way nor is either of us to waive any right which either of us may lawfully assert.

Dated at Indianapolis, Indiana, February 10, 1936.

The Board of Directors for Utilities
of the Department of Utilities of
the City of Indianapolis,
By Henry L. Dithmer,
President of its Board of Directors.

1228 PLAINTIFFS' STIPULATION EXHIBIT 86.

Resolution of Board of Directors of Citizens Gas Company Adopted September 9, 1935.

"Mr. Insley moved the adoption of the following resolution:

"Whereas, the City of Indianapolis, in the exercise of its right to take over and administer the property of Citizens Gas Company, of Indianapolis as a public charitable trust, has deposited with The Indiana National Bank of Indianapolis, in a special account to the credit of the Citizens Gas Company of Indianapolis, the sums of $2,500,000 and $1,050,000 to be held by the said Company as trust funds to be used for the sole purpose of retiring, respectively, the outstanding common stock of said Company at the par value thereof plus dividends at the rate of 10% per annum and retiring the outstanding preferred stock of said Company at 105% of the par value thereof, said Company, by its Board of Directors has furnished and made provision for the funds necessary for the payment of the dividend upon such preferred stock for the current quarter expiring August 31st, 1935); and,

"Whereas, by the provisions of the original and amended articles of incorporation of said Company, the franchise agreement entered into on August 25th, 1905, between the said City and the assignors of said Company, and the judgment and decision of the United States District Court for the Southern District of Indiana adjudicating the validity of said public charitable trust, the right of the City of

Indianapolis to acquire, take over and administer such property became complete upon the providing of the funds as aforesaid, and nothing further remains to be done to entitle said City to have such property conveyed and transferred to it.

"Now, Therefore, Be It Resolved that the proper corporate officers of the Citizens Gas Company of Indianapolis be, and they hereby are, authorized to execute and deliver deeds of conveyance and instruments of transfer and assignment in the words and figures as follows, to wit:"

(Here the "Deed of Conveyance of Real Estate" and the "Instrument of Transfer and assignment of Personal Property," subsequently executed by Citizens Gas Company, were copied in full. A correct copy of said "Deed of Conveyance of Real Estate" is attached to this Stipulation as Exhibit 55 hereto. A correct copy of said "Instrument of Transfer and Assignment of Personal Property," with the exception of the "List of Executory Contracts to which Citizens Gas Company of Indianapolis is a Party" which appears at the very end of said Instrument and which is set forth immediately below, is attached to the Bill of Complaint in cause 1844 as Exhibit E and in cause 1950 as Exhibit F.)

1229 "List of Executory Contracts to Which Citizens Gas Company of Indianapolis is a Party.

Name	Address
Central United Coal Company	Chicago, Illinois
The Koopers Coal Company	Pittsburgh, Pa.
Lake & Export Coal Corporation of New York	New York City
Milburn By-Products Coal Company (Subsidiary)	Milburn, W. Va.
The West Virginia Coal & Coke Corporation	Cincinnati, Ohio
Indianapolis Power & Light Company	Indianapolis, Indiana
Dearborn Chemical Company	Indianapolis, Indiana
The Hegeler Zinc Company	Danville, Illinois
Wm. Lynn Chemical Company	Indianapolis, Indiana
Michigan Alkali Company	New York City
Shell Petroleum Corporation	St. Louis, Mo.
Standard Oil Company	Indianapolis, Indiana
J. D. Adams Company	Indianapolis, Indiana

Name	Address
Buffalo Belt Company	North Tonawanda, N. Y.
General Electric Company	New York City
Indiana Oxygen Company	Indianapolis, Indiana
The Linde Air Products Company	Indianapolis, Indiana
The Republic Creosoting Company	Indianapolis, Indiana
Indianapolis Union Railway Company Belt Railroad Division	Indianapolis, Indiana
The Indianapolis News	Indianapolis, Indiana
The Indianapolis Star	Indianapolis, Indiana
The Indianapolis Times	Indianapolis, Indiana
The Western Union Telegraph Company	Indianapolis, Indiana
Domhoff & Joyce Company	Cincinnati, Ohio
The Barrett Company of New Jersey	
The Cleveland, Cincinnati, Chicago and St. Louis Railway Company	
Kroger Grocery & Baking Company	
City of Indianapolis	
R. T. Fatout to Merrion Corporation"	

(Here the two Assignments of Lease subsequently executed by Citizens Gas Company were copied in full. A correct copy of the first "Assignment of Lease" incorporated in said resolution is attached to this Stipulation as Exhibit 56 hereto. A correct copy of the second "Assignment of Lease" incorporated in said resolution is attached to the Bill of Complaint in cause 1844 as Exhibit F and in cause 1950 as Exhibit G.)

"Further Resolved that, prior to making delivery of the foregoing instruments to the said City of Indianapolis, the said officers shall take and receive from the said City an indemnity agreement in the words and figures as follows, to wit:"

1230 (Here the "Indemnity Agreement" subsequently executed by the Board of Directors for Utilities of the City of Indianapolis was copied in full. A correct copy of said "Indemnity Agreement", marked "Exhibit J", is attached to the Second Amendment and Supplement to the Bill of Complaint in cause 1844 and to the Amendment and Supplement to the Bill of Complaint in cause 1950.)

"Which motion, being seconded by Mr. Evans, was put upon its passage and carried."

(Pages 80-90, inclusive, of the Minute Book.)

1231 PLAINTIFFS' STIPULATION EXHIBIT 87.

Resolution of Board of Trustees of Citizens Gas Company Adopted September 9, 1935.

"Mr. Lieber moved the adoption of the following resolution:

"Trustees' Resolution as to Conveyance and Transfer of Property to City of Indianapolis.

* * * * * *

"(Here appear 2 paragraphs which are identical with the first 2 paragraphs of Plaintiffs' Stipulation Exhibit 86)". (Inserted pursuant to stipulation filed November 22, 1939.)

"Whereas, the Board of Directors of Citizens Gas Company of Indianapolis, at a meeting thereof duly held on the 9th day of September, 1935, by proper resolution authorized the conveyance, transfer, and assignment of all the property of the Citizens Gas Company of Indianapolis to the City of Indianapolis in the execution and the carrying out of the public charitable trust as aforesaid, and directed the officers of said Company to make and execute, for and on behalf of said Company the deeds of conveyance, and instruments of transfer and assignment, in the form hereinafter set out.

"Now, Therefore, Be It Resolved that insofar as this Board of Trustees has authority so to do, the proper corporate officers of the Citizens Gas Company of In-
1232 dianapolis be, and they hereby are, authorized to execute and deliver deeds of conveyance and instruments of transfer and assignment in the words and figures as follows, to wit:

(Here the resolution sets forth the same instruments as those set forth in Exhibit 86 to this Stipulation in the very same language in which those instruments are there set forth. Said instruments are: "Deed of Conveyance of Real Estate," "Instrument of Transfer and Assignment of Personal Property," "Assignment of Lease," and second "Assignment of Lease.")

"Further Resolved that, prior to making delivery of the foregoing instruments to the said City of Indianapolis, the said officers shall take and receive from the said City an indemnity agreement in the words and figures as follows, to wit:'

(Here the "Indemnity Agreement" subsequently executed by the Board of Directors for Utilities of the City of Indianapolis was copied in full. A correct copy of said "Indemnity Agreement", marked "Exhibit J", is attached to the Second Amendment and Supplement to the Bill of Complaint in cause 184+ and to the Amendment and Supplement to the Bill of Complaint in cause 1950.)

"which motion, being seconded by Mr. Schnull, was put upon its passage and carried."

(Pages 93-103, inclusive, of the Minute Book.)

1233 PLAINTIFFS' EXHIBIT 88.

Certificate.

I, Harold C. Mull, hereby certify that I am Secretary of the Public Service Commission of Indiana and have custody of the records of said Commission, and that after diligent search I am unable to find among such records any of the following papers:

1. Petition of Citizens Gas Company of Indianapolis and Indianapolis Gas Company dated in 1913 asking an order authorizing Indianapolis Gas Company to lease its property to the Citizens Gas Company, which petition was acted upon as shown by an entry in Public Service Commission Order Book No. 1, at page 154.

2. Intervening petition by way of remonstrance filed by Frank S. Fishback opposing the aforesaid petition.

3. Petition for rehearing or motion for new trial filed by Frank S. Fishback, which motion was overruled by an entry appearing in Public Service Commission Order Book No. 1, at page 273.

Signed and sealed at Indianapolis, Indiana, this 27 day of February, 1939.

Harold C. Mull,
Secretary of Public Service Commission of Indiana.

(Seal)

1234 • • • • •

"(Certificate to qualifications of certifying Officer omitted in printing)".

(Inserted pursuant to stipulation filed November 22, 1939.)

PLAINTIFFS' EXHIBIT 89.

* * (Caption) * *

SEPARATE AND SEVERAL ANSWER OF DEFENDANTS CITY OF INDIANAPOLIS, A MUNICIPAL CORPORATION; L. ERT SLACK, AS MAYOR OF THE CITY OF INDIANAPOLIS; WILLIAM A. BOYCE, JR., AS CITY CLERK OF THE CITY OF INDIANAPOLIS; THEODORE H. DAMMEYER, JOHN C. McCLOSKEY AND EMSLEY W. JOHNSON, AS THE BOARD OF PUBLIC WORKS OF THE CITY OF INDIANAPOLIS, TO PLAINTIFFS' BILL OF COMPLAINT.

Filed June 4, 1929 Albert C. Sogemeier.

John W. Holtzman,
Oren S. Hack,
Edward H. Knight,
Smiley N. Chambers,
Pickens, Davidson, Gause, Gilliom & Pickens,
Attorneys for Said Answering Defendants.

John W. Holtzman,
Fred C. Gause.
Of Counsel.

* * (Caption) * *

The City of Indianapolis, a municipal corporation; L. Ert Slack, as Mayor of the City of Indianapolis; William A. Boyce, Jr., as City Clerk of the City of Indianapolis; Theodore H. Dammeyer, John C. McCloskey, and Emsley W. Johnson, as the Board of Public Works of the City of Indianapolis, defendants in the above-entitled cause, for answer to plaintiffs' bill of complaint, say:

1. These answering defendants admit all the averments contained in the first subdivision of the plaintiffs' bill of complaint, except that they deny the averment that the plaintiffs are the owners and holders of any shares of the common capital stock of the defendant Citizens Gas Company, but on the contrary allege that they hold and own only beneficial certificates of interest and allege that the voting trustees of the Citizens Gas Company hold all shares

of the common capital stock of said company, all as hereinafter in Subdivision 20 of this answer more particularly set forth.

2. These answering defendants admit the averments of the second subdivision of plaintiffs' bill of complaint.

3. These answering defendants admit the averments contained in the third subdivision of plaintiffs' bill of complaint that the defendants Henry Kahn, Robert Lieber, Gustave A. Schnull, Thomas L. Sullivan and Lucius B. Swift, defendants herein, are citizens of the State of Indiana residing in the City of Indianapolis in said state, District and Division, but deny that said defendants individually purport to act as trustees or as a body purport to act as a Board of Trustees of all the common capital stock of the Citizens Gas Company defendant hereto; on the contrary, these answering defendants allege that said named individuals constitute and are the duly legally qualified and acting voting trustees of the Citizens Gas Company, all as hereinafter in Subdivision 20 of this answer more particularly set forth.

4. These answering defendants admit the averments contained in the fourth, fifth and sixth subdivisions of the plaintiffs' bill of complaint.

5. These answering defendants admit the averments of the seventh subdivision of the plaintiff's bill of complaint that the ground upon which the jurisdiction of this court depends is diversity of citizenship between each and all of the plaintiffs and each and all of the defendants and that the residence of all the defendants is in the Indianapolis Division of the Southern District of Indiana, but deny that the defendants, under color of certain statutes of the State of Indiana, are attempting to deprive the plaintiffs and other certificate holders of the Citizens Gas Company of property and contract rights, contrary to the provisions of Article I Section 10 of the Constitution of the United States or contrary to the provisions of the Fourteenth Amendment thereto. These answering defendants admit that the matter in controversy in this cause exceeds, exclusive of interest and costs, the sum or value of $3,000.

6. These answering defendants admit that on or about the 25th day of August, 1905, the City of Indianapolis granted a franchise to Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, their associates and assigns for a period of twenty-five (25) years; that a correct copy of said franchise marked Exhibit "A" is attached to plaintiff's complaint and made a part thereof and that certain por-

tions, but not all of said franchise, are correctly copied in said Subdivision 8 of said complaint.

7. These answering defendants admit that said ordinance was adopted without first submitting any question as to the proposed acquisition of the property and plant of the Citizens Gas Company to the qualified voters of the City of Indianapolis at a special or general election, but deny that such an election was required as a condition precedent to the enactment of said ordinance and deny that by failure to submit said question to said voters the provisions of paragraphs (f) and (g) of Provision 1 of said ordinance were or are null and void. These answering defendants further deny that the provisions of paragraphs (f) and (g) of Provision 1 of said ordinance are null and void and that said paragraphs attempted to create an interest in property vesting on a contingency more remote and that paragraph (i) of Provision 1 and Provision 22 thereof attempted to allow the exercise of options by said city at a time more remote than permitted under the common law of Indiana or under the statutes thereof then in force relating to perpetuities and alienations and deny that said provisions or any of them are or have been illegal or void.

8. These answering defendants admit the averments contained in the ninth and tenth subdivisions of plaintiffs' complaint.

9. These answering defendants admit that at the time the certificate of the Articles of Incorporation of the defendant Citizens Gas Company was subscribed and filed, Chapter 139 of the Acts of the Indiana General Assembly for the year 1905 was in full force and effect and that it required such certificate to include the various statements included in Items (a) to (f), both inclusive, of subdivision eleven of the plaintiffs' bill of complaint, but these defendants deny that said Act provides that such certificate should state only and solely certain facts as set forth in said items (a) to (f) and deny that said Act did not authorize any thing other than such facts to be stated in such certificate. These answering defendants admit that except for amendments not here material, such statute has been in effect at all times herein mentioned and deny that the provisions of said certificate setting forth the provisions of the ordinance of 1905 were and are surplusage under said Act and void.

These answering defendants allege that it was at that time and always since has been the law in Indiana that Ar-

ticles of Incorporation could contain valid and binding agreements although such agreements were not included in the facts required by law to be stated in the Articles of Incorporation, provided such agreements are not inconsistent with any of the provisions of law.

These defendants further allege that the provisions contained in said Articles of Incorporation respecting the acquisition by the City of Indianapolis of the plant and property of the Citizens Gas Company were to evidence the creation of a public charitable trust, all as hereinafter in Subdivision 20 of this answer more particularly alleged and that the insertion thereof in said Articles of Incorporation and the certificate filed with the Secretary of State was entirely legal and that the inclusion of such provisions in the Articles of Incorporation was legalized by the Act of 1929, as hereinafter more particularly averred.

These defendants further allege that each and every holder and owner of trustees' certificates of beneficial ownership in the first million dollars of capital stock issued by the Gas Company agreed, in the manner alleged in subdivision 20 hereof, by the execution of the subscription agreement and the acceptance of the trustees' certificates as therein alleged, to the inclusion in said articles of incorporation of said provisions, and each and every holder of trustees' certificates of beneficial ownership in the second million dollars of said capital stock, by buying pursuant to the published notice referred to in subdivision 20 thereof, and by accepting the trustees' certificates referred to in subdivision 20 hereof ratified and agreed to the inclusion of said provisions in said articles of incorporation and these defendants say that by reason of the foregoing facts, neither these plaintiffs nor any others similarly situated, can now object to the said agreement contained in said articles of incorporation nor question the validity of such provisions in said articles or in the amendments thereto.

10. These answering defendants admit the averments contained in the twelfth, thirteenth and fourteenth subdivisions of the plaintiffs' bill of complaint.

11. These defendants admit the allegation in subdivision fifteen of the plaintiffs' bill of complaint that said increased capital stock of the Citizens Gas Company was sold by the Gas Company at public auction to the highest bidders for a price in excess of $400,000 above the par value thereof, without requiring the purchasers at the time of purchase, or at any time, to execute a written stipula-

tion that the power of holding and voting said capital stock might be irrevocably given to holding trustees as required by a statute of Indiana, Chapter 58 of the Acts of 1889, page 91, then in full force and effect, and these defendants admit that the voting trustees caused to be delivered to themselves, took possession of, held and continued to hold and vote the certificates representing said shares of increased capital stock and issued to the stockholders in lieu thereof, trustees' certificates substantially in the form of Exhibit "E" attached to the plaintiffs' complaint herein evidencing the holding of said certificates by them, but these defendants deny that said voting trustees in so doing acted without authority and say that all of said increased capital stock was sold pursuant to public notice all as required by said Articles of Incorporation of said company and in which notice it was expressly stated that all stock sold should be issued in all respects conformably to the terms and conditions of the Articles of Incorporation and franchise of the Citizens Gas Company relating thereto. The circumstances surrounding the issuance of said certificates and the charitable trust created by said Articles of Incorporation and said franchise with reference to the property of the Citizens Gas Company of Indianapolis are hereinafter more particularly set out in Subdivision 20 of this answer.

12. These defendants for answer to subdivision sixteen of the plaintiffs' complaint admit that for a considerable period prior to 1921 the operations of the Citizens Gas Company in the City of Indianapolis were at a financial loss and that in the month of August, 1921, the situation was acute; but deny that in addition to bonds which the Gas Company had previously issued and sold to finance extensions and additions to its plant it had a floating indebtedness in excess of $2,600,000; deny that said company was unable to fund the same by the issuance and sale of preferred stock because of the provisions of said franchise of 1905 and deny that it was unable to fund the same by the sale of bonds because of its precarious financial condition; these defendants further deny that said company was faced with the danger of defaulting in payments of interest and principal on its outstanding obligations with a possibility of foreclosure and receivership. The defendants admit that the common stock of said company had been sold at prices ranging from a minimum of $25 to a maximum of $40 per share, but say that they have no knowledge as to whether such stock was then selling in the open mar-

ket at prices as low as $18 per share, but if the same be material leave the plaintiffs to make proof thereof. These defendants further deny that the company's financial condition rendered impossible the making of additions, extensions or betterments of its plant needed for public service. These defendants further deny that in the financial condition of said company the claimed right of the city to purchase the plant and property of the Gas Company pursuant to the terms of the franchise of 1905 was wholly valueless and deny that the price at which the city must purchase thereunder was substantially more than the then value of its property. These defendants say that the financial condition of the company as hereinabove referred to and as referred to in subdivision sixteenth of the plaintiffs' complaint was due primarily, if not altogether, to the fact that by the terms of its said franchise a rate of sixty cents per 1000 cubic feet was fixed as the maximum rate which could be charged for gas and that it had prior to August, 1921, been able to obtain a higher rate for gas only through the procurement of emergency relief from the Public Service Commission of the State of Indiana and that it was impossible under such circumstances for it to procure a rate for gas having such quality of permanency as would enable it to stabilize its financial position.

13. These defendants admit the allegations set forth in subdivision seventeen of the plaintiffs' complaint except inso far as the facts as therein set forth are alleged to follow upon and because of the situation as set forth in subdivision sixteen of said complaint and which facts have been in part denied in the preceding paragraph hereof.

14. These defendants admit the facts set forth in subdivision eighteen of the plaintiffs' complaint herein.

15. Answering subdivision nineteen of the plaintiffs' complaint these defendants deny that by the surrender of said franchise said Gas Company subjecting itself in all its operations to the Shively-Spencer Utility Commission Act and thereupon all rights, duties and obligations of the Gas Company under said franchise of 1905 and under the provisions of its Articles of Incorporation inserted pursuant thereto and all rights, duties and obligations of the city thereunder terminated and in substitution therefor the Gas Company and the city acquired the rights, duties and obligations defined by the terms of said Act. For a more particular statement as to the effect of the surrender of said franchise upon the operations of said Gas Company and the rights of the City of Indianapolis and its inhabitants in

and to the property of said company, reference is made to paragraphs 20 and 21 of this answer.

These defendants admit that subsequent to the surrender of said franchise the company was able to finance necessary extensions, additions and betterments to its plant and to refund its floating indebtedness by the issuance and sale of preferred stock and bonds and to discontinue the existing non-compensatory rates and otherwise to put and maintain its property devoted to public service in a sound operating condition to meet the expanding needs of its service, but these defendants say that such results flowed primarily, not from the surrender of said franchise, in August, 1921 but from the action of said company through proceedings instituted in the year 1922 in the United States District Court for the District of Indiana in securing compensatory rates for the use of its property devoted to public service.

16. These defendants admit the allegations in subdivision twentieth of the complaint concerning the adoption of a resolution increasing the capital stock of the Citizens Gas Company of Indianapolis and concerning the execution of a Certificate of Amendment of the Articles of Incorporation of the Gas Company in the respects set forth in said subdivision and further admit that true copies of said certificate of increase and certificate of amendment of the Articles of Incorporation are attached to the complaint as Exhibits "H" and "I" and that said certificates were filed in the office of the Secretary of State August 27, 1921. These defendants deny that the said voting trustees, in assuming to execute said amended Articles of Incorporation were wholly without authority, in fact or in law, to execute the same. They deny that they were not the stockholders of said company, either of record or otherwise, at the time of executing said purported certificate amending said Articles and allege that as appears from the terms of the stock certificates themselves, the certificates of beneficial ownership therein and the Articles of Incorporation of the company pursuant to which the same were issued, all of said stock was to be held and was held solely by said trustees with the sole right to vote the same and that in voting the same for such amendments to the Articles of Incorporation they exercised the expressed powers given to them by the terms of said certificates and said Articles of Incorporation. These defendants further deny that the amendments attempted to be made were not confined to the subject matter permitted by the statutes of Indiana in force

in 1921, as alleged in paragraph eleven of said complaint, and further, with reference to said voting trust, the reason for the creation thereof and the scope of the powers of the Voting Trustees, these defendants refer to paragraph 20 of this answer. These defendants deny that said voting trustees were not authorized by any terms of the voting trust to vote the stock of the company in order to perpetuate or increase or otherwise modify the powers of the voting trustees, or to sign and acknowledge any instrument as the stockholders of the Gas Company, or to make a new or amended contract affecting the rights or property of the stockholders or otherwise to vote the stock of the company or represent the stockholders of the company in amending Articles of Incorporation and allege that said voting trustees had full power and authority under the provisions of said voting trust as embodied in the Articles of Incorporation of said company and as referred to in the certificates issued representing the stock of said company and the beneficial interest in said stock to vote all the stock of said company and to do all other things as stockholders which it might be found wise or expedient in their judgment to do for the best interests of said company not inconsistent with the objects, provisions and purposes of said trust as embodied in the Articles of Incorporation of said company and these defendants allege that all of the amendments so made in said Articles of Incorporation were consistent with such objects, provisions and purposes, and the action of said voting trustees in voting said stock for the adoption of such amendments was consistent with and within the powers so granted to them.

These defendants further say that at the same meeting of the voting trustees of said Citizens Gas Company at which resolutions were adopted providing for the amendments to the Articles of Incorporation as set forth in Paragraph twentieth of the complaint herein, said voting trustees also adopted a resolution providing for the surrender of said franchise from the City of Indianapolis and that both of said actions by said voting trustees were part and parcel of the same proceeding of said voting trustees. That pursuant to said resolutions said franchise was surrendered as provided by law and the certificate certifying to such amendments to the Articles of Incorporation of said company was filed with the Secretary of State of the State of Indiana on the same date.

17. In answer to the twenty-first subdivision of the plaintiffs' bill of complaint these defendants admit that

early in the year 1929 the legislature of the State of Indiana enacted an Act with the title thereto as set out in said subdivision, and that said Act contained an emergency clause to give it immediate effect upon its passage, was approved by the governor, and became effective March 11, 1929.

These defendants admit the bill for said Act was prepared by the representatives of the City, and introduced in the legislature by members residing in such City, and was enacted by the legislature in the exact form in which it had been so prepared, but these defendants say that said facts are not material in this cause.

These defendants admit that said Act provides in effect that if in the original articles of incorporation of any corporation organized prior to May 1, 1913, that being the date of the creation of the Public Service Commission of this State, for the purpose of furnishing natural or artificial gas for fuel or illuminating purposes or for furnishing electric lights and water to the citizens of any city, or to furnish light, heat and power to any city, or the inhabitants thereof, provision is made for the transfer or conveyance of the property of such corporation to such city, subject to the outstanding legal obligations of such corporation, whenever the holders or owners of shares of stock or beneficial interest therein shall have received the par value of such shares of stock or certificates of beneficial interest, together with dividends as provided in such articles, such provisions in such articles are by said Act legalized and declared to be valid and binding upon such corporation and upon the holders and owners of any shares of such stock, stock certificates or beneficial interest therein, or their assigns.

These defendants deny that said Act was passed for the sole and only purpose of attempting to legalize any invalid and illegal provision of the articles of incorporation of the Gas Company as alleged in said bill of complaint.

These defendants say they are without knowledge as to whether at the time of the passage of said Act, any other corporation in the State of Indiana came within the provisions of said Act, but these defendants allege that said Act is general in its provisions and applies to any and all corporations organized for the purpose of furnishing public service of the character therein described to any town or city or the inhabitants thereof, and which was organized prior to May 1, 1913, that being the date when the Shively-Spencer Utility Commission Act became effective in said

State, and in the articles of incorporation of which provisions were made for the conveyance of the property of such utility to any such town or city upon the retirement of the capital stock or the payment to the holders or beneficial owners of such capital stock at the face value thereof.

Said defendants deny that said Act is unconstitutional and void for any of the reasons set out in said subdivision of the bill of complaint, or for any other reasons.

These defendants deny that said Act impairs the obligations of contracts existing at the time of its passage between the State of Indiana and the Gas Company and its stockholders created by the provisions of the Shively-Spencer Utility Commission Act, the surrender of the franchise of 1905 and the acceptance of an indeterminate permit pursuant thereto, and deny that said Act is in violation of Article I Section 10 of the Constitution of the United States, or of Article I, Section 24 of the Constitution of the State of Indiana.

These defendants deny that said Act deprives the stockholders of the Gas Company of property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and deny that it results in the confiscation of the property of the stockholders of the Gas Company without just compensation, in violation of Article I Section 21 of the Constitution of the State of Indiana.

These defendants admit that said Act has the effect of legalizing the articles of incorporation of the Gas Company as set forth in the bill of complaint, and grants to municipal corporations the power to accept a conveyance of the property of such Gas Company in accordance with such provision without submitting the question of such acquisition to a general election, and that said Act provides that such city may acquire such property in accordance with such provision without submitting the question of such acquisition or the terms and conditions thereof to the Public Service Commission.

These defendants deny that said Act deals with three separate and unrelated subjects, in violation of Article IV Section 19 of the Constitution of the State of Indiana, and deny that it confers privileges and immunities in violation of Article I Section 23 of the Constitution of the State of Indiana, and denies the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

These defendants deny that said Act attempts to create

a corporation other than banking and to confer powers thereon by special act, contrary to the provisions of Article XI, Section 13 of the Constitution of the State of Indiana.

These answering defendants say that said Legalizing Act of 1929 is valid in all respects. Said Act only legalizes a contract voluntarily made by said corporation with the State in its Articles of Incorporation and in the amendments thereof and enables said City to take said property in accordance therewith. Said Act does not attempt to revive any obligation abrogated by the surrender of said franchise, but only places the express stamp of approval by the State on a contract made by said corporation and which survived the surrender of said franchise.

Said act does not deprive the plaintiffs of the equal protection of the law by providing for an invalid classification. The classification to which it applies is a self-created class consisting of corporations who voluntarily placed in their articles of incorporation provision for the transfer of their properties prior to the time when the new rules in said Shively-Spencer Act governing such transfers came into effect, on to-wit: May 1, 1913. Said Act does not impose on said class any obligations, but merely approves self-imposed obligations contained in articles of incorporation. Said corporation is not complaining of said Act, but is voluntarily performing its obligations which said Act approves. Plaintiffs cannot complain of said Act for the reason that they, through said board of trustees having power to vote all stock, have given their consent to the performance of said obligation, and further because they are not injuriously affected by said Act in that they took their rights subject to the obligation which said Act approves.

Plaintiffs cannot complain on the ground that said Act should also, to be valid, have approved similar provisions appearing only in franchises held by corporations for the reason that they are not injured by such exclusion. Only an excluded corporation could complain on that ground if any such ground of complaint exists.

Said defendants say that said Act is not invalid in that it provides a method for effecting the acquisition of the instant property different from the methods provided for in said Shively-Spencer Act, or the Act of 1905, mentioned in plaintiffs' complaint. Said Acts do not apply to cases, as the instant one, where a corporation owns its property subject to a trust and an obligation to transfer its property in accordance with an agreement contained in its articles

of incorporation. The Act of 1929 directly approves provisions for the transfer of property subject to trusts and obligations voluntarily created by the corporations included in the class to which the Act applies. Plaintiffs are not injuriously affected by said Act on account of approval therein by the legislature of the transfer in question without the submission thereof to a vote or to the Public Service Commission. By such direct approval said Act only provides for the transfer which said corporation voluntarily agreed to, and which the plaintiffs and all other holders of certificates of beneficial interests in said stock agreed to by accepting their certificates wherein said conditions for surrender of said stock and the transfer of said property were incorporated. If said provisions for transfer of said property are not as advantageous to plaintiffs as transfers under the provisions of other statutes, in the absence of such contract, might be, such disadvantage is not created by said Act of 1929, but is a disadvantage voluntarily created by said corporation when it agreed to make such transfer and voluntarily acquiesced in by plaintiffs when they purchased said certificates subject to such obligation to transfer, and said Act cannot be invalid as to plaintiffs in such situation.

These defendants further allege that if said Act is a special law and only applicable to the Citizens Gas Company and said City, it is valid. That the General Assembly of the State of Indiana could have authorized the inclusion in the articles of incorporation of such corporations of the provisions contained in the articles of the Citizens Gas Company before the same was formed, and it could and did legalize such provisions by said Act of 1929.

Said defendants say that said Act of 1929 is not duplicitous. The subject on which it legislates is the transfer of utility properties under agreement to transfer expressed in articles of incorporation.

The provisions approving and legalizing such agreements and those enabling cities to take under such agreements are matters properly connected with said subject and are in aid of the main object of said Act to give effect to such agreements to transfer. Said Act of 1929 is in all respects valid.

18. Answering the allegations contained in Paragraph Twenty-Second of the complaint herein, these defendants admit that at the time the franchise of 1905 was granted by the City of Indianapolis, the Indianapolis Gas Company was furnishing gas in the central portion of the City under

a franchise from the City; that the City was dissatisfied with the monopolistic position of the Indianapolis Gas Company and with the rates then being charged by it, but deny that said franchise of 1905 was granted largely to provide competition and to procure a lower rate for gas for its inhabitants, although admitting that the public spirited citizens of Indianapolis who promoted said enterprise did have these objects and others in mind, and these defendants deny that the provisions for the Voting Trust as hereinbefore set forth were inserted principally for the insuring that the control of the Citizens Gas Company should not pass to the Indianapolis Gas Company or its stockholders.

Defendants admit that it was provided in said franchise of 1905 that no Voting Trustee of the Citizens Gas Company should be an employee or stockholder of the Indianapolis Gas Company; that after the passage of the Shively-Spencer Act of 1913 the Citizens Gas Company, pursuant to an order of the Public Service Commission of Indiana and with the full consent and approval of the City of Indianapolis, entered into a contract whereby it leased from the Indianapolis Gas Company all its plants and property for a period of ninety-nine years; that, as a condition to the making of said lease, the Indianapolis Gas Company was required to surrender its franchise in the City and to accept in lieu thereof an indeterminate permit as provided in said Act and the Gas Company was required to subject its rates to the control of the Public Service Commission as fully as if it had surrendered its franchise and received in lieu thereof an indeterminate permit under the provisions of said Act and was required immediately to reduce its rates. These defendants deny that with the making of said lease and the passing of all property devoted to the service of manufactured gas in the city to the control of the Citizens Gas Company, and the subjection of the rates to the control of the Public Service Commission, the original purpose of the City failed and the reasons for the existence of said Voting Trust and of many of the provisions of said Ordinance of 1905 disappeared, and allege that quite to the contrary, the prime purpose of the City and the reasons for the existence of said Voting Trust continued in full force and effect, all as is more particularly set out and alleged in Subdivision 20 of this answer.

These defendants admit that the plant and property subject to said ninety-nine year lease and the business and the public service furnished thereunder were in some respects

more extensive and have at all times been more extensive than those of the Citizens Gas Company, but they deny that the business and public service furnished through the property of the Indianapolis Gas Company were at that time or have since been in all respects more extensive than those of the Citizens Gas Company.

These defendants admit that since 1913 the Citizens Gas Company with full knowledge and consent of the City has operated the combined properties under the provisions specified by the Commission and has used its earnings and its financial credit in the making of extensions, improvements and betterments, both to its own property and to the property subject to said lease.

These defendants admit that at the time of the surrender in 1921 of said franchise of 1905, the City neither objected to nor protested said surrender, but deny the averment of plaintiffs' bill that "the apparent purpose of the surrender was to extinguish all original franchise obligations not already destroyed by acquiescence of the parties in said transactions of 1913," relating to the lease of the property of the Indianapolis Gas Company by the Citizens Gas Company.

These defendants further admit that thereafter the Citizens Gas Company openly conducted its operations in the city and elsewhere in accordance with the provisions of said Shively-Spencer Act and thereafter did not in any respect comply or attempt to comply with any of the terms and provisions of said surrendered franchise of 1905, except to this extent, that said Citizens Gas Company has at all times recognized the limitations contained in said franchise and in its Articles of Association restricting the amount of dividend which can be paid upon its common stock, and in addition thereto it has, as alleged elsewhere in said complaint, taken steps looking to the partial retirement of the principal of its common stock in accordance with the provisions of said franchise of 1905 and the provisions of its Articles of Incorporation, and except that at all times it recognized the existence of the public charitable trust as set forth in Sudivision 20 of this answer.

These defendants further admit that during all of this time until said City recently caused legislation to be perfected, introduced and enacted as alleged in Paragraph Twenty-one of the complaint herein said City, with full knowledge of the surrender of said franchise and of the fact that the business and service of the Gas Company was being conducted pursuant to the terms of said Act as here-

inbefore alleged made no protest or objection thereto and made no demands or claims of any kind upon the Gas Company to comply with said surrendered franchise, but these answering defendants allege that the City of Indianapolis has never at any time either by conduct or acquiescence waived or attempted to relinquish said trust impressed on the property and plant of Citizens Gas Company. As to the allegation that said City acquiesced in said surrender and subsequent operations, these defendants neither admit nor deny the same but leave to the plaintiff to make proper proof thereof.

These answering defendants deny the allegations in said Paragraph Twenty-two of the complaint that the stockholders of the Gas Company relying upon the acquiescence of the City in said surrender bought and sold shares of the common stock of the Gas Company in open market with the understanding that the City no longer had or asserted or claimed any rights under the franchise of 1905 and the Articles of Incorporation adopted pursuant to its conditions, but allege that each person who purchased a beneficial certificate accepted the same under an express agreement that the City had the right to acquire said property; as to the allegations that due to the improved condition of the Company brought about as stated in the complaint the stock of the Gas Company increased in market value until it reached in the year 1928 the price of $57 per share in the open market and many of the present stockholders of the Gas Company purchased shares at that price and will, if said shares are subject to retirement at the price of $25 per share as provided in the franchise of 1905 and the Articles of Incorporation adopted pursuant thereto, suffer as part of their damages a loss of the difference between said market value and said retirement price, these defendants have not sufficient knowledge as to the matters and facts so alleged but leave to the plaintiff to make strict proof thereof.

These defendants deny that by reason of the facts as alleged in said Paragraph Twenty-two and the reliance of the common stockholders thereon that the City is now estopped from asserting against the Gas Company any rights it otherwise might claim by virtue of said surrendered franchise and said Articles of Incorporation, and for a more detailed statement as to the effect of the surrender of said franchise, reference is made to Subdivision 21 of this answer.

19. These defendants admit that on the 20th day of

March, 1929, said City, acting through its Board of Public Works, adopted and subsequently presented to the Gas Company the resolution referred to in subdivision twenty-three of the bill of complaint, a copy of which is filed with said bill of complaint as Exhibit J, and admit that said resolution was presented after the surrender of said municipal franchise in 1921, but these answering defendants allege that the surrender of said franchise in 1921 and the fact that said city had taken no affirmative action since said time until the adoption of said resolution, did not deprive the said City of the rights demanded in said resolution and the right to have the property of said Gas Company conveyed to it in accordance therewith.

These defendants say that said City was and is entitled to have the property of said Gas Company conveyed to it pursuant to the terms of a public charitable trust with which all of the property of said Gas Company is impressed.

These defendants allege that said public charitable trust arose and was created, all as is alleged in subdivision twenty of this answer, the terms and provisions of which said trust are therein more specifically set out.

20. These answering defendants allege that a public charitable trust was created and exists in the plant and property of defendant Citizens Gas Company of Indianapolis in favor of the inhabitants and/or gas consumers of said City of Indianapolis, which trust was to be administered by the defendant Citizens Gas Company of Indianapolis and by the defendant City of Indianapolis as respective trustees thereof, in accordance with the terms of said trust, as hereinafter in this subdivision of this answer alleged.

That the facts in connection with the establishment of said public charitable trust were and are as follows:

That in the year 1887, the City of Indianapolis by an ordinance granted to the Consumers Gas Trust Company a franchise to furnish natural gas to the citizens of said City and vicinity upon the terms and conditions specified in said ordinance; that the supply of natural gas failed some time prior to 1904 and that an attempt was made by said Consumers Gas Trust Company to engage in the business of furnishing artificial gas to the citizens of Indianapolis; that as a result of this effort, litigation ensued in the District Court of the United States for the District of Indiana and the United States Circuit Court of Appeals for the Seventh Circuit, wherein it was held and finally adjudged as follows:

First. That the certificate holders of the Consumers Gas Trust Company of Indianapolis had the right to enjoin that company from engaging in the business of supplying artificial gas to the citizens of Indianapolis on the theory that such business was ultra vires the corporation.

Second. That under the franchise, Articles of Incorporation, Subscription Contracts and other relevant agreements, the City of Indianapolis had the right, by giving six months' notice, to purchase the property of the Consumers Gas Trust Company at any time after the expiration of ten years from the date of the ordinance, the amount to be paid for such plant to be determined by three disinterested appraisers.

Third. That a public charitable trust existed in favor of the inhabitants and/or gas consumers of Indianapolis in the property of the Consumers Gas Trust Company to the end that gas should be furnished at cost after the holders of beneficial certificates had received by dividends or otherwise an amount equal to their subscriptions and ten per cent. interest per annum.

That as a result of such litigation the City of Indianapolis was determined to have the right to purchase the plant and property of the Consumers Gas Trust Company and did in fact exercise such right by the assignment thereof for a nominal consideration to Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, being the same identical persons to whom the franchise and ordinance set out in paragraph six of the plantiffs' bill of complaint was granted, to the end that such persons should organize or cause to be organized the Citizens Gas Company of Indianapolis.

That the property formerly belonging to the Consumers Gas Trust Company was in fact purchased by the said Alfred F. Pots, Frank D. Stalnaker and Lorenz Schmidt and by them conveyed to the Citizens Gas Company of Indianapolis, defendant hereto; that as a result of said litigation there was a widespread public movement in the City of Indianapolis to the end that a Gas Company should be organized which should own the property and plant formerly owned by Consumers Gas Trust Company; that said property should be acquired through the medium of a new corporation in which the stockholders or the owners of beneficial certificates representing common stock should be entitled to receive only the re-payment of the face value of such beneficial certificates with interest thereon at the

rate of ten per cent. per annum until paid and that thereafter the city on behalf of the gas consumers of Indianapolis and the inhabitants thereof should have the right to acquire such property without the payment of any additional consideration; the plan was so formed for the purpose of avoiding that which had theretofore happened, viz: that the persons owning the beneficial certificates of stock should receive the face value of such certificates with interest and thereafter the city be compelled to purchase said plant and pay therefor a large sum of money.

That wide publicity was given by the public-spirited citizens engaged in the organization of the Citizens Gas Company of Indianapolis to the plan, including publicity in all of the newspapers in the City of Indianapolis, Marion County, Indiana, and that the essential elements of the plan and of the public charitable trust to be thereby created were stated and agreed upon as follows:

First. That all of the common stock of the Citizens Gas Company of Indianapolis should be issued to and perpetually voted by voting trustees to be appointed as provided in Section 6 of the original Articles of Incorporation which are set forth in Subdivision Seven of the plaintiffs' bill of complaint.

Second. That such Trustees should issue to each subscriber to the capital stock of the company a beneficial certificate and that the holder thereof should be entitled to re-payment of the face value of the same out of dividends or otherwise with interest at the rate of ten per cent. per annum, payable semi-annually, and that when the face value of such certificate had been paid the holder should have no further interest in the property and plant of the Citizens Gas Company.

Third. That when said certificate holders have been paid in full the City of Indianapolis should have the right to acquire said property for the benefit of the public and the consumers of gas in Indianapolis without the payment of any money or further consideration.

Fourth. That a public charitable trust to be administered by the Citizens Gas Company of Indianapolis and the City of Indianapolis respectively as trustees was to be and was created in the property and plant of the Citizens Gas Company of Indianapolis to the end that private exploitation thereof should be prevented and that gas should be supplied at the lowest possible cost to the citizens of Indianapolis who should desire to use the same.

It was necessary, in order to acquire the property and plant formerly belonging to the Consumers Gas Trust Company, to interest local capital in the enterprise and for the purpose of inducing the persons who should invest in the common stock of said company to make such investment upon the condition that they should never receive any more than a return of the face value of said certificate, it was proposed and agreed that interest thereon should be paid at the rate of ten per cent. per annum.

Fifth. Said plan contemplated that the Citizens Gas Company of Indianapolis should be the Trustee of said public charitable trust until such time as said certificate holders were repaid the face value of their certificates with interest at the rate of ten per cent. annually and that thereafter the City of Indianapolis should acquire said property for the benefit of the gas consumers and inhabitants of said city, but that it was never intended that title to the plant and property of said Ciizens Gas Company should be vested and it was not in fact vested in the City of Indianapolis as an agency of the State, but solely for the benefit of the inhabitants of said city and particularly those who at that time or thereafter should desire to use the gas to be supplied by said company.

That each of the original subscribers to the common capital stock of the Citizens Gas Company with which it was to begin business, to-wit: One Million Dollars par value thereof was required to and did execute subscriptions to the capital stock of the Citizens Gas Company upon the form set out as a part of the bill of complaint and marked Exhibit B.

That all present holders of beneficial certificates representing their ownership of the first one million dollars to be issued of the common capital stock of the Citizens Gas Company acquired the same either directly or by mesne assignments from the original subscribers to said capital stock and each and all of such present holders of said beneficial certificates had full knowledge and notice at the time of such acquisition, of the terms of said subscription contract hereinbefore set out; that said subscription contracts constituted and were a part of the general plan to form said public charitable trust.

That after the organization of the Citizens Gas Company of Indianapolis the voting trustees issued to each subscriber of the common capital stock and thereafter to all purchasers of such stock a trustee's certificate in the

form set out as a part of the bill of complaint as Exhibit E thereof.

That there was issued to each of the plaintiffs as evidencing his beneficial interest in said stock a trustee's certificate in said form, duly signed by the President of the Board of Trustees of said Voting Trustees, and attested by the President and Secretary, respectively, of the Board of Directors of said Gas Company, and each of said plaintiffs now have and hold such certificates in such form, and in which certificates it is agreed that the capital stock of said Gas Company shall be and remain under the exclusive and irrevocable control of said Board of Five Trustees and their successors, with full, complete and exclusive and irrevocable power in said Board of Trustees to hold said stock and vote the same during the continuance of the Citizens Gas Company of Indianapolis as a corporation, for all uses and purposes in the articles of incorporation of said Company mentioned, set forth and described.

It is further provided in said certificates so held and received by the plaintiffs that when said certificate holder shall have received by dividends or otherwise upon said certificate an amount equal to the face value thereon, together with interest thereon at the rate of ten per cent. per annum, payable semi-annually, then such certificate shall be fully paid and cancelled and the interest of said holder in said Company and its assets shall thereupon cease, and the property of said Company shall be disposed of as provided in such articles of incorporation.

That on the 25th day of March, 1911, pursuant to the provisions of Article 4 of the Articles of Incorporation of the Citizens Gas Company of Indianapolis, as set out in Subdivision Seven of the plaintiffs' bill of complaint, the common capital stock of said Company was increased from One Million Dollars to Two Million Dollars, and thereafter, from time to time, prior to July 1, 1919, said additional One Million Dollars of common capital stock was sold at public auction to the highest bidder therefor after giving thirty (30) days' notice of the time and place of such sale by publication in three Indianapolis newspapers having the largest city circulation, all as provided in said Article 4 of said original Articles of Incorporation.

That in said published notices of the offering of said additional common stock for sale at public sale, it was specifically stated that all stock sold should be issued in

all respects conformably to the terms and conditions of the rticles of Incorporation and franchise of the Citizens Gas Company relating thereto.

That all of said additional One Million Dollars of common stock was sold, pursuant to such notices of sale, and Trustees' certificates representing the beneficial ownership of said additional One Million Dollars of Common stock were issued to the purchasers at such public sales, or their nominees, in the form of the certificate hereinabove set out, and no other form of certificate or other evidence of ownership was ever issued to any of such purchasers of the nominees of any such purchasers.

That all subsequent owners of any of said second Million Dollars of common stock, upon acquisition thereof from prior owners thereof, received, and the present owners thereof now hold, Trustees' certificates of beneficial ownership in the form hereinabove set out, and there has never been issued or authorized any other form of certificate representing any part of the Two Million Dollars authorized common capital stock of the company other than the Trustees' certificates of beneficial ownership in the form hereinabove set out.

That the plaintiffs and each and every present or former holder of trustees' certificates has received, accepted and held such trustees' certificates containing the specific agreements hereinbefore set forth and has never at any time had any other evidence of his ownership of the beneficial interest in the Citizens Gas Company and that the plaintiffs and all other holders of beneficial certificates of the Citizens Gas Company of Indianapolis, defendant hereto, are bound by each and all of the terms and conditions of the foregoing subscription contract and beneficial certificates as well as by the provisions of the franchise contract, the Articles of Association, the amendments thereto and the public charitable trust created at the time of the organization of the Citizens Gas Company of Indianapolis, defendant hereto, as in this paragraph of answer specifically alleged.

That neither the plaintiffs nor any other present holder of such beneficial certificates has ever objected or protested against the form of such beneficial certificates or the covenants or agreements therein contained or in any way at any time evidence his unwillingness to be bound thereby until within the last few months when publicity was given to the plan of the City of Indianapolis to ac-

quire the plant and property of the Citizens Gas Company; that at no time either before or after such mentioned publicity has the plaintiff or any other holder of beneficial certificates of the Citizens Gas Company of Indianapolis surrendered or offered to surrender the same or asked or demanded for the issuance to him or them of certificates representing their beneficial ownership free from the conditions above set forth.

21. These answering defendants allege and say that the City of Indianapolis now has all of the rights in and to the property of the Citizens Gas Company of Indianapolis as claimed by it in the resolution set out in Subdivision Twenty-third of plaintiffs' complaint, as Exhibit J, and as recognized in the several resolutions of the board of directors and the board of trustees of said corporation set out in Subdivisions Twenty-fifth and Sixteen of said complaint, as Exhibits L and M, that the surrender of said franchise did not, and legally could not, take said rights from said city, or impair in any manner the aforesaid trusts or the rights, interests and obligations thereunder. As to the effect of the surrender of said franchise upon the said rights of said city, these defendants allege more particularly as follows:

(a) That it was the desire of the public-spirited citizens of Indianapolis who promoted the formation of said public charitable trust, as set forth in Subdivision 20 of this answer, of the City of Indianapolis and of said Citizens Gas Company, that said public charitable trust and the terms and conditions thereof should, for the protection of all concerned, be evidenced in every possible way. In order to accomplish such purpose, the dominant terms and conditions of said trust were placed in the franchise contract itself, in the Article of Incorporation of the Citizens Gas Company and the amendments thereto, in the subscription contracts and in the beneficial certificates issued by the trustees of the Citizens Gas Company. These answering defendants allege that the agreement so arrived at was not intended to be merely a part of the franchise contract or of the Articles of Incorporation, or of the subscription contracts, or of the Trustees' Certificates, but was stated in each and all of said papers and writings for the purpose aforesaid and in order to evidence the public charitable trust which had been created and which was to continue to exist and which trust could not be abrogated by the surrender of said franchise.

(b) Any provisions contained in the ordinance granting said franchise which provide for the retirement and cancellation of the common stock and the conveyance of such property to the city, were not abrogated by the surrender of the municipal franchise to the state, but the surrender of such franchise only had the effect herein alleged in sub-paragraph (c) (2) hereof, and all such provisions relating to the retirement of such stock and the conveyance of such property continued and remained in full force and effect after the surrender of such franchise and are still in full force and effect.

The voting trustees of the defendant Citizens Gas Company, at a meeting thereof held on the 11th day of August, 1921, adopted a formal resolution authorizing the surrender of said franchise and at the same meeting of said voting trustees a formal resolution was adopted authorizing the amendments to the Articles of Incorporation of said Gas Company which are particularly set forth in Subdivision Eleven of the bill of complaint herein; that by such action of said voting trustees taken at such meeting in authorizing the surrender of said franchise and the amendment of its Articles of Incorporation the purpose of said trustees was plainly evidenced and expressed to preserve and protect all rights of the City of Indianapolis and the inhabitants thereof in and to the property of the Citizens Gas Company.

These defendants further say that under the provisions of Section 53 of the Act of the General Assembly of the State of Indiana, entitled, "An Act Concerning Municipal Corporations," approved March 6th, 1905, said City was authorized and empowered by ordinance to receive and accept public trusts and to agree to conditions and terms accompanying the same and bind such City to carry them out, and by the ordinance referred to in plaintiffs' bill of complaint and attached thereto as Exhibit A, the Common Council of said City did receive and accept the public trust created in the manner set out in Subdivision 20 of this answer and as provided in the Articles of Incorporation of the Citizens Gas Company, and did agree to the conditions and terms therein provided, and the surrender of said municipal franchise by said company did not abrogate or affect the public trust so accepted and agreed to; and said defendants further allege that independently of statutory authority said City had power to accept and execute public trusts.

(c) Even though it be held that the surrender of said franchise operated to abrogate all the terms and provisions embodied therein, such fact would not impair the rights of said city in and to the property of said Gas Company for the following reasons:

(1) The rights of said city in and to said property were never in favor of the state or of said city as the agent of the state and were in no sense subject to any power reserved in the State of Indiana by virtue of which it could make a legally effective offer to said corporation to abrogate the same.

(2) The only offer made by the state to said corporation in said Shively-Spencer Utility Commission Act was the offer to abrogate the franchise contract entered into by it, through said city as its agent, and said corporation, and to substitute therefor a new contract directly between itself and said corporation. The effect of such offer was to establish new contractual and regulatory relations between the state itself and said corporation, and, to that end, to substitute for the permit granted by the city, as such agent, an indeterminate permit direct from the state, and to substitute direct regulation as to rates and service by means of state legislation to be administered by the Public Service Commission for regulation by the agency of the City of Indianapolis as embodied in such franchise contract. Such offer did not include the abrogation of obligations owing by said corporation to anyone other than the state or to said city in its capacity as an agent of the state. Said offer did not include a proposition to surrender the corporate franchise of said corporation, or to abrogate the contract between the said corporation and the state which existed between them by virtue of the Articles of Incorporation of said company, or to abrogate said trust which was created as aforesaid, or to abrogate the obligations of said corporation to said city in its capacity as the beneficiary or prospective trustee of said trust, or to abrogate the rights and interest of the inhabitants of said city as beneficiaries of said trust, or as beneficiaries of the right to have said city acquire said property in accordance with said provisions for the acquisition of said property for their benefit. Said corporation could not, and did not, by surrendering said franchise, abrogate more than said offer included, and such surrender in no manner affected matters which were not a part of, or dependent upon, said franchise.

(3) Said rights of said city in its said capacity as the

prospective owner and/or trustee of said property, and the obligation of said corporation to transfer said property to said city, and said trust, and said rights and interests of the inhabitants of said city were not dependent alone upon the franchise which said corporation surrendered. Said franchise and the exercise of any rights thereunder were themselves dependent upon the prior creation of said obligations, rights, trusts and interests aforesaid. Notwithstanding the fact that the provisions for the acquisition of said property by said city were included in the original instrument by which said city granted said franchise, the said provisions and the obligations and rights thereby created were at no time solely dependent upon said franchise or on the terms and provisions constituting the contract or franchise. The facts hereinabove alleged relating to the circumstances existing prior to, and at the time of the granting of said franchise, together with said original instrument, show that said provisions were included in the same instrument which evidences the contract of franchise, in part for the purpose of providing what should be incorporated in the Articles of Incorporation of said company when it should be thereafter incorporated and it appears therefrom that a further and permanent agreement embodying said provisions should be the Articles of Incorporation of the corporation to be formed by the grantees of said franchise. The form of such permanent agreement was embraced in said original instrument, and the same was intended to be incorporated in said articles in haec verba. Such permanent agreement was intended to become a part of the corporate franchise thereafter to be granted by the state to the proposed corporation, made by the articles of incorporation between such corporation and the state, and, as there evidenced was to be effective for the benefit of said city and its inhabitants. The provisions for the formation of said corporation and the inclusion of said permanent agreement for the acquisition of said property by said city in its articles constituted part of the consideration for the granting of said franchise by said city to said grantee and constituted conditions precedent to the exercise of any rights by said corporation under the said franchise to be assigned to it. The said circumstantial facts and said original instruments show that it was intended upon the organization of said corporation and the adoption of its Articles of Incorporation thereby to create vested rights

and interests on the part of said city and the inhabitants thereof in and to the property of which the corporation might become the owner and that said corporation should own such property subject to said rights and interests and the obligation to transfer its property to said city in accordance therewith.

(4) In conformity with the aforesaid intention of the parties to said original instrument, and in performance of said conditions precedent, the persons to whom said franchise was granted formed the contemplated corporation, the said Citizens Gas Company, defendant herein, and incorporated in its articles the said provisions for the acquisition of said property by said city, and assigned said franchise to said corporation. Said corporation was thus created and said provisions were thus incorporated in its articles of incorporation more than fifteen years before said corporation surrendered said franchise. Said provisions have ever since remained in, and are now a part of, said articles of incorporation. Said articles are a part of the corporate franchise of said corporation and constitute a permanent agreement between said corporation and the State of Indiana for the benefit of said city and its inhabitants, as aforesaid. By said provisions, said Citizens Gas Company became a trustee of its property for the purposes of said provisions. All of the property acquired by it became affected by said provisions and said trust, and the inhabitants and said city acquired vested rights and interests in and to all of said property, as aforesaid, before the said surrender of said franchise, and they are now the owners of said vested rights and interests. Said provisions in said articles, and said trust and said rights and interests have at all times since said incorporation existed wholly independently from said franchise. When said franchise was surrendered the said provisions in said articles, and the corporate franchise of said corporation, and said trust and said rights and interests, were not abrogated but remained unimpaired, and are now in full force and effect. The new contract arising between said corporation and the state upon surrender of said franchise, and the indeterminate permit as part thereof, do not in any sense supersede or abrogate said corporate franchise, said articles of incorporation or the contract made thereby, or said trust or any of said rights or interests. Any rights which said corporation may have under said indeterminate permit and under said new contract are subject to its obligations under said provisions in said

Articles of Incorporation and to said trust, and to said rights and interests on the part of said city and its inhabitants to have said property transferred to said city in accordance with said provisions in said articles. The provisions in said Shively-Spencer Act relating to the purchase of the property of a utility that has surrendered its franchise do not supersede said provisions for the transfer of its property contained in the Articles of Incorporation of said corporation, and said corporation has no right by virtue thereof to a purchase price for its property determined in accordance with the provisions of said act. Said act did not intend that said corporation could abrogate the contract made by its Articles of Incorporation and particularly by said provisions therein hereinbefore referred to, and did not intend that said trust and said obligations, rights and interests could be abrogated by the surrender of said franchise. The right of said city to the transfer of said property and the right of the inhabitants to have it so transferred, the obligation of said corporation to make such transfer, the said trust, and the said vested rights and interests in no degree depend for their existence on the franchise which was surrendered, but they arise out of an executed consideration and executed conditions precedent, and are efficaciously evidenced by said provisions in said Articles of Incorporation.

(5) The inhabitants of said city and the said city have a continuing right to the transfer of said property in accordance with said provisions. Said right was created and given by said corporation as a consideration for and condition precedent to the granting of said franchise and the exercise of any rights thereunder. The surrender by said corporation of its franchise did not in anywise surrender or abrogate the irrevocable rights of others which it had agreed to confer, and did confer, before it could receive and enjoy the thing with which it has voluntarily parted, viz : said franchise. Said corporation could, by said surrender, abandon or exchange the rights it received, but it could not escape its obligation provided for in the independent contract and which constituted the consideration and condition precedent which were essential to the existence and enjoyment of the rights granted it by said city.

(6) If the provisions for the transfer of said property constituted no more than an offer to make such transfer, the surrender of said franchise would not have operated to withdraw the same, inasmuch as said provisions have at all times appeared in said Articles of Incorporation

and such articles were unaffected by the surrender of said franchise. Coinciden' with such surrender said provisions were reincorporated in articles of amendment of said Articles of Incorporation. Neither said corporation nor plaintiff ever did anything to withdraw or to avoid said provisions in said original and amended Articles of Incorporation before said city made demand for performance. On the contrary, said corporation, by and through its board of directors, and its board of trustees having full power to represent plaintiff by virtue of the terms of said voting trust, is now carrying said provisions into effect in response to the demand made in behalf of said city, all as shown in Subdivisions Twenty-third and Twenty-fifth of plaintiffs' complaint. Plaintiffs' certificates, by virtue of which they claim the right to maintain this action, were issued and purchased by them after said franchise was surrendered, and the same have incorporated therein the same provisions for such transfer as appear in said original and amended articles. Said provisions were in effect when plaintiffs acquired said certificates, are a part of said certificates, and their rights in and to the property and assets of said corporation are subject to the rights of said city under said provisions for transfer.

(7) Said Citizens Gas Company of Indianapolis has at no time claimed, and is not now claiming, that the surrender of said franchise abrogated the right of said city to said property in accordance with said provisions. On the contrary, said corporation reaffirmed said provisions in said amended articles coincident with said surrender, as aforesaid, and it now intending to perform in accordance therewith. Plaintiffs are in no position to complain of said corporation's intention to transfer said property in accordance with said provisions for the reason that said provisions are a part of the contract between themselves and said corporation and they took their certificates subject to said provisions, also for the reason that so far as their consent is material to performance of said provisions by the corporation such consent is being given by said board of trustees, who have full authority to give such consent for plaintiffs by virtue of their power under said voting trust to vote all of the stock of said corporation on all matters affecting said corporation.

22. These answering defendants admit the allegations contained in subdivision twenty-four of the plaintiffs' bill of complaint.

23. These answering defendants admit the allegations contained in the twenty-fifth subdivision of the plaintiffs' bill of complaint.

24. These answering defendants, in answer to the twenty-sixth subdivision of the plaintiffs' bill of complaint, deny that the only purpose of creating the voting trust therein referred to, other than as previously set out in the plaintiffs' bill of complaint, was to carry out and make effective the rights of the city under said franchise of 1905, and deny that upon the surrender in 1921 of said franchise, all rights, duties and obligations thereunder, and under the Articles of Incorporation, terminated, and deny that the voting trust ceased to serve any useful or lawful purposes whatsoever, and deny that since said date said voting trust has existed only by the sufferance of the common stockholders of the Gas Company, and deny that in respect of the holders of the second million dollars issue of the common stock of the Gas Company there was no legal basis for the maintenance and/or validity of said voting trust, and deny that from the beginning said trust has existed in respect of such shares only at the sufferance of the owners thereof, but allege that said voting trust was performed and agreed to by all of the holders of said trustee's certificate, including these plaintiffs, in the manner and for the purposes set out in subdivision 20 of this answer.

These defendants deny that at the present time said voting trust operates to sever perpetually the voting rights of all the common stock of the Gas Company from the ownership of said stock without any lawful purpose or object to support such separation, and deny that the same is illegal and void.

These answering defendants deny that in voting said shares said Voting Trustees have not in the past, and deny that by their adoption of said resolution and their public utterances they have indicated that they will not in the future, consult the wishes or act for the benefit of the owners of said stock in voting the same, and deny that without regard to the wishes or rights of said owners they will vote said stock for the destruction of the rights of the common stockholders of said Company, but allege that said trustees have in the past, and intended in the future, to exercise their rights and perform their duties as such Voting Trustees in strict accordance with the power and obligations conferred upon them, as is more fully set out in subdivision 20 of this answer, and these

defendants further say that said voting trust was established as a part of and to more effectually preserve and execute the public charitable trust as set out in subdivision 20 hereof.

25. In answer to the twenty-seventh subdivision of the bill of complaint the defendants deny that the plaintiffs are owners of shares of stock of the Gas Company, but allege that said plaintiffs and all others similarly situated, are holders and owners of trustee's certificates as hereinbefore set out, and are only entitled to the rights and privileges prescribed by said trustee's certificates, and that all the rights of said plaintiffs in and to said stock are subject to the public charitable trust, as is fully set out in subdivision 20 hereof.

These defendants say that they are without knowledge as to the value of plaintiffs' said trustee's certificates, but admit that if said public charitable trust be declared invalid and that the holders of the beneficial interest certificates become entitled to the entire equity in said property, subject to the payment of the Gas Company's preferred stock and other indebtedness, and if the right of the City to acquire said plant and property be defeated, that the said certificates of beneficial interest would be worth more than their present value.

These defendants further say that the plaintiffs, and others in like situation, are only entitled to receive on account of their ownership of said beneficial certificates the sum of $25.00 per share and interest at the rate of ten percent per annum and no more, and that these defendants are not threatening or intending to do any act which will deprive either of the plaintiffs, or others in like situation, of any such rights.

26. In answer to the twenty-eighth subdivision of the plaintiffs' bill of complaint, these answering defendants admit that the individual defendants acting as officers, Board of Directors and Voting Trustees of the Gas Company, are in sole and exclusive possession and control of the Gas Company and all of its money, property and business, as well as of its corporate organization, and that they are, and for many years have been, transacting all of its business to the total exclusion of these plaintiffs and other holders of beneficial interest in the common stock thereof, so far as any voice in the management of said business is concerned, but these defendants say that said individual defendants have not transacted any of the business of said Gas Company to the exclusion of

any of the rights of the plaintiffs, or any other owners of beneficial interest similarly situated.

These defendants admit that unless finally enjoined by this court said individual defendants will continue to manage the affairs of the Gas Company in accordance with the provisions in said franchise agreement, that are now in effect, and the provisions of the Articles of Incorporation and amendments thereto of said Gas Company, and in accordance with the terms and provisions of said public charitable trust will, unless so enjoined, make the capital payments referred to in the bill of complaint to the holders of the trustee's certificates, and when the face value of said trustee's certificates has been paid to the holders thereof together with ten percent per annum interest thereon, and the preferred stock in said Gas Company has been retired, unless so enjoined by this court, they will transfer to said City said property in accordance with the demands of said City.

These defendants admit that the Voting Trustees have in their possession all of the certificates of stock issued to represent the common stock of said Gas Company, and unless enjoined by this court, said Trustees will assert the right to vote and will vote all of said stock so long as the same is outstanding and unretired, and will vote the same for the purpose of complying with the aforesaid demands of said City, but deny that they have excluded or will exclude the plaintiffs, or any persons similarly situated, from any participation in the affairs of the Gas Company in any particular wherein the plaintiffs, or any persons similarly situated, are entitled to participate, and deny that they will assert the right to vote or will vote any of said stock without regard to the rights or interests of the plaintiffs or others similarly situated.

These defendants say in answer to the allegation that they will assert the right to vote and will vote said stock without regard to the wishes of the plaintiffs, and others similarly situated, that unless otherwise adjudged by this court said trustees intend to vote said stock in accordance with the provisions of said Articles of Incorporation and amendments thereto, and said subscriptions to the stock of said Company and the provisions in the trustee's certificates heretofore referred to and in accordance with the terms and provisions of said public charitable trust as set out in subdivision 20 hereof, and if such purposes are not the wishes of the plaintiffs, then said trustees will

not, unless so enjoined, carry out the wishes of said plaintiffs and others similarly situated.

These defendants say that none of said acts or contemplated acts are in violation of any of the rights of either of the plaintiffs or any other persons similarly situated.

These defendants admit that the City and its officers, defendants herein, are now asserting and, unless restrained and enjoined by this court, will continue to assert the claimed rights of the City to acquire the property of the Gas Company, and to compel the Gas Company to pay for and retire the common stock thereof in accordance with the terms of the franchise of 1905 and the Articles of Incorporation of said Gas Company, but these defendatns deny that said City and its officers, defendants herein, are thereby casting, or will continue thereby, to cast a cloud upon the title to and adversely affect the actual value of the interests of the plaintiffs and others similarly situated, in the common stock of said Gas Company, or that any of said acts will result in the irreparable damage to plaintiffs or others similarly situated.

These defendants say that all of the rights claimed and asserted by said City and its said officers are legal and valid, and the assertion thereof will not cause the plaintiffs or others similarly situated any damage, nor entitle the plaintiffs or any others similarly situated to maintain this action.

27. In answer to the twenty-ninth subdivision of the bill of Complaint, these defendants deny that the acts done and claims asserted by the respective defendants herein, as set forth in the bill of complaint, are in derogation of the rights and to the irrevocable injury of the plaintiffs or others similarly situated, for which they have no adequate remedy at law and can have no relief save in a Court of Equity. They deny that the plaintiffs or others similarly situated, would each be required to bring a separate action for damages requiring a multiplicity of suits, and that damages would be difficult to ascertain and assess, for the reason that said acts done and claims asserted are not in derogation of the rights or in violation of the rights or interests of the plaintiffs or others similarly situated, and neither said plaintiffs or others similarly situated, have any cause of action for damages on account thereof.

These defendants deny that there is involved the violation of a trust by the individual defendants acting as officers, Board of Directors and Voting Trustees of the

Gas Company in respect of obligations owed plaintiffs and others similarly situated, and deny that the claims of the City constitute a cloud upon the title to the property of the plaintiffs or others similarly situated.

Wherefore, these answering defendants say that plaintiffs' bill of complaint should, on final hearing, be dismissed for want of equity and that the plaintiffs are not entitled to any relief whatever in the premises.

John W. Holtzman,
Oren S. Hack,
Edward H. Knight,
Smiley N. Chambers,
Pickens, Davidson, Gause, Gillion & Pickens,
Attorneys for Said Answering Defendants.

John W. Holtzman,
Fred C. Gause,
Of Counsel.

~~(Entry for June 4, 1939, continued)~~

~~And the defendants Citizens Gas Company et al file answer to bill of complaint which answer is as follows:~~

PLAINTIFF'S EXHIBIT NO. 90.

Mar 2-1939. Paul C. Carpenter, Official Reporter.

New Issue. $486,000.00

Citizens Gas Company of Indianapolis

10%

Cumulative Capital Stock

Authorized and Issued $2,000,000.00

Dated July 1st, 1919 Par value $25.00 per share

Semi-annual dividends payable September 28th, and March 28th, by check from Citizens Gas Company offices at Indianapolis.

Exempt in Indiana from all local and state taxes and free from normal federal income tax.

From the letter of Mr. J. D. Forrest, Secretary and General Manager, which is printed within, we summarize as follows:

The Company has assets in excess of all outstanding securities.

Originators of 60 cent gas, which rate has been maintained throughout the war. Cheapest gas in the world.

Company has complete monopoly in furnishing gas to Indianapolis, a city of over 300,000 people. Has 99 year lease on properties of Indianapolis Gas Company.

Company is owned and managed locally.

Only about 25 per cent of revenues are derived from sale of gas.

Manufacture of coke and by-products chief source of income.

Stock of Company is always sold at public auction to highest bidders, and has commanded premiums totaling $418,714.90. These premiums are held as special surplus. This issue completes full authorized capitalization.

Contract with Federal Government adjusted and $519,456.35 paid to the Company June 18th, 1919. This amount has been applied to earnings of Company for years 1919 and 1920.

Net earnings have been sufficient to pay full 10% dividends since 1915 and also to pay up accumulated dividends to full dividend rate for entire hitsory of Company except about $115,000 which will gradually be distributed out of earnings.

Company has in excess of 2,600 stockholders and of these substantially all reside in Indiana.

Stock is a 10% cumulative investment issued in the form of Trustees' Certificates.

Issuance and sale of this stock approved by Public Service Commission of Indiana.

We offer this stock, par value of shares $25.00, subject to prior sale and change in price, at $35.75 per share (or 143) at which price, the dividends being 10%, the stock yields 7%, tax exempt in Indiana and free from normal income tax.

Certificates will be ready for delivery on or after July 1st, 1919.

All legal matters pertaining to this issue approved by Smith, Remster, Hornbrook and Smith of Indianapolis.

Orders may be sent by telephone or telegraph at our expense.

The Union Trust Company
Bond Department—Chester A. Jewett, Manager
120 East Market Street
Indianapolis
Telephones: Main 1576, Auto 26-386

The statements contained herein are not guaranteed, but are based on information which we believe to be reliable and accurate, and upon which we have acted in the purchase of this stock.

Citizens Gas Company of Indianapolis
Majestic Building
Office of General Manager

Indianapolis, Ind., June 1, 1919.

The Union Trust Co.,
Indianapolis, Indiana.

Gentlemen:—

Referring to the purchase of 19,240 shares of the capital stock of this company which you made on May 29th, I beg to give you the following information about the history and present conditions of this company:

History.

The Citizens Gas Company of Indianapolis was organized for the purpose of acquiring the disused natural gas system of the Consumers Gas Trust Company, and to furnish the people of Indianapolis with gas at 60 cents per M. Cu. Ft. The former purpose was accomplished October 31st, 1907, and the company began to supply gas on a limited scale in April, 1909. The unusually low price at which the company undertook to sell gas made necessary the use of some process of manufacture which would yield large revenues outside of the gas business proper, for it was impossible to manufacture gas by the ordinary processes in use in the industry and sell it at the price indicated. Accordingly the company undertook to construct and operate by-product coke ovens from which the gas would be a by-product. The operation of these ovens began at the close of the year 1909. The initial coke oven plant was duplicated in the year 1913, and further extensions which have been completed this year have nearly doubled the capacity of the plant as increased in 1913. The by-product coke ovens which were in course of construction by the Indianapolis Gas Company were completed by this company after the property of the former company was leased in 1913, and these ovens have a capacity about 50 per cent. greater than the original ovens constructed by this company.

The expansion of the manufacturing plants of the company and the corresponding expansion of all branches of its business have required large additions to the original investment.

Growth of Resources 1910-1918.

The investment of the company in fixed property amounted to $1,507,801.57 on December 31st, 1910, and by December 31st, 1918, it had increased to $5,270,379.64, while it had also acquired by lease the important operating properties of the Indianapolis Gas Company. During this same period the company's necessary working capital had expanded from $153,781.72 to $1,692,024.40. The present sale of capital stock was made in order to meet in part the recent very great increases in the company's investment in plant and working capital.

Revenues.

The gross revenue of the company in the year 1910 was $525,583.74, while the gross revenue for the year 1918 was $5,780,838.09. The net revenue after deducting operating expenses and taxes amounted to $92,013.62 in the former year and $890,363.42 in the latter. The interest charges in 1910 were $32,155.00, thus leaving a net profit for the year of $59,858.62. For the year 1918 the leasehold rental amounted to $382,936.05 and interest and amortization charges were $151,151.46, thus leaving a net return of $356,275.91.

Originating 60c Gas.

The price at which the company undertook to supply the people of Indianapolis with gas was at the time the lowest in the United States. In spite of the very great increase in all manufacturing and construction costs this price of 60 cents per M. Cu. Ft. still obtains in this city. Such a price could not be maintained if it were not for the fact that this company is a large operator of by-product coke ovens. The gross income from the sale of gas amounts to rather less than 25 per cent. of the total income of the company. On account of greatly increased costs of production and the rates of gas which have generally been fixed on the basis of a lower price level, the gas companies of the United States have been passing through a very difficult period.

Government Settlement.

There has already been a revival in the by-product coking business which promises to make the year 1919 a satisfactory one. Heavy investments in manufacturing supplies and heavy increases in fixed charges were made necessary by the war contracts of the company, but these disadvantages will be offset to a considerable extent by the settlement of the company's war claims against the United States Government. The Government has already made payment of $519,456.35 in settlement of the principal claim. Under the contract which has thus been settled, the receipts from the Government would have been applicable to earnings during the years 1919 and 1920, and the amount received from the Government will therefore be allocated to these two years, thus affording a considerable offset to the shrinkage in the company's business due to the sudden termination of the war.

Dividend Record.

The company paid its first dividend on January 1st, 1911, and has maintained an unbroken dividend record since that time. Its total disbursements to its stockholders, including the dividend paid in March of this year out of earnings in the year 1918, have amounted to $1,107,471.98. Under the terms of its Articles of Incorporation and its franchise, the dividends of this company are limited to 10 per cent. on the face value of its outstanding capital stock, but such 10 per cent. dividends are cumulative. The deficiencies in dividend disbursements during the earlier years of the company's business have been made up to December 31, 1911. Other accruals for the period between January 1st, 1912, and June 30th, 1915, will require about $115,000 for full payment. Since the last named date dividends have been paid at the full rate of 10 per cent. per annum.

Surplus.

At the close of 1918 the surplus of the company stood as follows

Stock Premium	$253,714.90
First & Refunding Bond Sinking Fund	75,786.24
Undistributed Surplus	81,209.84
Total	$410,710.98

The paid in surplus designated stock premium will be increased from the recent sale of capital stock by about $165,000.00.

Depreciation Reserves.

It has been the policy of the company to create adequate depreciation and contingent reserves, in addition to charging maintenance costs to current expenses. The depreciation reserves on December 31, 1918, amounted to $676,688.36, from which certain deductions will be made covering the displacement of certain equipment removed in connection with the recent considerable enlargement of the manufacturing plant. It will be the policy of the company to continue to make appropriations to the depreciation reserve accounts to provide adequate reserves for replacements and obsolescence. Contingent reserves for the settlement of disputed taxes and unforseen claims amounted, on December 31, 1918, to $129,463.10.

Capitalization and Funded Debt.

The capitalization of the company prior to the recent sale of its capital stock stood as follows:

	Authorized	Issued
First & Refunding Mortgage		
5 Per Cent. Bonds	$10,000,000	$2,462,000
General Mortgage		
7 Per Cent. Bonds	1,500,000	1,400,000
Capital Stock	2,000,000	1,500,000

The full authorized capital stock will stand as issued with the delivery of stock sold on May 29th.

The General Mortgage 7 Per Cent. bonds are dated May 1st, 1918, and have been issued to provide funds for the construction of new by-product coke ovens and necessary by-product equipment. These are serial bonds which mature in two to five years. $650,000 of the First & Refunding Mortgage 5 Per Cent. bonds are pledged as collateral for the General Mortgage bonds and it is the purpose of the company to apply the proceeds from the sale of these bonds to the redemption of the General Mortgage bonds. The remaining bonds of that issue will be redeemed as they mature out of current funds.

Lessee Indianapolis Gas Company.

On October 1st, 1913, with the approval of the Public Service Commission of Indiana, this company took over under a 99 year lease all of the operating property of the Indianapolis Gas Company, consisting of a large water gas producing plant, a plant of by-product coke ovens then nearing completion, extensive shops for the distribution department, and the entire distribution system and gas business of the lessor. The manufacturing plants owned and leased by this company have been operated in harmony, and the distribution systems of the two gas companies have been connected and are operated as a single system. The combined systems for the distribution of gas in this city now comprise 621.67 miles of main and the company is now supplying 62,183 gas consumers.

Voting Trust.

The capital stock of this company is held in perpetual trust by a board of self-perpetuating trustees. This board votes all of the stock, and of course elects the directors of the company. The original issue of $1,000,000 of capital stock was sold on popular subscription and was taken by about 3,500 individual subscribers. Under the articles of association subsequent issues of stock have been sold at public auction, the premium going into the surplus account as indicated above. Substantially all of the stock of the company is held by citizens of Indianapolis and almost none of it by persons living outside of the State of Indiana. At present the stockholders number about 2,800. Trustees' certificates are issued to the stockholders by the voting trustees, and these entitle the holders to 10 per cent cumulative dividends. For some years past the company has been paying 5 per cent. semi-annual dividends, and, as indicated above, all of the accruals during the period when full dividends were not paid have now been paid with the exception of about $115,000. In event of inability to pay the full authorized dividend at any time, the company is pledged to make up the deficiency in the dividend distribution as soon as earnings make this possible.

Trustees and Officers.

The voting trustees of the company are Judge Thomas L. Sullivan, President; Thomas H. Spann, Vice-President; Lucius B. Swift, Henry Kahn and G. A. Schnull. The directors of the company are John R. Welch, President; A. F. Potts, Vice-President; J. D. Forrest, Secretary and General Manager; G. A. Efroymson, Treasurer; H. W. Bennett, J. H. Hooker, H. H. Hornbrook, Robert Lieber and Franklin Vonnegut.

I am attaching hereto profit and loss statement for the year 1918 and balance sheet as of December 31, 1918.

Very respectfully yours,

(Signed) J. D. Forrest,
Secretary and General Manager.

* * * * * *

("Here follows revenue statement of Citizens Gas Company for year ending December 31, 1918, and balance sheet as of same date.")

(Inserted pursuant to stipulation filed November 22, 1939.)

PLAINTIFFS' EXHIBIT 91.

Office of Citizens Gas Company

Indianapolis, Ind., June 7, 1913.

To the Stockholders of the Citizens Gas Company:

Your Company is again being subjected to attacks similar to many others which have been made since it was organized by you for the purpose of serving this community. As on many occasions in the past, your Company again calls on you to use your influence in meeting these attacks and in advancing the interests of your Company. The Management of this Company has never yet made a promise which it has failed to fulfill; and no line of policy has ever yet been adopted by this Company which has not worked to the interest of both stockholders and the public. The same Directors and the same Trustees continue in control of this Company, and we believe that the record made in the past by them in serving your interests and the interests of the public justify them in appealing to you for continued confidence

in their integrity and in their ability to conduct the affairs of this Company.

Petition to Public Service Commission.

On May 21st your Company submitted to the Public Service Commission of the State of Indiana a petition asking approval of a proposed lease of the entire gas property of the Indianapolis Gas Company, and submitted therewith both the draft of lease and a statement giving detailed reasons for believing that the lease was in the interest of this Company and of the public as well as reports and estimates showing the advantages to this Company, and ultimately to the consumer, from control of the property of the Indianapolis Gas Company under the terms of the lease. All of these papers are public documents, accessible to all citizens who are interested in ascertaining their contents, and extensive quotations from them have been made in the public papers. Further, the Management of the Company has been prepared to furnish inquiring stockholders any other information in its possession. There would therefore seem to be no justification for ignorant attacks on the Company; yet none of those who have made such attacks either in public or in private seem to have paid any attention to facts already made public or any desire to obtain further information. In brief, the statement filed with the Commission set forth the following information:—

Competition Dangerous to the Company and the Community.

Although the Citizens Gas Company has been able to compete successfully with its larger rival, and will continue to do so if necessary, this competition has not been without dangers in the past, and may be found to be more dangerous in the future. The old management of the Indianapolis Gas Company was bent on bringing the Citizens Gas Company into bankruptcy. It had much larger financial resources than the Citizens Company and had the approval of the immensely powerful interests which control many other gas companies in the United States. The old company has at last followed the lead of your Company by constructing By-Product Coke Ovens and it was the avowed intention of the old management

of that company to begin immediately such character of competition as was best calculated to destroy the Citizens Company. The far greater volume of business which the old company has always had would enable it to spend far more money in gaining and holding business than the Citizens Company could possibly afford, and when the cost of manufacturing gas could be reduced, it would be possible to injure this Company in many ways not previously attempted.

The Citizens Gas Company has had ample capital for its necessary work, but not for rapid extension or enlargements to outstrip its competitor. Under any competition which would prevent the Citizens Company from paying dividends, it would be difficult for the latter company to sell additional stock or bonds with which to keep itself abreast of the requirements of its business. Therefore, although an unreasonable cut in the price of gas would certainly cause great injury to the Indianapolis Gas Company, the greater size of that company and the greater resources of its New York owners would have enabled it to stand the strain far better than the Citizens Gas Company could do, and the latter might have become discredited and weakened beyond repair.

At the suggestion of the Citizens Gas Company certain citizens of Indianapolis acquired control of the Indianapolis Gas Company at a cost of nearly $2,000,000. This was done under an agreement in advance that the old plant and mains would be leased to your Company, which should then operate the entire system under your Franchise. This purchase was made in good faith, and these gentlemen stand ready to fulfill their part of the contract, if permitted to do so by the Public Service Commission. However, although the present owners of the Indianapolis Gas Company are friends of the Citizens Gas Company, if the lease does not become effective, they are bound to operate their property to their own best advantage. They would be obliged to carry on such competition as would best advance the interests of their company, and after establishing a record of large dividends for a year or two, they would probably sell the control to other large gas interests which would not be friendly to this Company and which would probably have larger resources than those of the previous owners. Thus the dangers of competition will not be removed unless the lease becomes effective, even although the control of

the old company may continue temporarily in the hands of friends of your Company.

Competition Wasteful to the Company and the Community.

It has never been disputed that a single gas company can be more efficiently operated than two in the same community, and where the single gas company is regulated by a franchise which safely guards the interests of the community, as yours does, or where it is operated under the regulation of a conscientious Public Service Commission, there is only loss to the community from a duplication of the service. Although the two gas companies in this city have generally made extensions in such a way as not to duplicate each other, there have been many duplications of mains; sometimes in the scramble to get into desirable territory, sometimes through ignorance of each other's plans which caused both companies to begin laying mains simultaneously in the same streets, sometimes because one company must put in new mains to improve its circulation, whereas the other company had already an adequate main in the same street. During the season of 1912 the Indianapolis Gas Company laid 28,000 feet of mains 8 inches or more in diameter at a cost of over $27,000. The greater part of these extensions was for the sake of strengthening the system and not for the purpose of taking care of new consumers. Now the Citizens Gas Company had adequate large mains in nearly all of these streets which could have served this purpose fully as well as the new mains just laid, if it had been possible for the two companies to operate as one. Such wastes of investment mean that ultimately the community must pay interest and dividends on such duplications. Similarly, thousands of new gas services have been laid to connect given houses, whereas those houses were already connected with the mains of the opposing company; yet it would be impossible to avoid these duplicate services if each company should continue to try to get and hold all business possible.

The Indianapolis Gas Company was subjected to an expense of about $22,000 per year for the maintenance of a New York office and the payment of salaries to New York officials. This was a waste of absentee ownership which the present owners can cut off regardless of any

amalgamation. In addition thereto we estimate that the amount of $58,941 can be saved in the operating expenses of the Indianapolis Gas Company by reduction of duplication of work and other wasteful expenses caused by competition. At the same time, it is estimated that $19,050 can be saved in the operation of the Citizens Gas Company by cutting off the duplication of service. These figures are based on the operating expenses of the two companies in 1912, and the savings must correspondingly increase as the volume of business becomes greater. It thus appears that by cutting off the New York office and eliminating certain known wastes of competition, there may be effected a saving of $99,991 per year in the operation of the gas business in this city. All of these economies, together with the saving in reduced capital charges on account of stoppage of duplicate construction, inure immediately to the benefit of the Stockholders of the Citizens Gas Company and ultimately, under your Franchise, to the benefit of the community generally.

Profits to the Citizens Gas Company.

Your Directors have ever felt that they were serving this community best by conducting your business in a businesslike manner and securing for you the return on your investment which your Franchise authorized, and which you had a reason to expect because of the subscriptions to the stock of this Company which made 60-cent gas possible in Indianapolis. They have therefore carefully considered the interests of the Stockholders of the Citizens Gas Company under the operation of the proposed lease, and they have concluded that there will be a large profit therefrom which will enable your Company more quickly to reach the maximum dividend authorized and to pay off the accrued back dividends authorized, and to reduce the price of gas still further in this community.

In addition to the saving of $80,941 in the operation of the Indianapolis Gas Company, as explained above, your Company would receive from the Indianapolis Company all other net profits after payment of rent. The net profits of that company in 1912 amounted to over $90,000. The company sold over 1,300,000,000 cubic feet of gas. The new plant now nearing completion will reduce the cost of gas in the holder from 22 cents to 10 or 11 cents, meaning a saving on last year's volume of business of about $150,-

000. This would make a total net profit for the Indianapolis Gas Company of $320,000, from which a rental of $140,000 would be deducted, leaving a net profit to your Company of $180,000 from the lease on the basis of last year's business. This is a conservative estimate since the gas sales of the Indianapolis Gas Company have been increasing annually at the rate of about 12½ per cent., so that the sales from the Indianapolis lines for the year 1914 will amount to about 1,700,000,000 cubic feet instead of 1,300,000,000 cubic feet as here given. But this conservative estimate is made still more conservative in the following statement, which has been presented to the Public Service Commission:

Estimate of Profits to Citizens Gas Company from Joint Operation of Citizens and Indianapolis Properties, Assuming No Increase in Business Over That of 1912 and Assuming a Saving in Manufacturing Costs of the Indianapolis Plant of Only 8.27 Cents.

Net earnings Indianapolis Gas Company, 1912.	$299,507.69
Savings on 1,329,179,000 cubic feet gas @ 8.27 cents	109,923.18
Saving from cutting off New York office	22,000.00
Saving from eliminating wastes	58,941.00
Net earnings on same volume of business	$490,371.87
Interest on $4,833,000 bonds @ 5%	241,650.00
Net profits	$248,721.87
Rent	140,000.00
Net gain to Citizens Gas Company	$108,721.87
Add net earnings Citizens Gas Company, 1912.	167,512.65
Add elimination of waste by Citizens Gas Company	19,050.00
Total Net Earnings for Citizens Gas Company	$295,284.52
Interest on $1,020,000 Citizens Bonds	51,000.00
Total Net Profits of Citizens Gas Company.	$244,284.52

Note—The profits to the Citizens Gas Company from operating the Indianapolis property as shown above would be equal to over 8½% on $1,250,000 of stock; and the com-

bined profits, after all fixed charges, would be equal to over 19% on the Citizens stock.

In view of the fact that the business of both companies is increasing rapidly and that your Company will reap material benefits from the completion of its new By-Product Coke Ovens, as well as from the operation of the property of the Indianapolis Gas Company, it is more reasonable to assume that the net profits to the Citizens Company for the calendar year 1914, after paying all bond interest and the rental of the Indianapolis property, would amount to $318,944. This estimate has been carefully worked out with the assumption that the total gas sales of the two companies in that year will amount to 2,214,273,000 cubic feet and that the gas will be sold at an average of 53 cents per thousand, and it is still estimated that the saving in manufacturing cost at the Indianapolis plant will be 8½ cents instead of 10 or 11 cents, as seems probable. This estimate also provides for some slight increase in bond interest for bonds sold to pay for gas main extensions.

For the year 1915, it is our belief, based on careful estimates, that the net profits to your Company, after paying all interest and rental charges, would amount to $326,323; and it is assumed, in our estimates, that the gas sales for that year will amount to 2,435,700,000 cubic feet and that the price of gas will average 50 cents per thousand cubic feet.

It will be observed that even on the most conservative of these estimates, your Company would be amply justified in renting and operating the other property, for the large surplus over dividend requirements would be ample to provide for unforeseen contingencies or for such reserves as might be considered wise by your Directors or required by the Public Service Commission. It is the belief of your Directors that the business will continue to show increasing earnings from year to year in the face of a continuance of our policy of reducing the price of gas for the benefit of the whole community. Your Company, after taking over the other property, would start with 51,000 consumers.

Profits to the Community.

Your Directors and Trustees have never lost sight of the purpose for which your Company was organized, namely the reduction in the price of gas, and it is their

desire that this reduction from the present unparalleled low price of 60 cents may be made as rapidly as possible. But aside from the desires of the Management of your Company, its organization is such that any improvement in its earning capacity must work to the benefit of the community, for the Directors must either reduce the price of gas and thus continue the corporation's existence, or they must apply surplus earnings to the return of the principal of your investment, after which the property would pass by law to the ownership of the City of Indianapolis. It therefore follows that the showing of profits which is made above, while immediately indicating advantage to the Stockholders of this Company, must ultimately work to the advantage of the entire community. It will be the policy of your Directors to absorb these profits by reducing the price of gas rather than by extinguishing your stock, for it is believed that this policy would meet the wishes of this community.

Terms of the Proposed Lease.

It was agreed by your Company, before Indianapolis capital purchased the control of the Indianapolis Gas Company, that if such control should be acquired your Company would lease the property, subject to approval of the Public Service Commission, at a rental at the rate of $60,000 for the last half of 1913 and of $140,000 per year thereafter, with the further provision that after the dividends of the Citizens Company shall reach 8%, the rental shall advance to $160,000, but in the event that the Citizens Company should not earn 8% in any year, the rental should drop back to $140,000. In addition to the payment of such rental, the Citizens Gas Company would take care of the interest on the outstanding bonds of the Indianapolis Gas Company, amounting to $4,833,000. While it was and is the desire of your Directors to obtain this property on the lowest rental possible, it was only on these terms that the investors could be induced to purchase the control of the Indianapolis Gas Company. The advantages to your Company from this lease are so great, as shown in the foregoing statements, that your Directors consider your Company easily justified in paying the rental agreed upon, although they would be glad to save at that point as at any other.

While the reproduction value of the property and busi-

ness connections of the Indianapolis Gas Company is not a matter of prime importance in considering this lease, since the earning value of the lease to your Company is so clearly established, your Company has a safe knowledge of the physical property which it is proposed to lease, and considers it an extremely valuable addition to the physical property controlled by you. The Indianapolis Gas Company has over 375 miles of mains, mostly under paved streets, some 50,000 services, likewise largely under paved streets, and over 40,000 meters now in use. In addition to the distributing system the Indianapolis Company has a large manufacturing plant to which it is now adding By-Product Coke Ovens of modern type, to be paid for by the present owners. The very large Water Gas Plant of the old company is in perfect condition and will be permanently valuable for the purpose of giving elasticity to the manufacturing departments of the two companies, thus removing many of the dangers from emergencies which have confronted your Company with its much smaller Water Gas Plant. The By-Product Coke Ovens, the By-Product Recovery Plant and the Coal and Coke Handling Equipment, will be of the most modern type and will be entirely new when they come into the possession of your Company. The old Coal Gas Manufacturing Plant will not itself be operated, but the Purifier Plants, the Power Plants and the Compressor Plants of the company will be in perfect condition when turned over to your Company. In addition to the foregoing, the Indianapolis Company owns large new Shops, Stables and Warehouses on West Pratt Street, together with equipment and stores, all of which will come to this Company. By tying together the two systems of mains, a much more perfect distribution of gas can be obtained than has ever been possible heretofore, and the complete connection of the two manufacturing plants, located on opposite sides of the city would seem to remove forever the possibility of cutting off the city's supply under any emergencies whatever.

While it is undoubtedly true that the capitalization of the Indianapolis Gas Company was greatly inflated at the time of its reorganization twenty-three years ago, it must be remembered that the company has distributed no dividends since one amounting to 2 per cent. in the year 1900, and that prior to that time the dividends had been small for several years. Since that reorganization, all of the earnings of the company have been put back into the

property and over 200 miles of mains have been laid, in addition to many other improvements. During that period no new bonds have been issued except to cover 90 per cent. of the actual cost of improvements on which the proceeds have been used, so that any bond discount allowed during that period has been paid out of earnings. Therefore, taking into consideration the present condition of the physical property, the large going-value represented by over 40,000 meters, and the fact that large earnings during a great many years were put back into the property, your Company does not regard the interest and rental charges assumed by it as excessive from the valuation point alone; but, as stated above, the main consideration at the present time is what the property can earn for the Stockholders of the Citizens Gas Company with gas selling at 60 cents or less.

It has been publicly stated that the present owners of the Indianapolis Gas Company acquired control in the interest of the Citizens Gas Company and were obliged to tie up nearly $2,000,000 in the purchase of stock, which in no case cost them less than 90 and in some cases more than par, and also to meet their obligation to complete payments on the new plant which is being constructed by their company. While the rent which it is proposed to pay will make their investment a good one, it must be said in justice to these gentlemen that they will reap no large speculative profits from the transaction. It must be remembered that your Company was not legally qualified to purchase this stock at the only time when it could be secured; and that if it had been legally possible to purchase the stock, your Company could not finance the transaction by the sale of its own stock and bonds, during the present period of tight money, without causing a tremendous fall in the values of both classes of securities. While, therefore, your Directors and Trustees would have been glad to obtain this property at lower charges, the rental is not considered excessive, in view both of the investment and risk of the present owners of the property, and of the very great advantages to you and to the community. The property was secured by a syndicate headed by Mr. Volney T. Malott, of the Indiana National Bank, and consisting of some six gentlemen, none of whom are Directors or Trustees of your Company. Although the stock of the Indianapolis Gas Company had a nominal quotation on the Indianapolis Exchange much lower than the price paid by this syndicate, there were no sales at the quoted prices;

and you can readily understand that the purchase of not less than 30,000 shares of stock held by a few owners, none of whom were residents of Indianapolis, as was necessary in this case, could not be made on the basis of quotations for a few shares. The syndicate, in order to reap any benefit from its investment, must continue to hold the stock for a considerable period; and at the present time there are few groups of capitalists in this or any other community, that could be formed for the purpose of tying up so large an amount of money.

While the ownership of over three-fourths of the stock of the Indianapolis Gas Company will thus be held by about six persons, the absolute control of that property under the lease would be vested in your Company, which now represents 3,000 stockholders. Out of this number only one person holds as much as $25,000 of your stock. That amount is held by the broker who purchased $200,000 of it in January, and represents his entire holdings at the present time. Three persons hold between $20,000 and $25,000 of your stock. Fourteen persons held between $10,000 and $20,000 of your stock. Thirty-four persons hold from $5,000 to $10,000 of your stock. All of the balance is in the possession of persons whose respective individual holdings are under $5,000 each. It thus appears that both the control and the larger share of the profits from the Indianapolis Gas Company will be vested in this popular Company, under the Trusteeship established in your Franchise.

Respectfully submitted,
Citizens Gas Company of Indianapolis.
J. D. Forrest,
Secretary and General Manager.

Voting Trustees: Thomas L. Sullivan, President; Thomas H. Spann, Vice-President; Lucius B. Swift; Henry Kahn; Gustav A. Schnull.

Directors: Franklin Vonnegut, President; A. F. Potts, Vice-President; J. D. Forrest, Secretary and General Manager; Lorenz Schmidt, Treasurer; F. M. Bachman; J. H. Hooker; Robert Lieber; W. J. Mooney; John R. Welch.

General Office—31-35 South Pennsylvania Street, Indianapolis, Indiana.

PLAINTIFF'S EXHIBIT NO. 92.

Report of the Citizens Gas Company of Indianapolis Six Months Ending June 30, 1913

To the Stockholders of the Citizens Gas Company:

The Company presents herewith its report for the first half of the year 1913. The Spencer-Shively Public Utilities Act having fixed June 30th as the close of the fiscal year for all public utility corporations in the State of Indiana, the fiscal year of this Company hereafter will date from July 1st instead of January 1st.

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Relations With Indianapolis Gas Company.

As you have been advised, your Company on February 27, 1913, after careful investigation and negotiations, entered into a contract with a syndicate organized by Mr. V. T. Malott, for the lease of all of the operating property and business of The Indianapolis Gas Company, over three-quarters of the stock of which the syndicate had acquired. After careful study of the business of The Indianapolis Gas Company, your Directors and Trustees were convinced that there would be large surplus profits for the Citizens Gas Company from the operation of the property of The Indianapolis Gas Company under the proposed lease, thus making possible not only the earlier payment of accumulated dividends to which you are entitled, but also bringing nearer the day when a further reduction in the price of gas could be made. It was further believed that by acquiring permanent control of the opposition company, the position of the Citizens Gas Company and the perpetuation of cheap gas in Indianapolis could be assured as in no other way. A petition for the approval of said lease was submitted to the Public Service Commission, after the organization of the same. This matter is still pending before the Public Service Commission which has indicated that certain conditions would have to be met before the lease would be approved. The owners of The Indianapolis Gas Company have consented to a reduction of rental below that to which they would agree prior to the purchase of the stock of that Company by them, thus making the lease still more desirable from the point of view of this Company. It is hoped that the negotiations between the Commission and your Company will result in the ap-

proval of the lease, which is believed by your Directors and Trustees to be very favorable for you and the gas consumers of Indianapolis. Opponents of the proposed lease have made many criticisms based on partial or false information, but the prolonged consideration of the subject has only tended to convince your Directors of the advantages which the lease would secure for all of the interests for which the Citizens Gas Company has always stood.

Meanwhile competition between the two companies continues with much attendant waste to both and considerable hampering of the development of your Company; but many of the more unreasonable elements of competition were eliminated when the competing company passed into the hands of friends of the Citizens Gas Company. One of the first effects of the change of ownership was seen at the time of the floods which inundated the plant of The Indianapolis Gas Company and completely stopped operations there. The Citizens Gas Company immediately made a connection with the mains of The Indianapolis Gas Company and from March 25th to 28th sent to that Company 6,431,000 cubic feet of gas, supplying the entire amount consumed by the citizens of Indianapolis on some of the days named. Had The Indianapolis Gas Company been in the hands of its former owners, they would rather have had their consumers deprived of gas, thus vastly increasing the suffering caused by the flood, than to have accepted gas from the Citizens Gas Company, thus acknowledging obligation to your Company and recognizing its ability to supply the entire city. Since that time and pending the completion of the by-product coke ovens of The Indianapolis Gas Company, your Company has been supplying it with a large amount of gas. Permanent connections have been made between the lines of the respective companies, thus safeguarding the city in the event of an emergency at the plant of either. Your Company has never yet received gas from the other Company, but in the past there have been many occasions when there would have been large economies from the purchase of gas from it instead of operating your water gas plant, and at times there would likewise have been a complete avoidance of danger to your Company.

Respectfully submitted,
By Order of the Board of Directors,
J. D. Forrest,
Secretary and General Manager.

Indianapolis, August 20, 1913.

Voting Trustees: Thomas L. Sullivan, President, Thomas H. Spann, Vice-President; Lucius B. Swift; Henry Kahn; Gustav A. Schnull.

Directors: Franklin Vonnegut, President; A. F. Potts, Vice-President; J. D. Forrest, Secretary and General Manager; Lorenz Schmidt, Treasurer; F. M. Bachman; J. H. Hooker, Robert Lieber; W. J. Mooney; John R. Welch.

General Office—31-35 South Pennsylvania Street, Indianapolis, Indiana.

PLAINTIFF'S EXHIBIT NO. 93.

Report of the Citizens Gas Company of Indianapolis Year Ending December 31, 1913.

To the Stockholders of the Citizens Gas Company:

The Company presents herewith its report for the year 1913, showing the results of operation for the entire year and also the report of receipts and disbursements for the two half year periods as required by the franchise.

Manufacturing Plants.

On October 1, 1913, your Company took over the operating property and business of The Indianapolis Gas Company. The operations for the year therefore include three months' operation of the Langsdale Avenue manufacturing plant and the entire Distribution System which had formerly been controlled by The Indianapolis Gas Company. Twenty-five of the new coke ovens at the Prospect Street plant were put into operation in June and the remaining 25 near the end of October. The operation of the Prospect St. Plant until very near the end of the year was considerably hampered by construction work which was in progress, and was therefore accompanied by unusual expenses at many times. That construction work was not entirely completed until after the close of the year. The new by-product coke ovens at the Langsdale Avenue Plant were at an advanced stage at the time the plant was taken over from The Indianapolis Gas Company, but the plant could not be put into operation at all until February 13th of this year, when a few of the ovens were first charged. At that date the old coal gas retorts were abandoned, and the work of dismantling began, in order to

make room in the same buildings for auxiliary equipment for the new coke oven plant. The completion of this last part of the new construction at the Langsdale Avenue Plant was necessarily delayed in order to keep the coal gas retorts in operation until the ovens could be started. The construction work at both plants was very greatly delayed by inability to secure prompt deliveries of material and equipment. However, all of these difficulties are now in the past, and your Company is in possession of two manufacturing plants which, both singly and in combination, probably constitute the finest gas producing equipment in the United States. The by-product coke ovens at the Prospect St. Plant have a producing capacity in excess of 3,500,000 cubic feet of gas per day. Those at the Langsdale Avenue Plant, when the auxiliary equipment shall be completed and the coke ovens can be heated by producer gas instead of by oven gas, will have a producing capacity in excess of 5,000,000 cubic feet of gas per day. The Water Gas Plant at Prospect Street has a capacity of about 2,000,000 cubic feet of gas per day. That at Langsdale Avenue has a capacity close to 6,000,000 cubic feet per day. As you have been advised heretofore, it is not practicable to manufacture water gas and sell it at the low price established by your Company in this city, but these water gas plants are of very great importance to the City of Indianapolis to provide for emergencies in the operation of the by-product coke ovens, possibly to increase the heat value of the Langsdale oven gas, and to supplement the latter when the peak loads of consumption rise above their capacity and before the average consumption of the city has reached a point where additional coke ovens can be constructed. The provision for heating the Langsdale ovens with producer gas will enable that plant, when operating conditions require, to send all of its oven gas into the city, while the provision for heating the ovens with their own gas will enable your Company to operate them more economically when the demand for gas does not necessitate the operation of the producers. While gas can be produced at your Prospect plant at a lower cost per thousand cubic feet in the holder, that plant has little elasticity except by the manufacture of water gas which is enormously expensive. The new coke ovens at your Langsdale plant provide an element of elasticity of very great advantage both for economical operation and in facility for rendering the city the service

which it requires; while the complete water gas plant at Langsdale Avenue affords a still greater element of elasticity for meeting emergencies and for producing an adequate supply of gas when the coke ovens of both plants would otherwise be over-taxed. No other gas company in the United States enjoys the advantages for economy and certain gas production that are furnished by these two plants when operated in combination.

Distribution System.

At the close of the year 1912 your Company had in use 174.96 miles of mains. The system of The Indianapolis Gas Company was appraised as of July 1, 1913 had a total of 376.34 miles. The Indianapolis Gas Company between July 1st and October 1st had laid 6.81 miles of additional mains. The total extensions made by your Company to its own system amounted to 9.56 miles during the year 1913, and its extensions to the system of The Indianapolis Gas Company between October 1st and December 31st amounted to 4.19 miles. Therefore the total distribution system operated by your Company at the close of the year amounted to 571.86 miles.

Immediately after taking charge of the leased property we made several emergency connections between the two systems, whereby gas could be transferred quickly from one to the other. These connections have been very useful and have enabled us to improve the service materially in the eastern and southwestern sections of the city. The engineers of the Company have worked out a comprehensive plan for tying the two systems together, so that they may be made substantially a common system. This work will be carried on as rapidly as possible, and when completed will give the gas consumers of the city the most uniform possible gas pressure. In addition to improving the service, the complete combination of the two systems will result in substantial economies by reducing the very heavy pumping expenses which have heretofore been necessary at the Langsdale Avenue Plant, and by enabling the two manufacturing plants to work in more complete unison for the supply of the city's requirements.

Your Company had in use on December 31, 1912, 10,698 meters. On September 30, 1913, this number had increased to 11,165, and The Indianapolis Gas Company had in use on that 41,541 meters. The total number in use at the end of the year was 52,738.

Lease of the Indianapolis Gas Company.

On September 30, 1913, the Public Service Commission of Indiana approved a contract of lease between your Company and The Indianapolis Gas Company, whereby all of the property and business of the latter passed under the control of your Company for a period of ninety-nine years. Under the terms of the lease your Company pays as rental the interest on the bonds of The Indianapolis Gas Company outstanding at the time of the lease, which amounted to $4,833,000; and any additional bonds of The Indianapolis Gas Company which your Company may use for the purpose of extensions and betterments t the property of The Indianapolis Gas Company will likewise be guaranteed as to interest charges by your Company. Your Company also pays an annual rental of $120,000 so long as the price of gas to the general consumers in the city shall be not less than 55 cents per thousand cubic feet. If the price shall be reduced to 50 cents per thousand cubic feet, the rental will be increased to $130,000, and if the price of gas shall be reduced to 45 cents per thousand cubic feet, the annual rental shall be $135,000. In addition to all of the property of The Indianapolis Gas Company at the date when the lease became effective, that Company was required by the lease to expend, without increase of bonded indebtedness, a total of $600,000 on the construction of the by-product coke ovens which was then in progress at the Langsdale Avenue Plant.

By this merger your Company has established on a much firmer basis the very low price of gas which it introduced in this city, and makes possible the introduction of very great economies in carrying on the gas business of this community. Your Company has been strengthened in every way, and its finacial position has been rendered much more secure by the removal of conditions which made it impossible to obtain capital outside of the City of Indianapolis. The profits to your Company from this merger cannot begin to be very great until after the middle of the year 1914, because it will be necessary to operate the water gas plant of The Indianapolis Gas Company on a large scale up to about the first of April. However, it was possible to begin certain important economies soon after the merger became effective, and these have already resulted in some net increase in your

Company's profits, after payment of all rental charges as well as your own bond interest. The net profits of your Company, after meeting all such fixed charges, amounted to $37,865.96 for the first quarter of combined operation, ending December 31, 1913. These figures compare with net profits of $35,775.22 for the quarter ending September 30, 1913, and with $31,652.78 for the last quarter of the year 1912. The gain in net profits for the first quarter of 1914 will be considerably larger than that for the last quarter of 1913. However, the full advantages of the merger in this direction will not be felt until a reasonable time has elapsed after putting the new and modern manufacturing plant into operation.

Respectfully submitted,
By Order of the Board of Directors,
J. D. Forrest,
Secretary and General Manager.

Indianapolis, March 28, 1914.

Voting Trustees: Thomas L. Sullivan, President; Thomas H. Spann, Vice-President; Lucius B. Swift; Henry Kahn; Gustav A. Schnull.

Directors: Franklin Vonnegut, President; A. F. Potts, Vice-President; J. D. Forrest, Secretary and General Manager; Lorenz Schmidt, Treasurer; F. M. Bachman; J. H. Hooker; Robert Lieber; W. J. Mooney; John R. Welch.

General Office—Majestic Building, Indianapolis, Indiana.

PLAINTIFFS' EXHIBIT 94.

Report of the Citizens Gas Company of Indianapolis
Six Months Ending June 30, 1914

To the Stockholders of the Citizens Gas Company:

The Company presents herewith its report for the first half of the year 1914.

Operation Under Merger.

During the entire period covered by this report, your Company was operating the plant and system of The Indianapolis Gas Company, which was taken over under lease, October 1, 1914. However, it was necessary to

operate the water gas and old coal gas plants for nearly two months of the period, because delays in obtaining delivery of materials held back the completion of the new coke ovens. Since the latter have been in operation they have been giving as good results as were anticipated.

When it is considered that the Company's estimates for 1914 were based on 60 cent gas and average business conditions and that a reduction in income amounting to $52,819.25 was brought about by the reduction in the price of gas, and that the business depression has resulted in a much lower price for coke than the Company has ever been obliged to take in the past, the operation of your Company under the merger appears fully to justify all that was anticipated at the time the estimates were made.

Since the changed conditions, with minor exceptions, could no more have been taken into account than the present European war, it may be claimed for your Company that it has, thus far, fulfilled its promises of a year ago. In addition, it has avoided by means of this merger, the immeasurable disadvantages of a gas and coke war with its competitor after the completion of the new coke ovens. ***Most of the unfavorable conditions indicated above would have worked much greater disadvantage to the Citizens Gas Company in competition with The Indianapolis Gas Company than they have done to your Company in control of the entire field.***

Respectfully submitted,

By Order of the Board of Directors,

J. D. Forrest,

Secretary and General Manager.

Indianapolis, September 23, 1914.

Voting Trustees: Thomas L. Sullivan, President; Thomas H. Spann, Vice-President; Lucius B. Swift, Henry Kahn, Gustav A. Schnull.

Directors: Franklin Vonnegut, President; A. F. Potts, Vice-President; J. D. Forrest, Secretary and General Manager; Lorenz Schmidt, Treasurer; F. M. Bachman, J. H. Hooker, Robert Lieber, W. J. Mooney, John R. Welch.

General Office: Majestic Building, Indianapolis, Indiana.

PLAINTIFFS' EXHIBIT 95-A.

Poor's Manual of Public Utilities. 857

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Citizens Gas Co. of Indianapolis.—Incorporated under Indiana laws, May 23, 1906, and in October, 1907, acquired the distribution system formerly owned by the Consumers Gas Trust Co., a natural gas company which had been placed in liquidation by order of the Courts. The company immediately constructed a water gas plant with a capacity of about 2,000,000 cubic feet of gas daily, which was placed in operation in April, 1909. It also constructed fifty by-product coke ovens, which were first put into commission in November, 1909. It has since constructed fifty additional coke ovens of the same type. On October 1, 1913, the company acquired by 99-year lease the plant and distributing system of the Indianapolis Gas Co., which company had a well equipped water gas plant having a capacity of over 4,000,000 cubic feet of gas per day, and had undertaken the construction of by-product coke ovens for its regular supply of gas. The Citizens Gas Co. completed the ovens and put them into commission about the middle of February, 1914. Under ordinary conditions the entire supply of gas for the city of Indianapolis is derived from the by-product coke-ovens, the water gas plants being operated only in times of emergency, or when there is a sudden increase in the demand for gas. Both the owned and the leased plants are operated regularly, and the entire business is conducted as a unit. The total owned and leased distribution system consists of 587.40 miles, and the company has over 53,000 meters in use. The population served is about 275,000, and this company conducts the entire gas business for the city and suburbs.

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Poor's Manual of Public Utilities. 859

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Company Leased by Citizens Gas Co. of Indianapolis.

Indianapolis Gas Co. (The).—Incorporated in 1890, under the laws of Indiana, as a consolidation of the Electric Lighting, Gas Heating and Illuminating Co., the Indianapolis Gas, Light and Coke Co. and the Indianapolis

Natural Gas Co. Owns a complete water gas plant having a capacity of 6,000,000 cu. ft. per day, and a by-product coke oven plant, capacity 5,000,000 cu. ft. of gas per day. The latter, which was completed by the lessor, was put into commission in February, 1914. Franchises are perpetual. Miles of mains, 399.18 of which 16.03 miles were added by the lessor.

Lease.—Leased on October 1, 1913, for 99 years, to Citizens' Gas Co.

Capital Stock.—Authorized and outstanding, $2,000,000. Shares, $50. Of the total stock, 34,453 shares of a par value of $1,722,650, are held by the trustee for the "Home Association of Stockholders of the Indianapolis Gas Co. Registrar, The Union Trust Co., Indianapolis, Ind. Transfer office, 1004 Majestic Building, Indianapolis, Ind. Annual meeting, second Tuesday in February, at Indianapolis, Ind. Books close 10 days before and re-open one day after.

Dividends.—Dividends guaranteed by Citizens Gas Co. of Indianapolis, under 99-year lease, dated September 30, 1913, at present rate of 6% payable January and July. Dividends payable by lessee to be increased to 6½%, if the price of gas is reduced to 50 cents per 1,000 cubic feet, and to 6¾ p. c. if the price is reduced to 45 cents. Dividends checks are mailed by Citizens Gas Co. Books close twenty days before and reopen one day after dividend payments. Stock likewise entitled to dividends from profits or liquidation of unleased property of the Indianapolis Gas Co., as and when declared by the directors of that Company.

Funded Debt.—Outstanding December 31, 1914, $5,052,000 first consolidated mortgage 5 p. c. 50-year gold bonds; due October 1, 1952; interest April 1 and October 1, at office of trustee, Equitable Trust Co., New York, N. Y. Coupon bonds, $1,000. Authorized, $7,500,000; the remainder of bonds being reserved for 90 p. c. of cost of betterments actually made. Co-trustee, Ferdinand Winter, Indianapolis, Ind. A first lien on all property owned by the Indianapolis Gas Co. and leased to the Citizens Gas Co., but not a lien on unleased property of the former company. Citizens Gas Co. has $163,000 bonds in its treasury for betterments made to leased property prior to December 31, 1914. Bonds may be registered upon the books of the Central Trust Co. of New York. Interest and refunding of bonds at maturity guaranteed by Citizens

Gas Co. under the lease of September 30, 1913. Listed on New York Stock Exchange.

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PLAINTIFFS' EXHIBIT 96-A.

2310 Public Utilities

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Citizens Gas Co. of Indianapolis.—Inc. May 23, 1906, in Ind. and on Oct. 31, 1907, acquired the distributing system and property formerly owned by the Consumers Gas Trust Co., a natural gas company which had been placed in liquidation by order of the courts. The Company immediately constructed a water gas plant with a capacity of about 2,000,000 cu. ft. of gas per day, which was placed in operation in April, 1909. It also constructed 50 by-product coke ovens, which were first put into commission in Nov., 1909. It has since constructed 50 additional coke ovens of the same type. On Oct. 1, 1913, the company acquired by 99-year lease the plant and distribution system of the Indianapolis Gas Co., which company had a well-equipped water gas plant having a capacity of over 4,000,000 cu. ft. of gas per day, and had undertaken the construction of by-product coke ovens for its regular supply of gas. The Citizens Gas Co. completed the ovens and put them into commission about the middle of Feb., 1914. Under ordinary conditions the entire supply of gas for the city of Indianapolis is derived from the by-product coke ovens, the water gas plants being operated only in times of emergency, or when there is a sudden increase in the demand for gas. Both the owned and the leased plants are operated regularly, and the entire business is conducted as a unit. The population served is about 335,000, and this company conducts the entire gas business for the city and suburbs. No. of customers, 66,000.

By the terms of the merger the Citizens Gas Co. leases the property of The Indianapolis Gas Co. for a period of 99 years and pays the interest on $4,833,000 Consolidated Mortgage bonds, and will pay the interest on such additional bonds as may be issued from time to time for extensions to the leased property. The lessee also pays a rental equivalent to 6% per annum on the $2,000,000 of capital stock of The Indianapolis Gas Co. If the price of gas is reduced to 50 cents per thousand cu. ft. this

rental is increased to 6½%, and if the price is reduced to 45 cts. per thousand cu. ft. the rental will be increased to 6¾% per annum, beyond which rate there will be no increase.

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Indianapolis Gas Co. (Operated under lease).—Inc. in 1890 in Ind.; consolidation of Indianapolis Gas, Light & Coke Co.; the Electric Lighting, Gas Heating & Illuminating Co. and Indianapolis Natural Gas Co. Natural gas supplied until 1903; but in 1902, a combined coal gas and water gas plant was constructed and placed in operation. The property and business of the Company is leased for 99 years from Oct. 1, 1913, to the Citizens Gas Co. of Indianapolis on terms outlined in that Company's statement. Company has surrendered its franchise and operates under an inteterminate permit granted by the Public Service Commission of Indiana.

Capital Stock.—Authorized and outstanding, $2,000,000; par, $50. Registrar: Central Union Trust Co., New York. Transfer office, 80 Broadway, New York. Dividends of 6% per annum are guaranteed by the Citizens Gas Co. of Indianapolis under the lease, payable semi-annually, J & J 1.

Funded Debt.—$5,357,000 First Consolidated Gold 5s; dated Oct. 1, 1902; due Oct. 1, 1952; int. A & O 1, at Equitable Trust Co., New York, Trustee. Coupon, $1,000; principal may be registered. Authorized issue, $7,500,000; unissued bonds reserved for betterments and extensions up to 90% of cost. Interest guaranteed by Citizens Gas Co. of Indianapolis. Secured on the property owned by the Indianapolis Gas Co. and leased to the Citizens Gas Co., but not a lien on the unleased property of the former company. In April, 1915, $163,000 of these bonds were publicly offered at 96 and interest, yielding 5⅛%. Mortgage does not contain tax free covenant.

Officers: Volney T. Malott, Pres.; L. C. Boyd, V-P; William J. Yule, Sec.; Arthur V. Brown, Treas. Directors: Volney T. Malott, William G. Irwin, Fred C. Dickson, Gavin Payne, J. G. Schmidlapp, L. C. Boyd, Arthur V. Brown.

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PLAINTIFFS' EXHIBIT 97-A.

54 Public Utilities

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Citizens Gas Company of Indianapolis

Officers: G. A. Efroymson, Pres.; C. L. Kirk, V-P.; F. G. Rastenburg, Sec.; J. I. Dissette, Treas.

Voting Trustees: Thos. L. Sullivan, Pres.; Frank C. Dailey, Herman Lieber, Carleton B. McCulloch, Gustav A. Schnull.

Directors: E. H. Evans, H. H. Hornbrook, C. L. Kirk, J. I. Dissette, G. A. Efroymson, Walter B. Harding, William H. Insley, Franklin Vonnegut, Indianapolis, Ind.

History and Properties—Incorporated May 23, 1906, in Ind., and on Oct. 31, 1907, acquired the distributing system and property formerly owned by the Consumers' Gas Trust Co., a natural gas company which had been placed in liquidation by order of the courts. The Company immediately constructed a water gas plant with a capacity of about 2,000,000 cu. ft. of gas per day, which was placed in operation in April, 1909. It also constructed 50 by-product coke ovens, which were first put into commission in Nov. 1909. In 1913 it constructed 50 additional coke ovens of the same type and in 1919 placed in operation another battery of 40 ovens of improved design. In 1927, it constructed a new battery of 40 coke ovens of latest design to replace the 100 ovens built in 1909 and 1913, which were removed from service. In 1929, it constructed another battery of 40 ovens of the same type as those built in 1927, the total number of ovens now being 120. On Oct. 1, 1913, the Company acquired by 99-year lease the plant and distribution system of The Indianapolis Gas Co., which company had a well-equipped water gas plant having a capacity of over 4,000,000 cu. ft. of gas per day, and had undertaken the construction of by-product coke ovens for its regular supply of gas. The Citizens Gas Co. completed the ovens and put them into commission about the middle of Feb., 1914. Under ordinary conditions the entire supply of gas for the city of Indianapolis is derived from the by-product coke ovens, the water gas plant being operated only in times of emergency, or when there is a sudden

increase in the demand for gas. Both the owned and the leased plants are operated regularly, and the entire gas business for the city and suburbs. No. of customers, Dec. 31, 1934, 75,420, compared with 73,370 in 1933, 73,889 in 1932, 77,736 in 1931, 78,634 in 1930 and 79,536 in 1929.

By the terms of the merger the Citizens Gas Co. leases the property of the Indianapolis Gas Co. for a period of 99 years and pays the interest on that company's Consolidated Mortgage bonds, and will pay the interest on such additional bonds as may be issued from time to time for extensions to the leased property. The lessee also pays a rental equivalent to 6% per annum on the $2,000,000 of capital stock of The Indianapolis Gas Co.

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Court Ruling on Ownership—Federal Judge Baltzell ruled on Feb. 26, 1930, that gas consumers and citizens of Indianapolis are the real owners and beneficiaries of Company, a public trust. Court upheld the City's claim for possession of Company before Aug. 30, 1930, to administer it for the benefit of the citizens.

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The Indianapolis Gas Company
(Leased to Citizens Gas Company of Indianapolis)

Officers. Wm. G. Irwin, Pres.; Arthur V. Brown, V-P.; William J. Yule, Sec.; Arthur V. Brown, Treas.

Directors: William G. Irwin, Arthur V. Brown, L. B. Ewbank, W. R. Higgons, Frederick G. Appel, P. C. Reilly, Sampel C. Sutphin.

Office, Indianapolis, Ind.

History and Property—Incorporated in 1890, in Indiana; consolidation of Indianapolis Gas, Light & Coke Co.; the Electric Lighting, Gas Heating & Illuminating Co. and Indianapolis Natural Gas Co. Natural gas supplied until 1903; but in 1902, a combined coal gas and water gas plant was constructed and placed in operation. The property and business of the Company is leased for 99 years from Oct. 1, 1913, to the Citizens Gas Co. of Indianapolis on terms outlined in that Company's statement. Company has surrendered its franchise and operates under an

indeterminate permit granted by the Public Service Commission of Indiana.

Capital Stock

Poor's Rating—B*—Better Grade Speculative.

Authorized and outstanding, $2,000,000; par $50.
Number of stockholders at Dec. 31, 1934, 375.
Transfer Office—116 E. Market St., Indianapolis, Ind.
Registrar—The Union Trust Co., Indianapolis, Ind.

Price Range	*1934	*1933	1932	1931	1930	1929	1928
High	45	50	45	50	57	55	59
Low	42	38	bid	bid	bid	bid	bid

*High and low bid prices.

Dividends—6% per annum are guaranteed by the Citizens Gas Co. of Indianapolis under the lease, payable semi-annually, January and July 1.

Annual Meeting—Third Wednesday in January.

Funded Debt

$6,863,000 First Consolidated Gold 5s; Due October 1, 1952
Poor's Rating—B**—Business Man's Investment.

Dated October 1, 1902.

Interest Payable April and October 1, at The Chase National Bank of the City of New York.

Denomination—Coupon, $1,000; principal may be registered.

Trustees—The Chase National Bank of the City of New York and Ferdinand Winter, Indianapolis.

Registrar—Central Hanover Bank and Trust Co., New York.

Provisions of Issue—Authorized issue, $7,500,000; outstanding, $6,863,000; unissued bonds reserved for betterments and extensions up to 90% of cost.

Guaranty—Interest guaranteed under terms of lease by Citizens Gas Co. of Indianapolis.

Security—Secured on the property owned by the Indianapolis Gas Co. and leased to the Citizens Gas Co., but not a lien on the unleased property of the former company.

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PLAINTIFFS' EXHIBIT 98-A.

Citizens Gas Company of Indianapolis

History: Incorporated under Indiana laws, May 23, 1906, and in October, 1907, acquired the distributing system and property formerly owned by the Consumers' Gas Trust Co. Company owns a water gas plant with a capacity of 2,000,000 cubic feet per day, serving a population of about 335,000. Franchises of company extend until 1930. Owns the entire capital stock of the Milburn By-Products Coal Co. Gas sales: 1918, 2,513,774,000 cu. ft.; 1919, 2,698,589,000 cu. ft.; 1920, 3,051,634,000 cu. ft ; 1921, 2,792,228,000 cu. ft.; 1922, 2,632,060,000 cu. ft.

Lease of Indianapolis Gas Co.: On October 1, 1913, the company leased for 99 years the property and business of the Indianapolis Gas Co., and is now in control of the entire gas business of the City of Indianapolis and the environs, having a population in excess of 250,000. The Indianapolis Gas Co. had at the date of lease a complete water gas plant, having a capacity of 6,000,000 cubic feet of gas per day. It had been operating coal gas retorts from which it supplied about one-third of its total output of gas, but had begun the construction of a by-product coke oven plant with a capacity of about 5,000,000 cubic feet of gas per day. Under the terms of the lease, the lessor was required to complete the construction of these ovens, and they were put into commission in February, 1914. At the date of the lease the Indianapolis Gas Co. had 383.15 miles of mains in its distributing system, which were increased to 387.34 miles by the end of the year. The combined manufacturing capacity of the plant now controlled by the Citizens Gas Co. is therefore 8,500,000 cubic feet of coke oven gas and 8,000,000 cubic feet of water gas. It is the purpose of the company to furnish only coke oven gas except in emergencies or for the purpose of making up deficiencies in its supply. The combined system of mains at the close of 1922 comprised 650 miles. The company had at that date 67,561 meters in use.

By the terms of the lease, the Citizens' Gas Co. leases the property of the Indianapolis Gas Co. for a period of 99 years and pays the interest on $4,833,000 Consolidated

Mortgage bonds, and will pay the interest on such additional bonds as may be issued from time to time for extensions to the leased property. The lessee also pays a rental equivalent to 6% per annum on the $2,000,000 of capital stock of the Indianapolis Gas Co. If the price of gas is reduced to 50 cents per thousand cubic feet this rental is increased to 6½%, and if the price of gas is reduced to 45 cents per thousand cubic feet, the rental will be increased to 6¾% per annum, beyond which rate there will be no increase.

* * * * * *

Table A.—Bond Records and Ratings (Based on Five Year Income Results, Etc.)

Name of Issue	Interest Payable	Maturity	Authorized	Outstanding	Average Income Available	Interest Required Per Annum	Factor of Safety	Security	Salability	Rating
1. Indianapol. Gas Co. 1st cons. 5	A&O	O. 1952	$7,500,000	$5,357,000	$867,941	$267,850	69%	High	Good	Aa
2. Cit. Gas of Ind. 1st & ref. 5...	J&J	Jl. 1942	10,000,000	3,848,000	480,091	192,400	40%	Good	"	A
3. Cit. Gas of Ind. gen. & ref. 7s.	M&N	My 1927	1,000,000	1,000,000		70,000	40%	Strong	Fair	Baa

Note: Average income available on No. 1 is average net revenue for five years shown in income account. Income available for No. 2 is after deducting interest requirement on No. 1 and guaranteed dividend ($120,000) on Indianapolis Gas Co. stock. For reference notes see next page.

374 Moody's Analyses of Investments

1. Indianapolis Gas Co. first consolidated 5s: Dated Oct. 1, 1902; due Oct. 1, 1952. Interest paid A. & O. at Equitable Trust Co., New York. Trustee: Equitable Trust Co., New York, and Ferdinand Winter, Indianapolis. Registrar: Central Union Trust Co., New York. Coupon, $1,000, registerable as to principal. Interest guaranteed under terms of lease by Citizens' Gas Co. of Indianapolis. Secured by a first mortgage on all property of the Indianapolis Gas Co. Unissued bonds reserved for improvements at 90% of cost. Listed on New York Stock Exchange. Company does not pay normal income tax.

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(PLAINTIFFS' EXHIBITS 99 TO 109.)

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"(Plaintiffs' Exhibits 99 to 109, inclusive, are photostats of the pages from Moody's Manual of Investments—Public Utility Securities—for the years 1924 to 1934, inclusive, which set forth material with respect to Citizens Gas Company of Indianapolis and The Indianapolis Gas Company. Statements appear in each of these 11 exhibits which are substantially identical with the statements quoted above from Plaintiffs' Exhibit 98-A from Moody's Manual of Investments—Public Utility Securities—for 1923)."
(Inserted pursuant to stipulation filed November 22, 1939.)

PLAINTIFFS' EXHIBIT 110.

2336 Moody's Manual of Investments

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Citizens Gas Company of Indianapolis

History: Incorporated under Indiana laws, May 23, 1906, and in Oct., 1907, acquired the distributing system and property formerly owned by the Consumers' Gas & Trust Co. In 1905, company entered into a contract with the City of Indianapolis which provided that at the expiration of 25 years the city may assume possession of the company and its properties by payment of the face value of the common

stock plus interest not to exceed 10% per annum. This contract was part of franchise granted to the company in that year. In 1921 company surrendered its franchise and accepted an indeterminate permit from the Public Service Commission of Indiana. Owns entire capital stock of the Milburn By-Products Coal Co.

Lease of Indianapolis Gas Co.: On October 1, 1913, the company leased for 99 years the property and business of the Indianapolis Gas Co. By the terms of the lease the Citizens Gas Co. pays (a) the interest on the consolidated mortgage bonds outstanding, and will pay the interest on such additional bonds as may be issued for future extensions to the leased property; (b) a rental equivalent to 6% on outstanding capital stock of the Indianapolis Gas Co. (with a possible increase of $15,000 if the price of gas to the consumer does not exceed 45 cents per M cu. ft.); (c) $300 annually for organization expense; and (d) such amounts equal to the taxes levied against the property including Federal income tax.

Company controls the entire gas business of the City of Indianapolis and the environs having a population in excess of 425,000. Number of employees, Dec. 31, 1934, 718.

Properties: As of Jan. 1, 1935, the owned property of Citizens Gas Co. consisted of a coke oven plant, known as Prospect Street Station, comprising three batteries of forty 14-ton Wilputte ovens with a total daily capacity of 11,000,000 cu. ft. and two 8′ 6″ water gas sets having a total daily capacity of 1,800,000 cu. ft. and 9,000,000 cu. ft. of holder capacity. The distribution system consisted of approximately 336 miles of cast iron and steel mains. The leased property, owned by Indianapolis Gas Co., consisted of a coke oven plant of one battery of forty-one 15-ton Semet-Solvay coke ovens with a daily capacity of 3,500,000 cu. ft., also two 11′ 0″ and two 7′ 6″ water gas sets, with a total daily capacity of 6,000,000 cu. ft. and holder capacity of 3,000,000 cu. ft. The distribution system consisted of approximately 531 miles of cast iron and steel mains. It is the purpose of the company to furnish only coke oven gas except in emergencies or for the purpose of making up deficiencies in its supply. The combined system of mains at the close of 1934 comprised 867 (1933, 865) miles. On Dec. 31, 1934, company had 75,259 meters in use (1933, 73,370).

City's Demand for Possession Under 1905 Franchise: The basis of the move to bring this company under municipal ownership is the 1905 contract (see above) entered into between the company and the City of Indianapolis. In Mar., 1929, a formal demand was made by the city to the trustees and directors of the company for the transfer of the title and assets. Company's directors in Apr., 1929, acknowledged the city's right to take over the properties after the preferred and common stocks had been redeemed. In June, 1929, common stock certificate holders of the company filed suits alleging that public charitable trust in favor of inhabitants of the city and gas consumers was broken when city franchise was surrendered in 1921. On Feb. 26, 1930, Federal Judge Baltzell of the U. S. District Court at Indianapolis upheld the validity of the 1905 contract which permits the city to take possession of the property before Aug. 30, 1930, and administer it for the benefit of the citizens, ruling that city had not given up any of its rights through surrender of the company's franchise. In final decision on May 29, 1930, Federal Judge Baltzell dismissed stockholders suit. No action in regard to the transfer of title of the properties was taken, however, as the litigation was carried to the U. S. Circuit of Appeals. The latter court in Jan., 1931, affirmed the decision entered May 29, 1930, by the lower court. Both the district and the circuit courts held that holders of beneficial certificates of common stock would receive everything for which they had contracted in subscribing for the stock whenever they should be repaid the face value of their shares together with 10% annual cumulative dividend. On May 18, 1931, the U. S. Supreme Court at Washington stated that it would not review the right of the city to take over the company as no Federal question was involved. Under a bill signed early in 1933 by Governor P. V. McNutt, the city was empowered to issue 50-year 6% bonds, to provide the purchase price for the company's properties. In Dec., 1933, the City of Indianapolis applied to the Public Works Administration for a $10,000,000 loan to acquire company's properties, but in Jan., 1934, it was explained that the PWA could make loans only for projects having a primary object of creating jobs.

City Sells Bonds to Acquire Properties: Under a resolution adopted May 7, 1935, by the Board of Directors for

Utilities of the City of Indianapolis, the city authorized the issuance of $8,000,000 of gas plant revenue bonds for the purpose of obtaining funds to exercise its franchise rights to acquire the properties and business of Citizens Gas Co. of Indianapolis and for improvements and extensions to such properties.

The Indianapolis City Utilities District (see below) on May 29, 1935, sold to Otis & Co., Cleveland and Halsey, Stuart & Co., Inc., New York, the issue of $8,000,000 gas plant revenue bonds, on a bid of 96.0625 for 4½s. Proceeds of the bond sale were to be used to acquire the Citizens Gas properties and for extensions and improvements thereof. The obligations that will be retired from the proceeds of this bond issue, in order to acquire company's properties, include company's $2,000,000 in $25 par common stock with accrued dividends of $500,000; $1,000,000 $100 par preferred plus dividends of $12,500 and a premium of $50,000 together with $2,800,000 in bonds. Upon retirement of these securities company's property will pass to the city, as provided by charter. Proceeds of the sale not used for retirement of company obligations will be used for working capital to make all necessary adjustment for supplying mixed gas to local consumers.

As of July 1, 1935, acquisition of company's properties had not been consummated.

Description of City Bonds:

City of Indianapolis (Ind.) gas plant revenue 4½s due 1938-67, incl.:

Authorized—$8,000,000; to be outstanding, $8,000,000.

Dated—June 1, 1935; due each June 1, 1938-67, incl.

Interest—J&D 1, at Halsey, Stuart & Co., Chicago or New York, Union Trust Co., Indianapolis, or Cleveland (O.) Trust Co.

Denomination—Coupon, $1,000; registerable as to principal.

Security—These bonds constitute valid and binding obligations of the city and are secured by a charge upon all of the income and revenues of all the gas utility system now or hereafter owned and or operated by said city and payable solely and exclusively out of such income and revenues.

Special Fund—The city further covenants that it will cause to be deposited, in one or more Indianapolis banks, in a special account under such condition as that the monies

cannot be withdrawn from such account or accounts except for payment of interest on and principal of these bonds, on the fifteenth day of each month during the operation by the city of said gas system out of the revenues derived from the operation, a sum equal to one-twelfth of the annual amount due and payable for principal and interest on these bonds, and the city agrees that there will be credited in this manner to such bond and interest fund not less than $360,000 annually in the years 1936 and 1937; $450,000 annually in the years 1938 to 1940, incl.; $500,000 annually in the years 1941 to 1967, incl.

Offered ($8,000,000)—In July, 1935, by Halsey, Stuart & Co., and Otis & Co., New York.

Preferred and Common Stock Called for Redemption: See details below.

City Utility District: During the 1929 session of the Indiana Legislature a law was enacted creating a utility district for the City of Indianapolis. This district will have a bonding power up to 2% of the assessed valuation of the property in the utility district and will have the power either to operate or lease the utility property. The district may also issue revenue bonds in the name of the city which shall not constitute an indebtedness of the city or district. Its affairs will be administered by a Board of Trustees who are empowered to appoint a Board of Directors for the management of the gas properties. Under the interpretations of the courts the act of transfer will be one in which the present corporation will turn the trusteeship over to the City Utility District which will become the continuing trustee for the property. Trustees (Utility District): G. J. Marott, A. D. Hitz, W. J. Mooney. Directors (Utility District): H. L. Dithmer, Brodehurst Elsey, E. A. Kahn, Guy A. Wainright.

Management: Officers: G. A. Efroymson, Pres.; C. L. Kirk, Vice-Pres. and Gen. Mgr.; J. I. Dissette, Treas.; F. G. Rastenburg, Sec. Directors: H. H. Hornbrook, E. H. Evans, J. I. Dissette, G. A. Efroymson, W. H. Insley, Franklin Vonnegut, W. B. Harding, R. H. Sullivan, C. L. Kirk, Indianapolis. Annual Meeting: Second Monday in January. Office: Majestic Bldg., Indianapolis, Ind.

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Bonded Debt: 1. Indianapolis Gas Co. first consolidated gold 5s, due 1952:

Authorized—$7,500,000; outstanding, $6,863,000.

Dated—Oct. 1, 1902; due Oct., 1952.

Interest Paid—A&O 1, at Chase National Bank, New York. Interest provided for under terms of lease by Citizens Gas Co. of Indianapolis.

Trustees—Chase National Bank, New York, and Ferdinand Winter, Indianapolis.

Registrar—Central Hanover Bank & Trust Co., New York.

Callable—Bonds are not subject to call.

Denomination—Coupon, $1,000, registerable as to principal.

Security—First mortgage on all property of the Indianapolis Gas Co.

Additional Bonds—May be issued for improvements at 90% of cost.

Legal—For savings banks in New Hampshire.

Tax Status—Company does not pay normal income tax.

Rating, Baa

2. Citizens Gas Co. of Indianapolis first and refunding (now first) gold 5s, due 1942:

Authorized—$10,000,000; outstanding, $2,858,500; held in sinking fund, $1,279,500.

Dated—July 1, 1912; due July 1, 1942. In the event that before Aug. 30, 1930, either the franchise of the company granted on Aug. 25, 1905, or any franchise substituted therefor and not extending beyond the date of maturity shall not be duly extended for a period extending beyond 1942 then, unless necessity for securing extension in order to enable the company to continue to conduct its business, shall in opinion of the Trustee have been obviated to its satisfaction all the bonds shall become due and payable and the bonds shall be deemed to be matured debts of the company.

Interest Paid—J&J 1, at Bankers Trust Co., New York.

Trustees—Bankers Trust Co., New York, and Union Trust Co., Indianapolis.

Denomination—Coupon, $500 and $1,000; registerable as to principal.

Callable—At 108 on any interest date on 30 days' notice. Bonds may also be purchased for sinking fund (which see).

Sinking Fund—¼ of 1% in 1915 and 1916; ½ of 1% thereafter to purchase bonds at not exceeding call price. Bonds so purchased or redeemed to be held alive and draw interest for sinking fund.

Security—First mortgage on all property of Citizens Gas Co. of Indianapolis.

Additional Bonds—May be issued for 80% of cost of improvements, etc., only when net earnings are twice interest charges on all bonds.

Legal—For savings banks in New Hampshire.

Quoted—In New York.

Tax Status—Company does not pay normal income tax.

Offered—($400,000) at 101 in July, 1912, by Payne, Bush & Co., Union Trust Co., Otto F. Haueisen & Co., O. M. Ragsdale & Co., and Newton Todd, Indianapolis; ($750,000) at 88½ in June, 1922, by Hemphill, Noyes & Co., and Huntington, Jackson Co., New York.

Price Range:	1934	1933	1932	1931	Rating, Baa 1930	1929
High	90½	80	93	104½	103½	104
Low	bid	bid	78	92	99½	97

Note: The entire outstanding common stock was called for redemption July 1, 1935 at $31.25 per share, plus dividends at the rate of 10% up to July 1, 1935 at the company's office. Such retirement is to be made through funds provided by the City of Indianapolis, as a step in the taking over of the company's property pursuant to the provisions of the Articles of Incorporation (see details above). As of July 23, 1935, over 75% of common stock was retired.

Liquidating Dividend Rescinded: Action of directors with reference to payment of a liquidating dividend of $5.00 per share on May 15, 1929 and the payment of a cash dividend of 1¼% on said stock on the same day, was rescinded, inasmuch as several stockholders brought suit in the United States District Court at Indianapolis, enjoining the directors from making the partial payment ordered to be made May 15. Trial was held in the United States District Court

May 5, 1930. Decision rendered May 29, 1930 upheld previous ruling that Citizens of Indianapolis are the real owners and beneficiaries of this company. Unless further litigation is brought forth it will fall the duty of the Gas Co. trustees and directors to carry out the refunding of common stock certificates by part payment.

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1235 PLAINTIFFS' EXHIBIT 111A.

July 19, 1935.

Mr. William J. Yule, Secretary,
The Indianapolis Gas Company
1004 Majestic Building,
Indianapolis, Indiana.

Indianapolis Gas Company Indenture dated
October 1, 1902

Dear Sir:

We enclose a letter dated July 17, 1935 which we have received from Messrs. Scudder, Stevens & Clark, regarding the lease to Citizens Gas Company of the property subject to the lien of the above mortgage and the City of Indianapolis taking over the assets of Citizens Gas Company. Kindly furnish Messrs. Scudder, Stevens & Clark with the information desired and forward to the undersigned a copy of your reply for our information.

Yours very truly,
Paul C. Beardslee,
Assistant Trust Officer.

656-HL
Encl.

1236 PLAINTIFFS' EXHIBIT 111B.

Scudder, Stevens & Clark

10 Post Office Square,
Boston

July 17, 1935.

Chase National Bank,
New York City.

Attention: Corporate Trust Dept.

Dear Sirs:

Would you kindly inform me as to whether the Cities Utilities District of Indianapolis, which has acquired the assets of the Citizens Gas Company, has legally assumed the lease of the Indianapolis Gas Company? I am requesting this information of you inasmuch as I believe that you would have official notice as the trustee for the Indianapolis Gas First Mortgage 5's of 1952.

Kindly direct your reply to the attention of the undersigned.

Very truly yours,
(signed) Allan T. Burros
A. T. Burros.

1237 PLAINTIFFS' EXHIBIT 111-C.

1004 Majestic Building,
Indianapolis, Indiana.

August 17, 1935.

Scudder, Stevens & Clark,
10 Post Office Square,
Boston, Massachusetts.

Attention: Allan T. Buros

Gentlemen:

Your letter of July 17th addressed to The Chase National Bank has been referred to us. We have delayed our reply in the expectation that we could give you a more definite answer to your question that we are at present able to do.

The City of Indianapolis through its Utilities District is arranging to take over the operation of the gas properties in Indianapolis through the exercise of its established right

to acquire the property of the Citizens Gas Company who hold a ninety-nine year lease for our plant and system. Inasmuch as the Utilities District has provided several million dollars for the purpose of perfecting its title to the property of the Citizens Gas Company and the greater portion of the common stock of the Citizens Gas Company has been acquired through this fund, we presume that the City has an equitable though not a legal title to the property at the present time. Until the City has a legal title it could not legally assume the lease, but we are advised that this should follow as a matter of course when the other property is transferred.

Yours very truly,
The Indianapolis Gas Company
By
Secretary.

Copy to The Chase National Bank.

1238 PLAINTIFFS' EXHIBIT 112.

September 6, 1935.

Mr. William J. Yule, Secretary,
The Indianapolis Gas Company,
1004 Majestic Building,
Indianapolis, Indiana.

The Indianapolis Gas Company Deed of Trust dated October 1, 1902

Dear Sir:

We enclose for your attention, letter dated September 4, 1935 received from Mr. Leonard S. Hole of Russell, Berg & Company, Boston, requesting information as to the present status of the bonds issued under the above mortgage and the lease of your company's properties to Citizens Gas Company. Will you please communicate direct with Mr. Hole in reply to his inquiries and forward a copy of your reply to the undersigned.

Yours very truly,
Paul C. Beardslee
Assistant Trust Officer.

Enclosure
656-RLL

1239 PLAINTIFFS' EXHIBIT 112A.

Russell, Berg & Company
75 Federal Street
Boston

September 4, 1935.

Chase National Bank
Corporate Trust Department
New York City.

Gentlemen:

We are in hopes that your bank as Trustee of the Indianapolis Gas Company 5s of 1952 will be above to furnish us with an accurate statement of the present status of the Indianapolis Gas Company bonds, since the properties of the Citizens Gas Company of Indianapolis were acquired by the City of Indianapolis. Will the servicing of these bonds constitute an operating charge against the gas properties prior in lien to the Indianapolis Gas bonds recently sold to the public? Has the City of Indianapolis considered the formal assumption of these bonds, in which case I presume they will acquire the tax-free status of municipal bonds? From what source will the Indianapolis Gas Company bonds be paid at maturity? What is the status of the 99-Year lease from the Indianapolis Gas Company to the Citizens Gas Company of Indianapolis?

Any information you can give us on this matter will be greatly appreciated as the services do not seem to contain very accurate information on the subject.

Very truly yours,
Russell, Berg & Company
By (signed) Leonard S. Hole.

LSH:MA

1240 **PLAINTIFFS' EXHIBIT 113.**

September 19, 1935.

Mr. William G. Irwin, President,
Indianapolis Gas Company
Indianapolis
Indiana.

Indianapolis Gas Company First Consolidated
5% Bonds due October 1, 1952

Dear Sir:

We are receiving numerous inquiries from holders of bonds of the above described issue with respect to newspaper reports that the City Utilities District in attempting to abrogate the lease made by your Company with the Citizens Gas Company in 1913. Bondholders state that such action would materially affect the security of their bonds and we would be obliged if you will be good enough to write us such information as we can pass on to bondholders with respect to this situation.

We will also be obliged if you will forward us a copy of the above mentioned lease and also advise us what action is being taken to protect the interests of the bondholders.

Thanking you in advance for your prompt attention to this letter, we are

Very truly yours,
Paul C. Beardslee
Assistant Trust Officer.

PSB-z

1241 PLAINTIFFS' EXHIBIT 114.

Copy of Telegram

Mr. William G. Irwin President
Indianapolis Gas Company
Indiana Indiana

October 1, 1935.

We have received no response to our wire of yesterday to George Hill Auditor Citizens Gas with respect to interest due today on Indianapolis Gas Company First Mortgage Bonds please wire whether or not funds will be forthcoming Stop We also await with interest reply to our letter to you of September nineteenth.

P. C. Beardslee—Corporate Trust.

1242 PLAINTIFFS' EXHIBIT 115.

October 3, 1935.

Mr. W. Y. Yule, Secretary,
Indianapolis Gas Company,
Indianapolis,
Indiana.

Indianapolis Gas Company First Consolidated
5% Bonds due October 1, 1952

Dear Sir:

We enclose herewith a copy of our letter of September 19 to Mr. William G. Irwin, President of your Company, to which we have received no reply. We also wired him on September 1 with respect thereto.

We are continually receiving inquiries with respect to the above described issue of bonds. The thought occurred to us that possibly Mr. Irwin is out of the city. We are, therefore, addressing a letter to you, hoping you can supply us with the information requested.

Thanking you for your kind cooperation, we are

Very truly yours,

PCB:z Paul C. Beardslee
Enc. *Assistant Trust Officer.*

1243 PLAINTIFFS' EXHIBIT 116.

Indianapolis, Indiana
November 7, 1935.

The Chase National Bank,
11 Broad Street
New York, N. Y.

In re: The Indianapolis Gas Company Deed of Trust Dated October 1, 1902

Gentlemen:

Pursuant to a resolution adopted by the Board of Directors of The Indianapolis Gas Company, the following facts relative to the property and business of the Company are sent to you as Trustee of our First Mortgage 5% Bonds.

Assuming to act under legislative authority and pursuant to provisions of the city franchise and articles of incorporation of the Citizens Gas Company of Indianapolis, the City of Indianapolis has taken over the property of that Company, and is now operating the same by its Board of Directors for Utilities, and is assuming to enter upon the discharge of the obligations of the Citizens Gas Company to its bondholders and stockholders. The City of Indianapolis, however, has refused to accept an assignment of the ninety-nine year lease, executed on September 30, 1913, by this Company to the Citizens Gas Company, by which all the property of this Company was leased to the Citizens Gas Company.

Under the circumstances, this Company though action of its Board of Directors, entered into a stipulation with the said City of Indianapolis, by which it was provided that the City, through its Board of Directors for Utilities, will continue the operation of the property of this Company for a period of six months pending negotiations, and that they will pay an amount for rental for said period equal to the amount of rental payable according to the terms of the lease. Preliminary meetings between representatives of this Company and representatives of the City have resulted in nothing definite.

Our Board of Directors is attempting to safeguard the legal position of both the bondholders and stockholders of the Company and have retained Hon. Newton D. Baker of

Cleveland, Ohio, as additional counsel. The Indianapolis Gas Company will be pleased to receive any suggestions you desire to make in the premises.

Very truly yours,
The Indianapolis Gas Company
By (signed) W. Y. Yule,
Secretary.

1244 PLAINTIFFS' EXHIBIT 117.

December 2, 1935.

Mr. W. Y. Yule, Secretary
The Indianapolis Gas Company
1004 Majestic Building
Indianapolis, Indiana.

The Indianapolis Gas Company Deed of Trust
dated October 1, 1902.

Dear Mr. Yule:

We wish to refer to your letter of November 7 in which you advise that preliminary meetings between representatives of the Company and representatives of The Indianapolis Utilities District are being held with respect to the assumption by the Utilities District of the lease of the Indianapolis Gas Company properties to the Citizens Gas Company.

We will appreciate it if you will keep us fully informed of the progress of the negotiations so that we may be in a position to take such action as may seem appropriate to protect the interest of the bondholders.

Very truly yours,
Paul C. Beardslee,
Assistant Trust Officer.

PSB-z

1245 PLAINTIFFS' EXHIBIT 118.

February 26, 1936.

Mr. W. Y. Yule, Secretary,
The Indianapolis Gas Company,
1004 Majestic Building,
Indianapolis, Indiana.

Re: The Indianapolis Gas Company Deed of Trust dated October 1, 1902

Dear Sir:

In your letter of November 7, 1935, you advised that preliminary meetings between representatives of your company and representatives of the Indianapolis Utilities District were being held with respect to the assumption by Indianapolis District of the lease of the Indianapolis Gas Company's properties to the Citizens Gas Company.

As we have recently received several inquiries from bondholders, we would appreciate your informing us of any recent developments in the matter.

Yours very truly,
Paul C. Beardslee,
645-MVB *Assistant Trust Officer.*

1246 PLAINTIFFS' EXHIBIT 119.

1004 Majestic Building
Indianapolis, Indiana,
March 2, 1936.

The Chase National Bank,
Trust Department,
11 Broad Street,
New York, N. Y.

Attention: Mr. P. C. Beardslee, Ass't Trust Officer.

Gentlemen:

Referring to your letter of February 26th in respect to any recent developments in the negotiation between this Company and the City affecting our lease, we wish to say that the Company expects to have a representative in New York early next week who will advise you fully regarding this matter.

Yours very truly,
The Indianapolis Gas Company
By Wm. J. Yule,
Wm. J. Yule, *Secretary.*

1247 **PLAINTIFFS' EXHIBIT 120.**

Citizens Gas and Coke Utility—Successor to
Citizens Gas Company
Majestic Building

Address all communications
to the company

Telephone
Riley 5421

Indianapolis, Indiana
November 1, 1935.

Chase National Bank, Trust Revenue Division,
11 Broad Street,
New York, N. Y.

Gentlemen:

We enclose herewith Indiana National Bank draft number 90195 in amount $421.44 drawn to your order. This remittance is in payment of your invoice number 33656 covering commission for paying Indianapolis Gas Company Bond Coupons due October 1, 1935, in like amount.

For your convenience we attach stub of your invoice. We trust same will be found correct.

Very truly yours,
Citizens Gas and Coke Utility
Acting Auditor.

Received Payment
Nov 4 1935
The Chase National Bank
of the City of New York
By .....

11G13
Enclosures.

Approved for Filing
By .....

1248 PLAINTIFFS' EXHIBIT 120-A.

Folder Copy

Trust Revenue Division
No 33656

The Chase National Bank

October 2, 1935.

Commission for paying coupons due October 1, 1935 detached from Indianapolis Gas Company 5% First Consolidated Mortgage Bonds.
¼ of 1% on $168,575. $421.44

Auditor,
Citizens Gas Company,
Majestic Building,
Indianapolis, Indiana.

Prepared	Checked	Division Head	Bill Posted	Remittance Posted
NS	RR		NS	

Date Paid
11-4-35

Approved

Trust N 19 1-35

1249 PLAINTIFFS' EXHIBIT 121.

1004 Majestic Building,
Indianapolis, Indiana,
March 26, 1936.

The Chase National Bank,
Trust Department,
11 Broad Street,
New York, N. Y.

Attention: Henry R. Harrison, Assistant Trust Officer.

Gentlemen:

Referring to your letter of March 19th in respect to the semi-annual interest due April 1, 1936, on the First Consolidated Mortgage 5% Bonds of this Company, we enclose herewith our check No. 2679 on The Indiana National Bank of this City payable to your order in the amount of $168,575. This covers the interest due on 6743 bonds. We have not included interest on 120 bonds which are held in our Treasury and 18 bonds which remain in the Treasury of the Citizens Gas & Coke Utility successor to the Citizens Gas Co. of Indianapolis. Coupons from these bonds will be forwarded to you in due course.

Yours very truly,
The Indianapolis Gas Company,
By Wm. J. Yule (signed)
Wm. J. Yule, Secretary.

PLAINTIFFS' EXHIBIT 122

1250

Additions and Betterments

to

Plant and System of The Indianapolis Gas Company

Reported by

Citizens Gas and Coke Utility

September 9, 1935 to Dec. 31, 1938

Period	Total	Plant	Pratt St.	Mains	Services	Meters 1st Inst.
July 1, 1935 to Dec. 31, 1935	$ 18,357.95	$ None	$ None	$ 14,919.79	$ 3,044.55	$ 393.61
Less July 1, 1935 to Sept. 8, 1935	12,698.18	None	None	11,158.28	1,417.40	122.50
Sept. 9, 1935 to Dec. 31, 1935	$ 5,659.77	$ None	$ None	$ 3,761.51	$ 1,627.15	$ 271.11
Jan. 1, 1936 to Dec. 31, 1936	28,776.91	*167.58*	1,734.66	23,608.97	2,213.24	1,387.62
Jan. 1, 1937 to Dec. 31, 1937	11,565.30	None	194.33	9,098.44	1,469.91	802.62
Jan. 1, 1938 to June 30, 1938	16,736.51	None	1,162.77	7,044,32	4,422.05	4,107.37
Sept 9, 1935 to June 30, 1938	$ 62,738.49	$ *167.58*	$ 3,091.76	$ 43,513.24	$ 9,732.35	$ 6,568.72
July 1, 1938 to Dec. 31, 1938	32, 597.98	None	None	23,859.21	6,736.02	2,002.75
Sept. 9, 1935 to Dec. 31, 1938	$ 95,336.47	$	$ 3,091.76	$ 67,372.45	$ 16,468.37	$ 8,571.47

1251 PLAINTIFFS' EXHIBIT 123-A.

Indianapolis, Indiana,
May 12, 1936.

Minutes of a Called Meeting of the Board of Directors
of
The Indianapolis Gas Company

A called meeting of the Board of Directors of The Indianapolis Gas Company was held on Tuesday, May 12, 1936, at 9:45 o'clock A. M.

Present: Messrs. Appel, Brown, Ewbank, Higgins, Irwin, Reilly and Smith.

Absent: None.

The meeting was called to order by the President, Mr. Irwin, and consideration was given to a letter received from Messrs. Thompson, Rabb & Stevenson, Counsel for the Department of Utilities of the City of Indianapolis, which letter is as follows.

• • • • • •

"(Here appears a copy of the letter dated April 8, 1936 from Thompson, Rabb & Stevenson to The Indianapolis Gas Company, a copy of which letter is in evidence as City's Stipulation Exhibit 80)"

(Inserted pursuant to stipulation filed November 22, 1939.)

On motion of Mr. Higgins, seconded by Mr. Ewbank, the following resolution was unanimously adopted:

Resolved, That the Secretary of the Company be, and he is hereby directed to acknowledge letter addressed to this Company under date of April 8, 1936, by Messrs. Thompson, Rabb & Stevenson, Counsel for the Department of Utilities of the City of Indianapolis, by transmitting to them the following letter which is hereby approved and authorized by this Board.

• • • • • •

"(Here appears a copy of the letter dated May 12, 1936 from The Indianapolis Gas Company to Thompson, Rabb & Stevenson, a copy of which letter is in evidence as City's Stipulation Exhibit 81.)"

(Inserted pursuant to stipulation filed November 22, 1939.)

1252 PLAINTIFFS' EXHIBIT 123-B

Consideration was given to the following letter received from Messrs. Baker, Hostetler, Sidlo and Patterson under date of May 4, 1936.

• • • • • •

"(Here appears a copy of a letter dated May 4, 1936 from Baker, Hostetler, Sidlo & Patterson to The Indianapolis Gas Company.)"
(Inserted pursuant to stipulation filed November 22, 1939.)

On Motion of Mr. Higgins, seconded by Mr. Brown,

1253 PLAINTIFFS' EXHIBIT 123-C

it was unanimously voted to direct the Secretary to send the following letter to Messrs. Baker, Hostetler, Sidlo and Patterson.

• • • • • •

"(Here appears a copy of a letter dated May 12, 1936 from The Indianapolis Gas Company to Baker, Hostetler, Sidlo & Patterson.)"
(Inserted pursuant to stipulation filed November 22, 1939.)

There being no further business, on motion duly seconded, the meeting adjourned.

William E. Morin,
Chairman.

Wm. J. Yule,
Secretary.

PLAINTIFFS' EXHIBIT 124.

• • • • • •

"(This exhibit is identical with Plaintiffs' Exhibit 93.)"
(Inserted pursuant to stipulation filed November 22, 1939.)

1254 PLAINTIFFS' EXHIBIT 125.

Massachusetts Mutual Life Insurance Company
Springfield, Massachusetts

Re: Indianapolis Gas Company Mortgage
Dated October 1, 1902

The Chase National Bank of the City of New York,
as Trustee under The Indianapolis Gas Company
Mortgage dated October 1, 1902
11 Broad Street
New York, New York

Dear Sirs:

The undersigned are the owners and holders of $265,000 principal amount of Indianapolis Gas Company First and Consolidated Mortgage Five Per Cent Gold Bonds due October 1, 1952 and outstanding under the above described Mortgage.

It is our understanding that a default in the payment of interest on the above described bonds is threatened by the reason of a refusal of the City of Indianapolis through the medium of the Board of Directors for Utilities of the City of Indianapolis to recognize the validity of the lease made by the Indianapolis Gas Company to Citizens Gas Company of Indianapolis on September 30, 1913, which provided for a lease of all of the property of Indianapolis Gas Company to Citizens Gas Company of Indianapolis, in consideration, among other things, of the covenant of Citizens Gas Company of Indianapolis to pay to the Trustee under the above described Mortgage the interest on all of the above described bonds outstanding thereunder and to refund said bonds at maturity or provide for their extension.

In view of this threatened default, we hereby request you, as Trustee under the said Mortgage, to request the opinion of the firm of Messrs. Baker, Hostetler, Sidlo & Patterson in Cleveland, Ohio, on the following points:

1. Whether the lease above referred to belongs in law and equity to the body of the trust created by the above described Mortgage and forms part of the security for the above described bonds.

2. Whether you, as Trustee, upon our request, have the right under the said Mortgage, prior to a default in

payment of interest on said bonds, to proceed, as plaintiff in a civil suit, either in law or equity, against Citizens Gas Company of Indianapolis, Indianapolis Gas Company, the City of Indianapolis, the Board of Directors for Utilities of the City of Indianapolis, and any other appropriate parties to such a suit, seeking an adjudication of the validity of the said lease and the establishment of the same as a part of the body of the trust created by said Mortgage for the security and protection of said bonds.

3. Whether the reasonable compensation and expense of your counsel and attorneys in any such suit
1255 would be a proper and legal charge against the body of the trust created by said Mortgage.

4. Whether such a suit could be maintained in the United States District Court for the District of Indiana.

We further request you, if the opinion of Messrs. Baker, Hostetler, Sidlo & Patterson to all the questions listed above is in the affirmative, to institute a suit of the kind above referred to in the United States District Court for the District of Indiana through Messrs. Baker, Hostetler, Sidlo & Patterson, and such other local attorneys in Indianapolis as may be mutually satisfactory to you and said firm, and upon such other conditions as you may reasonably deem desirable, and to take such other appropriate legal or equitable remedies as you being advised by said firm shall determine to be most effectual to protect and enforce your rights and those of the holders of said bonds.

Date: April 16, 1936.

Very truly yours,
Massachusetts Mutual Life Insurance Company
By: H. S. Payson Rowe
Manager.

The following numbers are the bonds held by us:

548, 781/2, 1001, 1007, 1038, 1151, 1171, 1385, 1401/2 1451, 1618, 2043/47, 2150/52, 2317, 2409, 2486, 2620/1, 2726/7, 2780/83, 2827, 2955, 3012/3, 3019/29, 3076, 3113/15, 3130/1, 3473/4, 3861, 4039, 4097, 4276, 4301/3, 4399, 4521, 4552/3, 4557, 4607, 4691/2, 4725/6, 4788, 4830, 4899/900, 4906/7, 4935, 4976, 5153, 5172, 5188, 5281, 5477/80, 5482/4, 5544/5, 5559, 5570/73, 5607/8, 6285/300, 6310/21, 6324/26, 6385/6415, 6466/6484, 6545/59, 6676/97, 6701/34, 6793/805.

1256 PLAINTIFFS' EXHIBIT 126.

New England Mutual Life Insurance Company
Eighty-Seven Milk Street
Boston, Massachusetts

Treasurer
Wallace D. Dexter, Jr.

Assistant Treasurers
Dwight Foster
William A. Kugler

Re: Indianapolis Gas Company Mortgage
Dated October 1, 1902

The Chase National Bank of the City of New York,
as Trustee under The Indianapolis Gas Company
Mortgage dated October 1, 1902

11 Broad Street
New York, New York

Dear Sirs:

The undersigned are the owners and holders of $150,000 principal amount of Indianapolis Gas Company First and Consolidated Mortgage Five Per Cent Gold Bonds due October 1, 1952 and outstanding under the above described Mortgage.

* * * * * *

"(Here follow 7 paragraphs which are identical with the last 7 paragraphs in Plaintiffs' Exhibit 125.)"
(Inserted pursuant to stipulation filed November 22, 1939.)

1257 Date: April 17, 1936.

Very truly yours,
New England Mutual Life Insurance Company
By: J. A. Barbey
Vice-President.

Attest:
Morris P. Capen
Secretary.

The following numbers are the bonds held by us:
1008/20, 1136/50, 1299/1314, 1317/22, 1323/36, 1445/50, 1551/4, 2487, 2875/8, 3205/17, 3782/9, 4383/81, 4439, 4485/90, 4873/6, 4917, 5178/87, 6255/79.

1258-1271 * * * * * *

(PLAINTIFFS' EXHIBITS 127, 128, 128A, 128B, 129 and 130 omitted pursuant to stipulation filed Nov. 22, 1939.)

1272 PLAINTIFFS' EXHIBIT 131.

Citizens Gas and Coke Utility, Successor to Citizens Gas Company
Majestic Building

Address all communications
to the company

Telephone
Riley 5421

Registered Mail
Oct. 23, 1935
14

Indianapolis, Indiana
October 21, 1935

The Chase National Bank
11 Broad Street
New York, N. Y.

Gentlemen:

We are inclosing eighteen (18) own coupons, maturing October 1, 1935, which were detached from Indianapolis Gas Company First Consolidated Mortgage Bonds.

Yours very truly,
Citizens Gas and Coke Utility
F. G. Rastenburg,
Acting Assistant Secretary.

T
450—

1273 PLAINTIFFS' EXHIBIT 132.

Registered Mail
May 4 1936
18

1004 Majestic Building,
Indianapolis, Indiana,
May 1, 1936.

The Chase National Bank,
Trust Department,
11 Broad Street,
New York, N. Y.

Gentlemen:

We enclose 138 Coupons No. 67, April 1, 1936 clipped from the First Consolidated Mortgage Five Per Cent Bonds of this Company. These are treasury coupons which have been cancelled and are sent to you in order that you may complete the record of the April 1, 1936, bond interest.

Yours very truly,
The Indianapolis Gas Company
By Wm. J. Yule
Wm J. Yule
Secretary.

Acknowledged
By WJY

1277 PLAINTIFFS' EXHIBIT 139.

Stipulation of Facts in the Todd Case.

This stipulation is copied on pages 186-248, inclusive, of the Record in the United States Circuit Court of Appeals for the Seventh Circuit in the case of Todd *vs.* Citizens Gas Company of Indianapolis, *et al.*, Plaintiffs' Exhibit 2 for Identification, which original exhibit is included in this transcript by order of the Court.

(Excerpts therefrom printed pursuant to Stipulation filed Nov. 22, 1939, are as follows:)

PLAINTIFFS' EXHIBIT 139.

IN THE DISTRICT COURT OF THE UNITED STATES.

For the Southern District of Indiana

Indianapolis Division.

Newton Todd,
Plaintiff,
vs.
Citizens Gas Company, et al.,
Defendants.

In Equity
No. 1191.

STIPULATION OF FACTS.

The parties hereto agree that for the purpose of the trial and final hearing of this case, the following facts, in addition to those admitted in the answers, are true. All parties reserve the right to object to the introduction of any part of this stipulation on any ground other than that the facts therein contained have not been established by the best evidence.

* * * * * *

(2) (d). Plaintiff, Newton Todd, brought and has maintained this suit on behalf of himself and other holders of certificates issued by said Board of Trustees who may wish to join in this suit and contribute to the expense thereof, and plaintiff, Newton Todd, in this suit, is asserting what he claims are corporate rights and immunities of the Citizens Gas Company of Indianapolis. At the time of the commencement of this action and now, there were and are approximately 1400 persons who were the owners and holders of such Certificates issued by said Board of Trustees, and in whose name stock certificates were issued by Citizens Gas Company as aforesaid. Plaintiff, Newton Todd, asserts in this suit that rights guaranteed by the Constitution of the United States to Citizens Gas Company and to him and other holders of certificates issued by said Board of Trustees, are being violated by acts of the defendants, under color of certain statutes of the State of Indiana, and seek to enjoin such acts and asks for a decree quieting title of the Citizens Gas Company to certain real and personal property situated within the Southern District of Indiana. The claims

of the plaintiff, Newton Todd, with respect to the violation of his constitutional rights and those of other holders of Certificates issued by said Board of Trustees and of the Citizens Gas Company are denied by the defendants.

* * * * * *

4. Defendant Citizens Gas Company of Indianapolis, during its corporate existence, has acquired title to and is now the owner of certain real estate, together with the buildings, fixtures, machinery and equipment used and useful for the manufacture, storage and distribution of artificial gas and the by-products thereof, together with pipe lines, mains and other equipment necessary for distributing artificial gas in the City of Indianapolis, and also a manufacturing plant and ovens for the production, manufacture and sale of commercial coke. Said real estate is situated in the City of Indianapolis, Marion County, State of Indiana, and within the jurisdiction of the District Court of the United States for the Southern District of Indiana, Indianapolis Division, and said property, so situated, is correctly described in Paragraph IV of the Bill of Complaint.

Defendant Company owns all of the capital stock of Milburn By-Products Coal Company, a corporation, which has acquired title to and now owns certain leasehold rights in coal lands located in the Counties of Raleigh and Fayette, in the State of West Virginia, used and useful for the purpose of mining and producing therefrom coal for use in the operation of the business of defendant Company which leaseholds are those referred to in Paragraph VI of the bill of complaint. Defendant Company also is the owner of a certain leasehold estate in and to the property of the Indianapolis Gas Company, as created by a certain contract of lease for ninety-nine years dated September 30, 1913, and recorded in Miscellaneous Record 78, pages 257-278, inclusive, of the records in the Recorder's office of Marion County, State of Indiana.

Said Indianapolis Gas Company was organized as an Indiana corporation for the purpose of furnishing artificial gas in the City of Indianapolis on the 10th day of January, 1881, and continued actively in business, until the execution of the lease aforesaid, under a franchise granted to its predecessor in title by ordinance of the City of Indianapolis on the 3rd day of April, 1876. On

the 7th day of October, 1913, said Indianapolis Gas Company surrendered said Franchise in accordance with the provisions of the Shively-Spencer Utility Commission Act described in Stipulation 10 hereof, and in lieu thereof accepted an Indeterminate Permit. Said Indianapolis Gas Company now owns, subject to said lease, the legal title in 518.10 miles of gas mains and pipes in the central portion of the city, and said Citizens Gas Company now owns 328.85 miles of gas mains and pipes within such city.

5. This suit is not a collusive one to confer jurisdiction on a court of the United States of a suit of which it would otherwise not have cognizance.

6. On the 25th day of August, 1905, the Common Council of the City of Indianapolis passed an ordinance ratifying, confirming and approving a certain Franchise Contract executed on the 25th day of August, 1905 by and between the Board of Public Works of said City, and Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, contracting for themselves and their associates and assigns, which said ordinance was approved by the Mayor of said City and became effective on the 30th day of August, 1905. Said Franchise Contract and Ordinance ratifying the same are correctly set out in Paragraph VI of the Bill of Complaint.

* * * * * *

8. On the 24th day of May, 1906, the said Alfred F. Potts, Frank D. Stalnaker, and Lorenz Schmidt, who were the parties named in the Franchise set out in Stipulation 6 hereof, assigned and transferred to the defendant, Citizens Gas Company of Indianapolis, all of their rights in the aforesaid Franchise Contract, which assignment was accepted by the defendant company, and said defendant company continuously thereafter operated under said Franchise until it surrendered the same as hereinafter stated, and said defendant has had no other franchise granted by the City of Indianapolis.

* * * * * *

Said company is to be formed on the plans set forth in said franchise for the protection of the public interests, with authority to pay its stockholders dividends of 10% per annum payable semi-annually.

(9. (a)) Said company is to accept and operate under said franchise, and may acquire, through the city or by

purchase, the pipe lines and other property lately operated by the Consumers Gas Trust Company in said City.

* * * * * *

(d) Some subscriptions were also received in consideration of making extensions of the gas mains to reach the property of certain subscribers, which subscriptions were accepted on condition that enough subscriptions be obtained to warrant the proposed extensions. Such subscriptions were taken on a form which is as follows:

"Subscription to Stock of Citizens Gas Company of Indianapolis. Temporary Office 1201 Law Building. New Phone 361.

Trustees	Directors
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....

I hereby subscribe for and agree to take ..... shares (par value $25.00 each) of the capital stock of the Citizens Gas Company of Indianapolis, and to pay for the same at the rate of $25.00 per share to the Union Trust Company of Indianapolis, Trustee for said Citizens Gas Company as follows: 10 per cent on demand, and 20 per cent on the 10th day of each month thereafter (except that the last payment shall be 30 per cent) until the full amount of said subscription shall have been paid.

All money paid on this subscription shall be held by the Union Trust Company, Trustee, until the first installment of 10 per cent shall have been paid on not less than $500,000 of subscriptions; but if for any reason such installment shall not be paid by October 31, 1906, then the full amount of money paid on this subscription shall be returned to subscriber by said Union Trust Company Trustee.

"I hereby agree that the stock above subscribed shall be issued to a board of five trustees, named in the articles of incorporation of said company, in perpetual and irrevocable trust, in the manner and according to the terms and conditions of the articles of incorporation under which said company is formed; and that when the indebt-

edness of said company is fully paid, and the subscribers shall have received an amount equal to the amount by them subscribed and paid, with dividends equal to 10% per annum, then the trustees and directors shall execute proper instruments transferring all the property of said company of every kind and description, to the city of Indianapolis: and that thereupon all my interest in said company and all its property shall thereby be cancelled, released and extinguished."

Name .....

Address .....

Date.....

.....

Oct. 30, 1907

Pay no money to solicitors."

* * * * * *

13. At the Seventy-sixth General Assembly of the State of Indiana, held during the early part of the year 1929, there was adopted a bill which was published as Chapter 78, pages 268-271, Acts 1929, the title of which is as follows:

"A Bill for an Act relating to corporations organized before May 1, 1913, for the purpose of furnishing gas for fuel or illuminating purposes or electric lights or water, or light, heat and power to any town or city or the citizens or inhabitants thereof, and the articles of incorporation of which provide for the transfer of the property of such corporations to such town or city, legalizing certain provisions in the articles of incorporation thereof and authorizing the conveyance of the property of such corporations to such towns or cities and authorizing such towns or cities to accept such conveyance, repealing all laws in conflict therewith and declaring an emergency."

Said bill prepared by the legal department and special counsel of the City of Indianapolis employed for the purpose of bringing about a transfer of the plant and property of the defendant, Citizens Gas Company of Indianapolis, to the City of Indianapolis; said bill was introduced in the House of Representatives of the General Assembly by members residing in the City of Indianapolis and elected from Marion County and was passed in the exact form prepared and submitted by said counsel for the defendant City without change or amendment of any kind

or character. Said bill contained an emergency clause providing for its taking effect immediately upon its passage, was approved on the 11th day of March, 1929, and, so far as it was valid, became a law on said day.

14. On the 20th day of March, 1929, the defendant City of Indianapolis, acting only by and through its Board of Public Works, but without any action thereon by its Common Council and without an election thereon by the qualified voters of said City, passed a resolution asserting a right to acquire the plant and property of the defendant, Citizens Gas Company of Indianapolis. Said resolution is correctly set out in Paragraph XIV of the Bill of Complaint. Defendant City of Indianapolis served said resolution upon the defendant Citizens Gas Company of Indianapolis, its directors and trustees, on said 20th day of March, 1929. Defendant City of Indianapolis through its agents and employees, on said 20th day of March, 1929, served a copy of said resolution upon the defendants Citizens Gas Company of Indianapolis, its officers, the members of its Board of Directors and the members of its Board of Trustees.

* * * * * *

19. After the passage of the ordinance of August 30, 1905 and the incorporation of the Citizens Gas Company on May 23, 1906, the City of Indianapolis took no affirmative steps in its own behalf in connection with the taking over of the property of the Citizens Gas Company until the 20th day of March, 1929. Defendant City of Indianapolis has not proceeded under the terms of said Shively-Spencer Utility Commission Act in making its aforesaid demand, and the Public Service Commission of Indiana has neither ordered nor approved the acquisition by defendant City of said plant and property nor determined the value of said plant and property nor fixed the terms and conditions of said acquisition.

20. At no time has the question of the acquisition of the plant and property of defendant, Citizens Gas Company of Indianapolis, by defendant City been submitted to the qualified voters of said City at a special or general election.

21. The directors of the defendant company have caused the two resolutions set out in Stipulation 15 hereof to be printed and mailed to all holders of certificates issued by said Board of Trustees of the Citizens Gas Com-

pany, including plaintiff; said resolutions Nos. 1 and 2 have been published in the newspapers of Indianapolis and elsewhere and said directors have publicly expressed their intention of acceding to the demands of the defendant City and of conveying the plant and property of the defendant company to the City in accordance with the notice, resolution and demand set out in Stipulation 14 hereof. The directors and trustees of the Citizens Gas Company intend to and will carry out their expressed intention and will convey said plant and property of the defendant company pursuant to said demand by the defendant City unless enjoined and restrained from such action.

* * * * * *

By agreeing to the statements contained in the above stipulations, the parties hereto are not agreeing as to any legal rights resulting therefrom, and in particular are not agreeing as to the rights flowing to plaintiff and other holders from the issuance of the certificates in the forms set forth in Stipulations 2(b) and 2(c) hereof, nor as to the relation to the Citizens Gas Company of plaintiff and others to whom such certificates were issued; but said legal rights and relation are to be determined by the facts set forth in these stipulations and the facts proved at the trial and the law applicable thereto. Any party to this cause shall have the right at the final hearing to introduce any additional or further evidence in this cause, providing that the same is not in contradiction of any of the facts herein stated.

Frederick L. Matson,
Earl B. Barnes,
Austin V. Clifford,
Attorneys for Plaintiff, Newton Todd.

Edw. H. Knight,
John W. Holtzman,
Fred C. Gance,
Attorneys for City of Indianapolis; Reginald Sullivan, as Mayor of the City of Indianapolis, Henry O. Goett, as City Clerk of the City of Indianapolis, and E. Kirk McKinney, Louis G. Brandt and Charles O. Britton, as and constituting the Board of Public Works of the City of Indianapolis.

Thompson, Rabb & Stevenson,
Smith, Remster, Hornbrook & Smith,

Attorneys for Citizens Gas Company of Indianapolis, John R. Welch, Gustav A. Efroymson, Henry H. Hornbrook, William H. Insley, Clarence L. Kirk, James H. Hooker, Franklin Vonnegut, James I. Dissette, Edgar H. Evans; Gustav A. Schnull, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis; Otto Lieber, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis; Frank C. Dailey, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis; Thomas L. Sullivan, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis; Henry Kahn, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis.

PLAINTIFFS' EXHIBIT 135.

(Excluded by District Court.)

No. 26163.

IN THE SUPREME COURT OF INDIANA.

To May Term, 1932.

Appeal From the Superior Court of Marion County.

Allen G. Williams,
Appellant,

vs.

Citizens Gas Company of Indianapolis, *et al.*,
Appellees.

Appellees' Brief.

James M. Ogden,
Attorney General of Indiana,

George W. Hufsmith,
Deputy Attorney General,
For Appellees John W. McCardle et al.

Edward H. Knight,
Corporation Counsel,
James E. Deery,
City Attorney,
William H. Thompson,
Albert L. Rabb,
Thomas D. Stevenson,
Attorneys for Appellees City of Indianapolis, et al.

Louis B. Ewbank,
Samuel Dowden,
Attorneys for Appellees Indianapolis Gas Company, et al.

Charles Remster,
Henry H. Hornbrook,
Albert P. Smith,
Paul Y. Davis,
Kurt F. Pantzer,
Ernest R. Baltzell,
Attorneys for Appellees Citizens Gas Company, et al.

• • • • • •

• • (Caption—26163) • •

APPELLEES' BRIEF.

The ninety-eight pages of mingled argument and discursive statement following the title "Nature of the Action" in appellant's brief invite and justify the following re-statement of the

Nature of the Action.

This is a suit whereby appellant suing as an inhabitant and taxpayer of the City of Indianapolis on behalf of himself and other inhabitants and taxpayers of the city asks that it be decreed that a public charitable trust exists in the property of Citizens Gas Company of Indianapolis; alleges that a conspiracy was formed in 1913 to destroy the public charitable trust existing in the property of the Citizens Gas Company of Indianapolis and alleges as the overt acts in this conspiracy the enactment of the Shively-Spencer Act creating the Public Service Commission of Indiana, the approval by that Commission of a lease of property of the Indianapolis Gas Company to the Citizens Gas Company, the payment of millions of dollars under such lease, the surrender by the Citizens Gas Company of its franchise and its acceptance of an indeterminate permit, its obtaining various orders from the Public Service Commission of Indiana, and its obtaining a decree from the United States District Court at Indianapolis enjoining the enforcement of confiscatory rates. The relief sought is not only a declaration that a public charitable trust exists in the property of the Citizens Gac Company, but an adjudication that the Shively-Spencer Act is void and that every order of the Public Service Commission of Indiana affecting in any manner the Citizens Gas Company is void; that the lease between the Indianapolis Gas Company and the Citizens Gas Company is void notwithstanding its approval by the Public Service Commission; that the Indianapolis Gas Company be declared insolvent and the Citizens Gas Company be declared insolvent or in imminent danger of insolvency and a receiver appointed for such companies; that the several millions of dollars paid by Citizens Gas Company under such lease be repaid to it; that the assets of the Citizens Gas Company be administered by such receiver; that the public charitable

trust on behalf of the inhabitants and taxpayers of said city of Indianapolis be preserved and enforced; that the directors and trustees of the utility district of Indianapolis be enjoined from acting as such; and that the Mayor, the defendants, city officials, Gas Company officers and others be enjoined from conspiring to "defeat said public charitable trust."

Propositions, Points, And Authorities By Which Appellant's Alleged Errors Are Met Or Obviated And The Judgment Sustained.

A and B.

No Reversible Error Can Be Predicated on the Ruling of the Lower Court in Striking Out From the Complaint Averments With Respect to an Alleged Conspiracy for The Enactment of the Shively-Spencer Public Utility Act for the Reason That Such Averments Are Irrelevant Beyond Possibility of Amendment Because There Is Not In Law Any Such Thing as a Conspiracy to Bring About the Enactment of a Valid Statute.

• • • • • •

C.

The Demurrer of Appellees Citizens Gas Company et al. to Appellant's Complaint Was Correctly Sustained by the Lower Court for the Reason That the Complaint Is Insufficient for Want of Facts in That Appellant as an Individual Member of the Public or as a Taxpayer Has No Right as Such to Maintain an Action to Enforce a Public Charitable Trust and No Right to Injunctive Relief Is Shown, No Right to a Receivership, and No Clouds Upon the Title of the Public Charitable Trust Appear.

• • • • • •

This Suit Is of Such Nature That It Cannot Be Maintained by an Individual Member of the Public.

3. Appellant sues only as an "inhabitant and taxpayer" of appellee City of Indianapolis, and on behalf of himself and of other inhabitants and taxpayers of the city, but neither he nor any other inhabitant has any separate

or divisible interest in the public charitable trust that is the subject matter of this suit; he is not seeking to assert rights that public officers have refused to assert; and he has no right to maintain this suit.

State ex rel. v. *Holt*, 163 Ind. 198, 200.

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6. A public charitable trust in the property of Citizens Gas Company was created by its organization under conditions that when the subscribers to its stock have been repaid par plus interest, its property should be conveyed to the city. That the trust is a charitable one appears from the fact that the public will receive the property of the Gas Company without having to purchase it. That the trust is a public one is manifested from the fact that the beneficiaries, i. e., the inhabitants of the City of Indianapolis, are an indefinite and unascertained class.

Todd v. *Citizens Gas Co.*,

Cotter v. *Same*,

42 Fed. (2nd) 85, (C. C. A. 7).

7. A suit to enforce a public charitable trust can not be maintained by an individual member of the public such as appellant. The exclusive right to maintain such a suit is in the appropriate law officer of the public. The reasons are clear: not only has an individual no definite or separable interest in the trust, but for an individual either as sole plaintiff or in the guise of a class suit, to assume the duty of litigating on behalf of the public would infallibly subject the trust to embarrassment, confusion, loss and damage.

Stearns v. *Newport Hospital*, 27 R. I. 309, 62 Atl. 132;

Burbank v. *Burbank*, 152 Mass. 254, 25 N. E. 427;

Barker v. *Hauberg*, 325 Ill. 538, 156 N. E. 806;

Gibson v. *Frye Institute*, 137 Tenn. 452, 193 S. W. 1059;

Dillaway v. *Burton*, 256 Mass. 568, 153 N. E. 13;

Wemme v. *Noyes*, 294 Pac. 602 (Oregon).

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No Right to Receivership Is Shown.

• • • • • •

15. The lease between said companies is alleged to be invalid. But it was approved by the Public Service Commission of Indiana, under express authorization of Section 95 of the Shively-Spencer Public Utility Act. After this very lease had been so approved, an action was brought by a taxpayer to vacate the order of approval; judgment was entered against such plaintiff; and an appeal therefrom was dismissed: *Fishback* v. *Public Service Commission*, 193 Ind. 282. This approval of this lease cannot now be collaterally attacked.

Public Service Commission v. *Indianapolis*, 193 Ind. 37.

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18. A lessee of property of which it has held possession and from which it has taken the income as such lessee for seventeen years cannot, nor can anybody claiming through or under such lessee, attack the validity of the lease under which it took and has continued to hold the same, without surrendering such possession, and without accounting for nor offering to account for and restore the income so received. Even if appellant had the right to maintain an action to set aside the lease of the Indianapolis Gas Company's property (which is denied) because of fraud, and even if facts alleging actionable fraud were alleged (and they are not), the action must fail for want of an offer to surrender the leased premises and to restore the consideration received thereunder.

Ashmead v. *Hurt*, 125 Ind. 566, 568;

Callahan v. *Dunker*, 51 Ind. App. 436, 445;

Deford v. *Urbain*, 48 Ind. 219, 221;

Anchor Ins. Co. v. *Meyer*, 61 Ind. App. 35, 41;

Westhafer v. *Patterson*, 120 Ind. 459, 462;

South Bend, etc., Gas Co. v. *Jensen*, 182 Ind. 557, 560.

19. The lapse of seventeen years without action by the inhabitants and taxpayers of Indianapolis to challenge the validity of the lease is such laches as to preclude the granting of the relief here prayed.

Sinclair v. *Guzenhouser*, 179 Ind. 78, 131;

Ryason v. *Dunten*, 164 Ind. 85, 94-97;

Turpie v. *Lowe*, 158 Ind. 314, 320, 322.

No Clouds Upon Title of Property in the Public Charitable Trust Are Shown.

20. The facts alleged as basis for the appointment of a receiver for the property of appellee Citizens Gas Company are also alleged to be clouds upon the title of the property subject to the public charitable trust existing in that property. For the same reason they are not and cannot be clouds upon title. It is additionally alleged that the surrender of its franchise by the Citizens Gas Company is a cloud upon title of such trust. But this contention is forever quieted by the final judgments in the cases of *Todd and Cotter, et al.* v. *Citizens Gas Company, City of Indianapolis, et al.*, hereinbefore referred to, which have finally established the existence and validity of the public charitable trust in the property of Citizens Gas Company notwithstanding the surrender of its franchise.

Todd v. *Citizens Gas Co., Cotter* v. *Stone*, 46 Fed (2nd) 855 (C. C. A. 7; Cert. den. 283 U. S. 852).

• • • • • •

22. Appellant also asserts that the Federal Court proceedings were void as to the public charitable trust because the trust was not represented. But the Citizens Gas Company was the Trustee of the public charitable trust. Its presence in that litigation and its action therein was not in derogation of the trust, but on behalf of the trust. Beneficiaries of an express trust are in court whenever the trustee is in court.

Hord, Trustee, v. *Bradbury*, 156 Ind. 30, 33.

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D.

The Demurrer of Appellees Indianapolis Gas Company, Ferdinand Winter, and Trust Company of America, Was Correctly Sustained to Appellant's Complaint for the Reason That the Complaint Is Insufficient for Want of Facts in That Appellant as an Inhabitant or Taxpayer Is Not a Real Party in Interest, No Right to Injunctive Relief Is Shown, and No Right to a Receiver Appears.

• • • • • •

E.

The Demurrer of Appellees John W. McCardle et al. as the Public Service Commission of Indiana Was Correctly Sustained to Appellant's Complaint for the Reason That the Complaint Was Insufficient for Want of Facts in That Their Official Acts Were Performed in Good Faith Within the Scope of Valid Statutes and Cannot Here Be Collaterally Attacked.

* * * * * *

F.

Appellant's Motion to Vacate the Rulings to Strike Out Parts of the Complaint, etc., Presents No Reversible Error Because Error Has Been Assigned Directly Upon the Rulings Themselves; and the Basis Asserted for the Motion, viz., the Pendency of Demurrers, Is Contradicted by the Record.

* * * * * *

ARGUMENT.

Appellant, suing as an inhabitant and taxpayer of the City of Indianapolis, on behalf of himself and other inhabitants and taxpayers of the City, seek a decree declaring that a public charitable trust exists . he property of Citizens Gas Company of Indianapolis, notwithstanding the final adjudication to that effect in Todd and Cotter cases against the City and the Gas Company (46 Fed. 2nd, 855; 283 U. S. 852); that the Shively-Spencer Public Utility Act creating the Public Service Commission of Indiana is void, notwithstanding the repeated recognition this Court has given to the validity of that statute; that the lease between the Citizens Gas Company and the Indianapolis Gas Company is void, notwithstanding its approval both by the Commission and in litigation (*Fishback* v. *Public Service Commission*, 193 Ind. 282); that all the moneys paid by the Citizens Gas Company under such lease should be repaid to it, irrespective of the benefits the Citizens Gas Company obtained by such payments; that because of such payments the Citizens Gas Company is insolvent or in imminent danger of insolvency and a receiver should be appointed for it and its assets administered by such receiver "that said public charitable trust in behalf of the inhabitants and taxpayers of said city of Indianapolis may be preserved and enforced," notwithstanding the fact that no public officer has been requested to bring such a suit.

* * * * * *

This Suit Is of Such Nature That It Can Not Be Maintained by Appellant as an Individual Member of the Public.

The conspicuous feature of this litigation is that appellant as plaintiff, an individual inhabitant and taxpayer, has constituted himself the sole vindicator of the rights of the public in a public charitable trust to the exclusion of the public officials charged with such duty.

The facts pleaded in the complaint show that a public charitable trust exists in the property of appellee Citizens Gas Company of Indianapolis. Suffice it to say that a public charitable trust was thus created by the organization of the Citizens Gas Company with provisions in its articles of association that all rights of that company and of the subscribers to its capital stock should terminate when the latter had been repaid par plus specified interest and that thereupon the property should be conveyed to the city. The trust res is the plant and property of the Citizens Gas Company. The settlors of the trust were the subscribers to its capital stock, as well as the individuals who obtained and assigned a franchise to the Company. Their charitable purpose is manifest from the express limitation of all participation by certificate holders in profits and assets to such repayment of par plus interest, with the result that the public will receive the plant and property without the necessity of purchasing the same. The indefinite and unascertained class of beneficiaries—typical feature of a public charitable trust—consists of the inhabitants of Indianapolis.

This is not a case where moneys paid by appellant for taxes have been or are about to be expended in a matter considered by him to be illegal. He asserts that he is one of the class "who furnished the funds with which to repay the persons who supplied the money used in the construction and acquisition of the trust property". (Appellant's Brief, pp. 257, 259.) But the complaint refutes this assertion. Appellant is not shown to be a consumer of gas. The pleaded franchise contract shows conclusively that the subscribers to the capital stock of the Gas Company (often referred to as certificate holders because the stock was assigned to trustees who issued trustee's certificates to the subscribers) are to be repaid the par value of their stock plus stipulated interest out of earnings, and if not out of earnings, then out of the proceeds of a mortgage to be placed upon the property. No taxes are to be used for the

acquisition of such property by the public. Indeed, as the Circuit Court of Appeals stated, 46 Fed. (2nd) 855, 866, the franchise

"could not be regarded as a purchase in 1905 or a contract for a purchase. It was an agreement by which the city obtained an interest in the plant subject to the charge in favor of the certificate holders. No funds of the city were paid or contracted to be paid for the plant."

It follows that the cases relied upon by appellant, which pertain to proceedings by taxpayers to enjoin the expenditure of taxes about to be illegally expended, or to recover taxes illegally diverted, are not in point. Nor can it be any proper ground of apprehension by appellant that moneys to be raised by taxation may be expended for debts of the Citizens Gas Company. No such intent is alleged. None is apparent. The right of the City of Indianapolis to accept public trusts (Clause 6, paragraph 53 of Section 10284, Burns' 1926) is not limited to unencumbered property. That a city takes property subject to debts does not make those debts the city's debts.

Fox v. *City of Bicknell*, 193 Ind. 537.

The unescapable truth is that appellant solely as an individual member of the public arrogates to himself the right by litigation to control the management of such trust to the exclusion of the officials of the public. But the rule is thoroughly settled that an individual member of the public has no right as such to maintain an action to enforce or protect a public charitable trust.

* * * * * *

We submit that the Attorney General of Indiana and/or the Prosecuting Attorney for the Nineteenth Judicial Circuit at all times had and have the exclusive right as against individual inhabitants such as appellant, to bring suit to enforce and protect the public charitable trust in the property of Citizens Gas Company of Indianapolis; from which it follows that appellant had no standing in court to maintain this action and his complaint is insufficient for want of facts.

No Right to Equitable Relief Is Shown.

Even if appellant as a private citizen, taxpayer, or inhabitant, having no separate or divisible interest in the subject matter of the public charitable trust, nevertheless could maintain an action to enforce it without respect to the rights or duties of the public officers, yet his complaint is in no respect sufficient to state a cause of action.

* * * * * *

1. But the complaint does not allege that plaintiff is a stockholder or a creditor of either the lessor Indianapolis Gas Company or the lessee Citizens Gas Company, or that either company owes a debt to anybody not amply secured, or owes any debt at all to the City of Indianapolis, of which city he is an inhabitant and taxpayer; there is no averment as to the value at this time of the property leased by the Indianapolis Gas Company to the Citizens Gas Company, nor of its value at any time since the year 1913, when the lease was executed, seventeen years before suit was commenced.

2. The complaint does not allege that the Citizens Gas Company ever acquired or owned any plant or gas mains or property other than the plant, real estate and 375 miles of gas mains leased to it by the Indianapolis Gas Company (Appellant's Brief, pp. 158, 161 to 168), with extensions of and betterments to the same, paid for by the sale of mortgage bonds of said lessor (Appellant's Brief, p. 192), except only as an inference might be drawm that it acquired 100 miles of gas mains in 1906, to comply with the condition in its city franchise that it have that amount of mains (Appellant's Brief, p. 120), which franchise was assigned to it in 1906 (Appellant's Brief, p. 137); and does not intimate that the Citizens Gas Company had any source of income from which to make the alleged payments of rentals, interest and taxes except out of such income from operation of the leased property.

3. The complaint does not allege that the stockholders of the Citizens Gas Company nor any off them have ever been repaid, from savings or otherwise, amounts equal to the face value of their certificates of stock, with interest thereon at the rate of 10% per annum, as provided in the franchise and articles of association (Appellant's Brief, pp. 119, 135, 136), to give any right to a conveyance of its property to the city "to be owned and operated or leased by it"; nor does it even aver that any dividends whatever ever were paid by said lessee company to its stockholders, or that it ever earned any income whatever from which to pay dividends. The averments that the lessee, Citizens Gas Company, took subscriptions for and sold its capital stock (Appellant's Brief, pp. 138, 145), that its franchise was amended so as to authorize the mortgage of its property to secure bonds it might issue (Appellant's Brief, pp. 149-151), and that it "acquired property of great value" (Appellant's Brief, pp. 151, 152), are not supplemented by the suggestion that it ever had any earnimgs or income, or

ever repaid anything to investors, either of dividends or amounts invested; the averred conclusion of law "that there has been a substantial performance of all conditions precedent to the changing of said inchoate trusteeship into an active trusteeship on the part of said municipal city of Indianapolis" (Appellant's Brief, p. 144), and the fact that the Citizens Gas Company "has laid out and expended of the moneys, funds and property of the taxpayers of said city (of Indianapolis) * * * a large sum" (Appellant's Brief, p. 200), not amounting to allegations that the company earned an income from property other than what was leased—or from it, either—or that it paid dividends or repaid its mortgage loans, or reimbursed investors, so as to require a conveyance to the city as trustee.

4. The complaint does not allege anything as to the income which the lessee has drawn from the leased gas plant embracing 375 miles of gas mains and extensions (now totalling in excess of 500 miles) during the 17 years it had held possession and operated same when this action was commenced, and had paid the rentals, interest and taxes complained of.

5. The complaint does not deny that the provisions of the lease authorizing the lessee Citizens Gas Company to take down and sell bonds of the lessor secured by the mortgage attacked, in such amount that the proceeds when sold at 85% of the face will pay "the total cost of such extensions or betterments" (Appellant's Brief, p. 192), has been fully carried out as to all extensions and betterments made, the only averment in relation thereto being that "the said Citizens Gas Company has well and truly performed all the obligations imposed upon it by said pretended lease" (Appellant's Brief, p. 200).

6. The complaint does not allege that the lessee had surrendered possession of the leased property, nor returned the income which it received therefrom during the seventeen years that possession was held, nor contain any offer to surrender possession or to pay for the use of the leased property during those seventeen years, nor any offer to return or to account for such income or any part of it.

7. The complaint, filed in March, 1930, does not allege facts tending to constitute any cause for challenging the validity of the mortgage given by the Indianapolis Gas Company October 1, 1902 (Appellant's Brief, pp. 173, 203), to secure $7,500,000.00 of bonds, nor the lease by that company to the Citizens Gas Company of September 13, 1913 (Appellant's Brief, p. 165), expressly made subject to said

mortgage (Appellant's Brief, pp. 173, 192, 193), which has not existed during the entire seventeen years that the Citizens Gas Company has continued to hold and occupy under the lease.

* * * * * *

It is elementary that any suit seeking rescission of an executed contract must involve at least an offer to restore the received consideration, or to account for it. But appellant ignores the transactions of seventeen years during which the Citizens Gas Company has openly held possession of the leased property and seeks to wipe out the very existence of the lease without any regard to the equities of the interested parties. Yet that lapse of time constitutes such laches as to preclude equitable relief.

The lease is fair upon its face. There is no suggestion that the agreed rental is disproportionate. The lease was made as a result of proper corporate action. It had the considered approval of the Public Service Commission of Indiana. It follows that this suit, to adopt the words of this Court in *Public Service Commission* v. *City of Indianapolis*, 193 Ind. 37, 42-43,

> "is a collateral attack upon the action of the commission, and can only succeed in case the order was wholly void, either because of fraud which entered into it, or because the commission was without jurisdiction or exceeded its jurisdiction in making such order."

There is not a single fact alleged in the complaint showing that fraud induced or vitiated the order of the Commission. There was no excess of jurisdiction, because Section 95 of the Shively-Spencer Public Utility Act is an express grant of authority to the Commission for the approval of leases of such nature. Appellant vigorously attacks the constitutionality and validity of the Act. There is no need to debate such questions at this time. This Court has repeatedly recognized the Act as legal. The action of the Commission upon this very lease has been upheld judicially: *Fishback* v. *Public Service Commission*, 193 Ind. 282.

It thus appears that the alleged insolvency that is the apparent basis of the request for the appointment of receivers rests in appellant's conception that practically everything that has occurred from the organization of the Indianapolis Gas Company to and including the passage of the legalizing Act of 1929 is null and void: and particularly that there must be a repayment by the Indianapolis

Gas Company to the Citizens Gas Company of moneys paid as rental under a lease lawfully approved by a legally constituted tribunal and sanctioned by the final judgment of a court of competent jurisdiction with respect to property of which the Citizens Gas Company has had the continuous benefit for some seventeen years. In short, appellant desires to substitute his opinion as to the validity of the lease for that of the two companies, of the Commission, and of the Court. In other words, no ground whatever is shown for the appointment of a receiver.

The first prayer of the complaint is that the existence of a public charitable trust in the property of Citizens Gas Company for the benefit of the inhabitants of Indianapolis be adjudged. (Appellant's Brief, p. 221.) Prayer and suit are unnecessary. There has been a final decision by a court of competent jurisdiction forever establishing the existence of such a public charitable trust: *Todd* v. *Citizens Gas Company et al.; Cotter* v. *same;* 46 Fed. 2nd. 855, 283 U. S. 852. The City of Indianapolis was a party to such litigation, and therefore every one of its citizens and inhabitants is bound thereby. *Heckman* v. *United States,* 224 U. S. 413, 445, 56 L. ed. 820, 833. The existence and validity of the public charitable trust having thus been finally adjudicated, neither appellant nor any other inhabitant of the City may relitigate these questions in this or any other court. *Cromwell* v. *Sac County,* 94 U. S. 351, 24 L. ed. 195. The effect of these decisions cannot be avoided by characterizing the demurrers to the complaint as "speaking demurrers." Appellant himself by his supplemental complaint refers to the decisions and shows that he was restrained from litigating during the pendency of such cases. His statement that the final disposition by the Supreme Court of the United States of those cases absolves him of any restraint is of course a conclusion of law and of no effect. Appellant's assertions of what the law is are of no weight; the court knows and takes judicial notice of the law without the necessity of pleading. The allegations of the complaint pertaining to the alleged conspiracy to defeat the establishment of the public charitable trust are therefore stultified, and appellant's prayer for a declaration of the existence of such trust and equitable aid in support thereof are to be disregarded.

Conclusion.

Appellant's suit professes to be in the public interest. But no one is helped, and nothing is proved, by vague though voluminous accusations of fraud and conspiracy to defeat the very public charitable trust in the property of Citizens Gas Company of Indianapolis whose existence and validity have been fully, fairly, and finally determined by a court of competent jurisdiction. It is hardly in the public interest to seek to wrest from public officials by means of private receivership proceedings the control of a public charitable trust with which they are charged. It would be a most mischievous precedent that a public charitable trust is to be enforced according to the views, not of the law officers of the public, but of any private individual who desires to arrogate his opinion over that of the public. And certainly it is not in the public interest to hinder and delay the performance of such trust by litigation such as this; and this suit could have no other effect.

We ask that the judgment of the lower court be forthwith affirmed.

Respectfully submitted,
Edward H. Knight,
Corporation Counsel.
James E. Deery,
City Attorney,
William H. Thompson,
Albert L. Rabb,
Thomas D. Stevenson,
Attorneys for Appellees City of Indianapolis in the State of Indiana, a Municipal Corporation, Reginald H. Sullivan, as Mayor of said City of Indianapolis, Henry O. Goett, as City Clerk of said City of Indianapolis, E. Kirk McKinney, Louis C. Brandt, Charles O. Britton, as the Board of Public Works of said City of Indianapolis, Sterling R. Holt, Thomas C. Howe, George J. Marott, A. Dallas Hitz, William J. Mooney, as the Board of Trustees for Utilities of said City of Indianapolis, Edward H. Kahn, Henry L. Dithmer, Eli Lilly, Brodehurst Elsely, Almus G. Ruddell and Guy A. Wainwright, as the Board of Directors for Utilities of said City of Indianapolis.

James M. Ogden,
Attorney General of Indiana,

George W. Hufsmith,
Deputy Attorney General,
For Appellees John W. McCardle, Francis T. Singleton, Howell Ellis, Calvin F. McIntosh and Jere West as the Public Service Commission of Indiana.

Charles Remster,
Henry H. Hornbrook,
Albert P. Smith,
Paul Y. Davis,
Kurt F. Pantzer,
Ernest R. Baltzell,
Attorneys for Appellees Citizens Gas Company of Indianapolis, a corporation, Henry Kahn, Otto R. Lieber, Gustav A. Schnull, Thomas L. Sullivan, Frank C. Dailey, James I. Dissette, Gustav A. Efroymson, Edgar H. Evans, James H. Hooker, Henry H. Hornbrook, William H. Insley, Clarence L. Kirk, Franklin Vonnegut, John R. Welch, Frederick G. Rastenburg and Paul E. Crosier.

Louis B. Ewbank,
Samuel Dowden,
Attorneys for Appellees Indianapolis Gas Company and
Ferdinand Winter and Trust Company of America as Trustees under a mortgage executed by said Indianapolis Gas Company.

June 10, 1932.

1274-1275 • • • • •

(PLAINTIFFS' EXHIBITS 136, 137 and 138 omitted pursuant to stipulation filed Nov. 22, 1935.)

1278 CITY'S STIPULATION EXHIBIT 60.

September 9th, 1935.

Indianapolis Gas Company,
1004 Majestic Building,
Indianapolis, Indiana.

Gentlemen:

By request of the Board of Directors for Utilities of the City of Indianapolis, we hand you herewith certified copies of two resolutions today adopted by such Board, viz: one for rejection by the city of assignment of lease between your company and the Citizens Gas Company of Indianapolis and the other for temporary use of such property. We also hand you copy of a rejection of such assignment which has today been recorded in the office of the Recorder of Marion County, Indiana.

Very truly yours,
Thompson Rabb & Stevenson.

1279 CITY'S STIPULATION EXHIBIT 61.

The Indianapolis Gas Company,
1004 Majestic Building,
Indianapolis, Indiana.

Gentlemen,—

Herewith we tender you the sum of $171,575.00; which we understand is equivalent to the amount of interest due and payable upon your First Consolidated Mortgage Five Per Cent. Bonds on October 1, 1935.

This sum is tendered you as a payment on account of temporary use and occupancy of your property by the City of Indianapolis pursuant to the certain resolution, entitled "Resolution for Temporary Use of Property of The Indianapolis Gas Company" adopted by the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis, Indiana, on September 9, 1935;

a copy of which resolution was that day transmitted to you.

This sum is not tendered you under or on account of the certain lease between you and Citizens Gas Company of Indianapolis dated September 30, 1913, or any assignment thereof. The City of Indianapolis is not acting under said lease, or any assignment thereof, and has not recognized and does not recognize said lease as an obligation in any respect, either binding upon the City or upon any property acquired by the City from said Citizens Gas Company of Indianapolis.

Dated at Indianapolis, Indiana, September 24, 1935.

Board of Directors for Utilities of the
City of Indianapolis
By Henry L. Dithmer,
President.

1280 CITY'S STIPULATION EXHIBIT 62.

The Indianapolis Gas Company,
1004 Majestic Building,
Indianapolis, Indiana.

Gentlemen,—

Herewith we tender you the sum of $4780.80, which we understand is equivalent to the amount of your third instalment of Federal Income tax for the year 1934 payable in 1935.

This sum is tendered you as a payment on account of temporary use and occupancy of your property by the City of Indianapolis pursuant to the certain resolution, entitled "Resolution for Temporary Use of Property of The Indianapolis Gas Company" adopted by the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis, Indiana, on September 9, 1935; a copy of which resolution was that day transmitted to you.

This sum is not tendered you under or on account of the certain lease between you and Citizens Gas Company of Indianapolis dated September 30, 1913, or any assignment thereof. The City of Indianapolis is not acting under said lease, or any assignment thereof, and has not recognized and does not recognize said lease as an obligation in any respect, either binding upon the City or upon

any property acquired by the City from said Citizens Gas Company of Indianapolis.

Dated at Indianapolis, Indiana, September 24, 1935.

Board of Directors for Utilities of the
City of Indianapolis
By Henry L. Dithmer,
President.

1281 CITY'S STIPULATION EXHIBIT 63.

September 27, 1935.

The Indianapolis Gas Company,
1004 Majestic Building,
Indianapolis, Indiana.

Gentlemen:

We have had no response from you to our repeated requests for an opportunity to negotiate a lease for the use of your property by the City of Indianapolis.

That there may be no misunderstanding of our position, we desire to obtain from you an agreement for the use of your property by the City of Indianapolis in connection with its operation of property acquired from Citizens Gas Company of Indianapolis, and upon terms that are both appropriate and fair. Therefore we have asked, and we now ask, that you inform us whether you are willing to undertake to negotiate such an agreement.

This is a matter not merely of private interest, but of public concern. While you have responsibilities to your security holders, we have responsibilities to our citizens. We seek no unfair advantage, and will take no arbitrary action; but we are determined that the interests of the community shall be protected so long as the service of gas is here confided to our care.

You have returned without explanation or comment checks that we sent you by way of compensation for temporary use of your property since September 9, 1935, the date upon which the City acquired the property owned by Citizens Gas Company; and we understand that by so doing you incur the risk of non-payment of your bond interest on October 1st as well as non-payment of certain taxes, with the consequent danger of a default in your mortgage bond obligations.

1282 To avoid such an unnecessary misfortune, we again offer you these sums, viz. $171,575.00 and

$4780.80. We waive no rights by making this offer; but we ask you to waive no rights of yours by an acceptance. You may take these payments without prejudice to your position and without qualification, save only that the City be not precluded, upon the ground that by making these payments it has recognized as binding upon it the obligations of your lease with Citizens Gas Company.

We consider the terms of your lease with the Citizens Gas Company are inappropriate and unfair to the City and to consumers of gas. We are willing to undertake to negotiate the terms of a new lease from you to the City that will be both appropriate and fair.

Are you willing to do the same?

Board of Directors for Utilities
of the City of Indianapolis
By Henry L. Dithmer,
Its President per ALR.

1283 CITY'S STIPULATION EXHIBIT 64.

September 30, 1935.

The Indianapolis Gas Company,
1004 Majestic Bldg.,
Indianapolis, Indiana.

Gentlemen:

We tender you herewith two checks, one in the sum of $171,575 and the other in the sum of $4780.80 which equal the amount of the interest on the mortgage bonds of The Indianapolis Gas Company for October 1, 1935, and its third instalment of Federal Income Taxes. In making this tender we do not agree that the lease executed between The Indianapolis Gas Company and the Citizens Gas Company under date of September 30th, 1913, is valid or enforceable against the City of Indianapolis, nor do we waive any rights by making this tender and payment, but we ask you to waive no rights of yours by accepting; and you shall be at full liberty to assert, as we understand you do, that said lease is an obligation binding on the City of Indianapolis.

We likewise offer to make all other payments stipulated in said lease for a period of six months from the 9th day of September, 1935, (the day upon which the property of the Citizens Gas Company was transferred to the City of Indianapolis) upon the same terms and conditions. We

will make these payments without prejudice to our position or rights and you may accept the same without prejudice to your position or rights and without qualification save only that it is agreed that by making all such payments the city has not recognized as valid or binding upon it the obligations of your lease with the Citizens Gas Company.

Very truly yours,
Board of Directors for Utilities
of the City of Indianapolis
By Thompson Rabb & Stevenson,
Its Counsel.

1284 CITY'S STIPULATION EXHIBIT 65.

The Indianapolis Gas Company
1004 Majestic Building
Indianapolis, Indiana

Sept. 30, 1935.

Board of Directors for Utilities of the
City of Indianapolis

Attention: Thompson, Rabb & Stevenson, Counsel

Gentlemen:

We are in receipt of your favor of today, September 30, 1935, enclosing two checks, with a stipulation which you expect us to join in, the substance of which we understand to be as follows:

That neither you nor we are waiving any rights which any of us may have previously had, or may claim, concerning the lease executed between The Indianapolis Gas Company and the Citizens Gas Company under date of September 30, 1913, you making these or future payments referred to without prejudice to your position or rights and we accepting the same without prejudice to our position or rights under said lease or in any relation thereto.

We expect to deposit said checks early tomorrow morning and if we have in any way misinterpreted your letter, please notify us immediately.

Very truly yours
The Indianapolis Gas Company
By Wm. J. Yule
Secretary.

1285 CITY'S STIPULATION EXHIBIT 68.

October 10, 1935.

The Indianapolis Gas Company,
1004 Majestic Building,
Indianapalis, Indiana.

Gentlemen:

At a preliminary conference held Tuesday at the Columbia Club between representatives of your company and the Board of Directors of the Department of Utilities of the City of Indianapolis, at the request of that Board, I stated the principal objections which the City of Indianapolis has to the terms of the 99 year lease executed by your Company and the Citizens Gas Company on September 30, 1913. As I advised you, the objections stated are not to be considered as inclusive, because undoubtedly, if a new lease is to be executed, there are many provisions of the old lease, not discussed, which would need thorough consideration and substantial revision.

At your request, we sumarize below the provisions of the lease of September 30, 1913, which in the opinion of the Board of Directors of the Utility Department are particularly burdensome:

1st. Subdivision 7 requires the Citizens Gas Company to refund the bonds secured by the mortgage executed by The Indianapolis Gas Company during the entire term of the lease. That section further provides:

"Should such refunding bonds be sold below par then the lessee shall pay any additional sum necessary to complete the payment of the outstanding bonds, and shall have no lien upon the property or charge against the lessor therefor * * *"

1286 It is then provided that if the refunding bonds should be sold at a premium, the premium should belong to the Citizens Gas Company.

In substance, this is a guaranty that for a period of 99 years from September 30, 1913, the debt of The Indianapolis Gas Company will be refunded without expense to it.

It is probable that the mortgage debt would have to be refunded twice during the remaining 77 years of this lease and if, as is likely, the bonds should be sold below par this agreement imposes a very heavy financial responsibility.

2nd. Subdivision 14 of the lease requires the lessee during the entire continuance of the lease to pay all taxes of every nature and description not only on the property covered by the lease, but upon its earnings and the rental reserved "so far as the same may constitute the basis for an income tax." Under this provision of the lease, the Citizens Gas Company not only paid the local property taxes amounting to $95,543.91 for the year 1934, but also Federal Income taxes and Indiana Gross Income taxes upon the rent. The amounts paid in 1934 for income taxes were slightly in excess of $25,000 and if the present trend of taxation is continued this covenant would impose an increasing burden throughout the unexpired term of the lease.

3rd. Subdivision 15 of the lease contains a covenant that the Citizens Gas Company will, during the term of the lease, "renew, repair, replace and extend the same, so as to maintain and keep the demised premises in as good order, repair and condition as the same are now or may be put upon the completion of the construction contract hereinabove referred to, and in their present state of efficiency."

There are additional provisions of the lease authorizing the abandonment of the coal gas plant of the lessor, making certain provisions with respect to mains affected by electrolysis, and also providing for the sale of obsolete plant under certain conditions.

The agreement with respect to renewals and replacements is so broad as to place a heavy and undetermined burden upon the lessee with respect to renewals.

4th. Sudbdivision 21 requires an increase in the annual rental of $10,000 a year when gas is sold at a price of less than 50c per 1000 cubic feet but more than 45c
1287 and an additional increase of $5,000 in the annual rental when gas is sold at 45c per 1000 cubic feet or less. The clear tendency of this provision of the lease is to penalize the lessee if it reduces the price of gas. The purpose of the Board of Directors of the Department of Utilities of the City of Indianapolis is to make reductions in the price of gas furnished whenever that is possible. Any contract which increases the rent to be paid, when and if the price of gas is reduced is, in the Board's opinion, objectionable.

5th. The lease contains a provision that the lessee will perform and observe all of the covenants and agreements of the lessor (except those as to the payment of the prin-

cipal of the bonds) contained in its mortgage. Under this provision of the lease The Indianapolis Gas Company has submitted to the Citizens Gas Company a bill for services rendered to it by its attorneys.

6th. The rent (exclusive of taxes) now payable under the terms of this lease is as follows:

Interest on bonded debt	$343,150
Dividends to stockholders	120,000
Organization expense Indianapolis Gas Company	300
Total	$463,450

The Board of Directors of the Department of Utilities regards this rent as burdensome and out of proportion to the value of the use of the property. If a satisfactory arrangement is to be concluded there must be a substantial reduction in this rent, the amount of which reduction can only be determined by an investigation of the cost and value of the property and its usefulness to the Utility District.

As we have already notified you, the position of the Utility District is that this lease is not binding on the City of Indianapolis or enforceable against it or the property acquired by it from Citizens Gas Company.

We have pointed out above what we believe to be the most burdensome features of the lease in order that in any negotiation you may understand our position.

Very truly yours,
Thompson, Rabb & Stevenson.

1288 CITY'S STIPULATION EXHIBIT 69.

January 6, 1936.

The Indianapolis Gas Company,
Indianapolis.

Gentlemen,—

By direction of the Board of Directors for Utilities of the City of Indianapolis, we hand you herewith a copy of a resolution adopted by such Board on January 3, 1936.

Very truly,
Thompson, Rabb & Stevenson.

enc.

1289 CITY'S STIPULATION EXHIBIT 70.

The following resolution was then offered, considered, and unanimously adopted:

"Whereas, on the 9th day of September, 1935, this Board adopted a resolution for the temporary use of property of The Indianapolis Gas Company for a period of six months from such date, pending negotiations for an agreement for the continued use of such property but not under an assignment of the certain lease from The Indianapolis Gas Company to Citizens Gas Company of Indianapolis, dated September 30, 1913; and

Whereas, negotiations have been commenced but have not been concluded nor have they progressed; and

Whereas, this Board does not desire to continue after March 9, 1936, payments in amounts equivalent to those specified in said lease, for the use of said property:

Be It Resolved, by the Board of Directors for Utilities of the City of Indianapolis, That the arrangement for payments for temporary use and occupancy of the property of The Indianapolis Gas Company as specified in the resolution of this Board adopted September 9, 1935, be not continued after March 9, 1936; and

Be It Further Resolved, That a copy of this resolution be transmitted to said The Indianapolis Gas Company."

1290 CITY'S STIPULATION EXHIBIT 77.

February 10, 1936.

Mr. Lewis B. Ewbank,
Fletcher Trust Bldg.
Indianapolis.

Dear Sir:

In accordance with the request of Mr. Arthur V. Brown I am delivering to you for transmittal to the Indianapolis Gas Company a written proposal in connection with the purchase of its property.

Very truly yours,

1291 CITY'S STIPULATION EXHIBIT 78.

March 20, 1936.

The Indianapolis Gas Company,
Majestic Building,
Indianapolis.

Gentlemen:

The City of Indianapolis through its Department of Utilities desires from time to time to lay and use mains and pipes to be connected and used with mains and pipes of The Indianapolis Gas Company.

May it be understood:

(1) That pending an agreement between the City and The Indianapolis Gas Company settling the controversy between them as to the validity and binding effect on the City or its Department of Utilities of the certain lease dated September 30, 1913, between The Indianapolis Gas Company and Citizens Gas Company of Indianapolis, or pending the final determination in a litigated case whether such lease is a valid and binding obligation upon the City of Indianapolis or the Department of Utilities of said City or any of the property of either, the City or its Department of Utilities may from time to time lay and use mains and pipes in connection with the mains and pipes of The Indianapolis Gas Company without prejudice to the position or rights of either the City or its Department of Utilities or of The Indianapolis Gas Company;

(2) That pipes and mains so laid and used by the City or its Department of Utilities shall not be considered as laid or used under or by reason of said lease, nor as becoming the property of The Indianapolis Gas Company, unless or until an agreement upon that subject is made between The Indianapolis Gas Company and the City or its Department of Utilities, or unless and until such subject is finally determined by litigation between the City of Indianapolis or its Department of Utilities and The Indianapolis Gas Company.

Please let us hear from you.

Very truly yours,
Thompson, Rabb & Stevenson.

1292 CITY'S STIPULATION EXHIBIT 79.

1004 Majestic Building,
Indianapolis, Indiana,
April 6, 1936.

Messrs. Thompson, Rabb & Stevenson,
115 North Pennsylvania Street,
Indianapolis, Indiana.

Gentlemen:

I am directed by the Board of Directors of The Indianapolis Gas Company to acknowledge your letter of March 20, 1936, and to advise you that this Company grants your request made therein as to the future laying of pipes and mains to be connected with and extensions of the pipes and main which this Company now owns, upon the terms and conditions outlined in your letter, upon, however, the following and additional terms and conditions, viz:

1. That the Department of Utilities of the City of Indianapolis shall advise this Company in writing before beginning actual construction of any such mains and pipes, of the location and extent of said additions or extensions to existing mains and pipes belonging to this Company, and of the estimated cost thereof to the Citizens Gas and Coke Utility or the Department of Utilities of the City of Indianapolis.

2. That The Indianapolis Gas Company shall have the right and option to purchase and acquire said means and pipes so laid and constructed by the Citizens Gas and Coke Utility or the Department of Utilities of the City of Indianapolis upon the payment to either said Utility or the Department of Utilities of the City of Indianapolis such sum or moneys as shall equal the entire cost to said Citizens Gas and Coke Utility or Depart-
1293 ment of Utilities of the City of Indianapolis of the purchase, laying and installing of said mains and pipes.

The option and right to acquire said mains and pipes to continue for a period of three years from this date and exercisable upon ninety (90) days written notice to the Department of Utilities of the City of Indianapolis.

3. The consent granted by this letter may be cancelled

and annulled upon sixty (60) days written notice to the Department of Utilities of the City of Indianapolis as to any additional mains and pipes, the construction or laying of which shall not have been commenced at the time of receipt of said notice of cancellation. Provided that said notice of cancellation, if the same should be given, would not in any wise end or terminate the option and right of this Company to purchase any pipes and mains laid or constructed prior to said cancellation under the consent of this letter all as provided for in Clause No. 2.

We shall be pleased if you will advise us of the acceptance of the terms of this granting of your request.

The Indianapolis Gas Company,
By Wm. J. Yule,
Secretary.

1294 CITY'S STIPULATION EXHIBIT 80.

April 8, 1936.

The Indianapolis Gas Company,
Majestic Building,
Indianapolis.

Gentlemen:

This will acnowledge receipt of your letter of April 6th, 1936, with respect to main extensions.

This letter has been submitted to the Board of Directors for the Department of Utilities of the City of Indianapolis. No objection was expressed to the 1st and 3rd conditions stated in your letter, but we are asked to make this inquiry about the 2nd condition:

Would it be agreeable with you, in lieu of such 2nd condition, to provide that if the lease of September 30, 1913, be held binding upon the City, any such extensions be considered as made under its provisions; but that if such lease is held not binding, you agree, not by way of option, but positively, to acquire such extension at cost?

Please let us hear from you.

Very truly,
Thompson, Rabb & Stevenson,.

1295 CITY'S STIPULATION EXHIBIT 81.

1004 Majestic Building,
Indianapolis, Indiana,
May 12, 1936.

Messrs. Thompson, Rabb & Stevenson,
115 North Pennsylvania Street,
Indianapolis, Indiana.

Gentlemen:

In reply to your letter of April 8, 1936, relative to the subject of extensions of mains belonging to this Company, we desire to state:

It is entirely agreeable to us that in event lease of September 30, 1913, is held binding upon the City of Indianapolis and its Department of Utilities, such extensions as you hereafter make to our mains be considered as made under and pursuant to the terms and provisions of said lease.

We cannot agree, in event the lease is held not binding, to purchase said extensions at their cost as you requested in your letter.

We will, however, in such event agree to purchase such extensions as shall hereafter be made to our mains at the appraised value thereof, not to exceed cost, upon the following terms and conditions:

1. Before any extensions are actually started, you submit to us, for examination by us and our engineers, a full and complete statement and plan of such proposed extension or extensions with such information as to territory to be served and services to be rendered as we may request, together with a statement of the cost of the same.

2. Upon approval by us of such proposed extension or extensions, and the construction by you of the same in accordance with said approval, when and as it is given, we shall then undertake definitely to purchase from you said extension or extensions, said purchase to be consummated within a reasonable time after the settlement of the controversy now existing between us as to the effect and validity of the lease above referred to. The approval or rejection by us of any proposed extensions is to be made in writing.

Very truly yours,
The Indianapolis Gas Company,
By Wm. J. Yule,
Secretary.

1296 CITY'S STIPULATION EXHIBIT 82.

May 23, 1936.

The Indianapolis Gas Company,
Indianapolis.

Gentlemen,—

Confirming our conversation today with Mr. A. V. Brown and Judge Ewbank:

Your letter of May 12th referred to an appraised price or value for such extensions of your mains as should be made, but omitted to state how or by whom such appraisement was to be made—a material point.

Will you agree that such appraisement is to be made jointly by an engineer to be selected by you and by an engineer to be selected by the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis, or by Citizens Gas & Coke Utility, each to pay the expense of its own engineer; and in the event of their disagreement, i. e. the disagreement of such engineers, they to select a third engineer, whose valuation is to be binding upon both parties, and whose expense is to be paid half by each party; the valuation to be made upon notice by either party to the other that a valuation is desired.

And will you let us hear from you as quickly as possible, preferably Monday?

Very truly,
Thompson, Rabb & Stevenson.

1297 CITY'S STIPULATION EXHIBIT 83.

1004 Majestic Building,
Indianapolis, Indiana,
May 25, 1936.

Messrs. Thompson, Rabb & Stevenson,
115 North Pennsylvania Street,
Indianapolis, Indiana.

Gentlemen:

In reply to your letter of May 23rd which has reference to our letter of May 12th in respect to extensions which may hereafter be made to our mains, we desire to say the

method and procedure which you propose for the appraisal of such extensions is satisfactory to those of our officers and directors to whom it has been possible to submit your suggestion. It seems reasonable to assume that there will be no objection on the part of other officers and directors when they can be consulted.

Very truly yours,
The Indianapolis Gas Company,
By Wm. J. Yule,
Secretary.

1298 CITY'S STIPULATION EXHIBIT 84.

1004 Majestic Building,
Indianapolis, Indiana,
June 3, 1936.

Messrs. Thompson, Rabb & Stevenson,
115 North Pennsylvania Street,
Indianapolis, Indiana.

Gentlemen:

In reply to your letter of May 23rd last relative to the method of procedure for appraisals of extensions which may be made by the City or the Citizens Gas and Coke Utility to the mains of our Company in accordance with the previous correspondence on the subject, we desire to state that the proposal set out in your letter is satisfactory to us and we hereby accept the same as a completion of the understanding heretofore had through correspondence.

Very truly yours,
The Indianapolis Gas Company,
By Wm. J. Yule,
Secretary.

1299 CITY'S STIPULATION EXHIBIT 85.

Indianapolis, Indiana,
September 30, 1936.

The Indianapolis Gas Company,
Indianapolis, Indiana.

Gentlemen:

On February 10th, 1936, at your suggestion, we submitted to you a proposition containing the terms on which we were willing to acquire the plant and property of The Indianapolis Gas Company. This proposition was submitted with a clear understanding that it was requested by the directors of the Company and by a substantial number of both the stockholders and bondholders of the Company. It was likewise stated to you before the proposition was submitted that no purchase would be consummated merely on the action of the Company through its stockholders but that such a purchase must have the approval of the bondholders.

We understand that the terms of the proposition submitted do not meet with your approval.

In addition, an action has been commenced in the United States District Court in Indianapolis by the Trustee under the deed of trust securing mortgage bonds of The Indianapolis Gas Company in which the plaintiff seeks a declaration of the validity and binding effect of the lease of September 30, 1913, against the City of Indianapolis as successor trustee.

We procured an extension for filing our answer in this case until October 1st, but the plaintiff has been unwilling to grant a further extension of time and it is necessary for us to file our answer not later than Thursday of this week.

In view of these circumstances the offer which we made to you to purchase your property is hereby withdrawn.

Very truly yours,
Board of Directors for Utilities of
The City of Indianapolis,
By Henry L. Dithmer,
Its President.

1300 CITY'S EXHIBIT B.

Pages 358 to 362, inclusive of the Minute Book of the Board of Directors for Utilities of the City of Indianapolis.

(Here appear (pp. 358-361) the contract of March 2, 1936 between the Department of Utilities of the City of Indianapolis and The Indianapolis Gas Company and a certified copy of a resolution adopted by the Board of Directors of The Indianapolis Gas Company ratifying said contract. A copy of said contract and of said resolution appears as Exhibit E to the answer and counterclaim of the City of Indianapolis, et al. (I R. 205-208))

(page 362)

The following resolution was thereupon offered and unanimously adopted:

Resolved, By the Board of Directors for Utilities of the City of Indianapolis:

That the certain written agreement dated March 2, 1936, by and between The Indianapolis Gas Company, an Indiana corporation, and the Department of Utilities of the City of Indianapolis, with respect to continued temporary use by the City of Indianapolis of property belonging to said The Indianapolis Gas Company, is hereby approved and adopted by this Board for and on behalf of the City of Indianapolis; and the act of Henry L. Dithmer in executing said agreement for this Board as its President is hereby ratified and confirmed; and

That the officers of said Board and of Citizens Gas & Coke Utility are hereby authorized and directed to take all steps necessary and proper to carry into effect the said agreement.

A discussion as to the cost of gas then followed.

There being no further business, the meeting adjourned.

(Signed) Henry L. Dithmer,
President.

(Signed) Roy Sahm,
Secretary.

* * * * * *

1301 "(City's Exhibit C omitted pursuant to stipulation filed Nov. 22, 1939.)"

1302 CITY'S EXHIBIT 1.

State of Indiana }
Marion County } ss.

The undersigned, John M. Layton, hereby certifies:

1. That he is the duly elected, qualified and acting City Clerk of the City of Indianapolis in said County and State.

2. That as such City Clerk he has the custody of the official records of the Common Council of the City of Indianapolis, including the books and records of said Common Council in which all ordinances and appropriations adopted or made by said Common Council are recorded.

3. That after diligent search of all of the records of said Common Council of the City of Indianapolis, the undersigned finds no record to exist of the following tenor:

First. That there is no record of any appropriation for the making of any payments called for by a certain lease executed by and between The Indianapolis Gas Company and the Citizens Gas Company of Indianapolis on September 30, 1913, either before, at or after the date of the execution of such lease.

Second. That there is no record of any ordinance adopted or other action taken by the Common Council of the City of Indianapolis either before, at or after the date of the execution of said lease of September 30, 1913, by and between The Indianapolis Gas Company and the Citizens Gas Company, authorizing the execution of said lease by the City of Indianapolis or by the Citizens Gas Company of Indianapolis or by any one on behalf of the City of Indianapolis and no ordinance or other action ap-
1303 proving, confirming or ratifying said lease, or adopting the provisions thereof or attempting to bind the City of Indianapolis or any of its property to the performance of such lease, or recognizing any binding effect thereof on the City of Indianapolis or any of its property.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the City of Indianapolis, this 9th day of February, 1939.

John M. Layton (signed)
(Seal) *Clerk of the City of Indianapolis.*

"(Certificate to qualifications of certifying officer omitted in printing)."

(Inserted pursuant to stipulation filed November 22, 1939.)

1304 CITY'S EXHIBIT 2.

Certificate.

State of Indiana } ss.
Marion County }

The undersigned, Martin H. Walpole, hereby certifies: That he is the duly appointed, qualified and acting Executive Secretary and Clerk of the Department of Public Works of the City of Indianapolis, Indiana; that as such, he has custody of the official records of the Department of Public Works of said City, including the official records of the Board of Public Works from the date of creation of said Board in the year 1891 until its change of name in 1935 to the Board of Public Works and Sanitation, and that he has custody of the official records of said last named Board.

That he has caused a search to be made of said records and finds no record to exist of this tenor, viz:

(a) Authorizing, on behalf of said City, said Department, or said Board, the execution of the certain lease dated September 30, 1913, by and between The Indianapolis Gas Company and Citizens Gas Company of Indianapolis;

(b) Ratifying, confirming, or approving the execution of said lease, on behalf of said City, Department, or Board;

(c) Adopting the provisions of said lease, on behalf of said City, Department, or Board;

(d) Attempting to bind said City, or any of its property in the custody of said Department or Board, to the performance of said lease;

(e) Recognizing any binding effect of said lease upon said City, or any of its property, or said Department or Board.

Witness my hand this 28th day of February, 1939.

M. H. Walpole (signed)
As such Executive Secretary and Clerk.

1305 The Board of Public Works and Sanitation does not and is not required to have an official seal.

M. H. Walpole (signed)
As such Executive Secretary and Clerk.

* * * * * *

1306 "(Certificate to qualifications of certifying officer omitted in printing)."

(Inserted pursuant to stipulation filed November 22, 1939.)

1307 CITY'S EXHIBIT 3.

State of Indiana, } ss.
Marion County. }

The undersigned, Charles S. Rauh, hereby certifies:

1. That he is the duly appointed, qualified and acting Secretary of the Board of Trustees for Utilities of the Department of Utilities of the City of Indianapolis in said County and State.

2. That as such Secretary he has the custody of the official records of the Board of Trustees for Utilities of the Department of Utilities of the City of Indianapolis including the Minute Books and Records in which all action taken by said Board of Trustees for Utilities is recorded.

3. That after diligent search of all the records of the Board of Trustees for Utilities of the Department of Utilities of the City of Indianapolis the undersigned finds no record to exist of the following tenor:

1st. That there is no record of any action taken by said Board of Trustees for Utilities approving or adopting on behalf of the City of Indianapolis a certain lease of September 30, 1913, by and between The Indianapolis Gas Company and the Citizens Gas Company of Indianapolis.

2nd. That there is no record of any action of said Board of Trustees for Utilities confirming or ratifying said lease or adopting the provisions thereof or attempting to bind the City of Indianapolis or any of its property to the performance of such lease or recognizing any binding effect thereof on the City of Indianapolis or any of its property.

3rd. That there is no record of any action taken by said Board of Trustees for Utilities of the Department of
1308 Utilities of the City of Indianapolis authorizing the issuance or circulation of any circular or advertising matter or authorizing anyone to make any representations on behalf of the Department of Utilities of the City of Indianapolis, in connection with the re-sale of utility revenue bonds by Otis & Company and Halsey, Stuart & Company, or any other person or corporation.

4th. That there is no record of any action taken by the Department of Utilities of the City of Indianapolis authorizing any person to do any act or make any representation in connection with the re-sale of said revenue bonds.

In Witness Whereof, I have hereunto set my hand as such Secretary this 8th day of February, 1939.

(Signed) Charles S. Rauh
Secretary of the Board of Trustees for Utilities of the Department of Utilities of the City of Indianapolis.

* * * * * *

1309 "(Certificate to qualifications of certifying officer omitted in printing)."

(Inserted pursuant to stipulation filed November 22, 1939.)

1310 CITY'S EXHIBIT 4.

State of Indiana, } ss.
Wayne County. }

The undersigned, Roy Sahm, hereby certifies:

1. That he is the duly appointed, qualified and acting Secretary of the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis in said County and State.

2. That as such Secretary he has the custody of the official records of the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis including the Minute Books and Records in which all action taken by said Board of Directors for Utilities is recorded.

3. That after diligent search of all the records of the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis the undersigned finds no record to exist of the following tenor:

1st. That there is no record of any action taken by said Board of Directors for Utilities approving or adopting on behalf of the City of Indianapolis a certain lease of September 30, 1913, by and between The Indianapolis Gas Company and the Citizens Gas Company of Indianapolis.

2nd. That there is no record of any action of said Board of Directors for Utilities confirming or ratifying said lease or adopting the provisions thereof or attempting to bind the City of Indianapolis or any of its property to the performance of such lease or recognizing any binding effect thereof on the City of Indianapolis or any of its property.

3rd. That there is no record of any action taken by said Board of Directors for Utilities of the Department of
1311 Utilities of the City of Indianapolis authorizing the

issuance or circulation of any circular or advertising matter or authorizing anyone to make any representations on behalf of the Department of Utilities of the City of Indianapolis, in connection with the re-sale of utility revenue bonds by Otis & Company and Halsey, Stuart & Company, or any other person or corporation.

4th. That there is no record of any action taken by the Department of Utilities of the City of Indianapolis authorizing any person to do any act or make any representation in connection with the re-sale of said revenue bonds.

In Witness Whereof, I have hereunto set my hand as such Secretary this 8th day of February, 1939.

Roy Sahm (Signed)
Secretary of the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis.

* * * * * *

1312 "(Certificate to qualifications of certifying officer omitted in printing)."

(Inserted pursuant to stipulation filed November 22, 1939.)

1313 CITY'S EXHIBIT 5-A.

IN THE DISTRICT COURT OF THE UNITED STATES

For the District of Indiana

Indianapolis Division.

The Chase National Bank of the City of New York, Trustee, *Plaintiff*,
vs.
Citizens Gas Company of Indianapolis, a corporation, *et al*, *Defendants*.

In Equity No. 1844

INTERROGATORIES PROPOUNDED TO THE INDIANAPOLIS GAS COMPANY BY THE DEFENDANT, CITY OF INDIANAPOLIS AND THE INDIVIDUAL DEFENDANTS WHO ARE MEMBERS OF THE BOARD OF TRUSTEES AND DIRECTORS FOR UTILITIES OF THE CITY OF INDIANAPOLIS.

1314-1381 • • • • • •

1319 Interrogatory No. 23.

Were you advised for the first time on or about July 10, 1935, that the City of Indianapolis was denying the validity of and the enforceability against it of said lease of September 30, 1913?

Interrogatory No. 24.

At any time prior to July 10, 1935, did you know of any controversy existing between the Indianapolis Gas Company and the City of Indianapolis as to the validity or enforceability against the City of Indianapolis of said lease of September 30, 1913?

Interrogatory No. 25.

Did you, through any officer, agent or attorney of yours, advise said Chase National Bank of New York prior to March 2, 1936, that your company was proposing to enter into an agreement with the City of Indianapolis for the payment into the Th Indiana National Bank of Indan-

apolis of certain sums of money pending the final determination of this controversy?

Interrogatory No. 26.

If you shall answer Interrogatory No. 25 in the affirmative, then state what officers, agent, attorney or representative of yours gave such information to said Chase National Bank of New York and to what officer, agent or attorney of said Chase National Bank of New York such information was communicated?

1320 Interrogatory No. 27.

Has any correspondence been interchanged between yourself or any one acting on your behalf and said Chase National Bank of New York respecting said agreement of March 2, 1936, or in any way dealing with that agreement or what action you or The Indiana National Bank should take in respect of such agreement?

Interrogatory No. 28.

If you answer Interrogatory No. 27 in the affirmative, then give a list of the dates of any letters and telegrams so interchanged, the persons by whom written and to whom written.

Interrogatory No. 29.

Are the letters and telegrams referred to in Interrogatory No. 28 in your possession?

Interrogatory No. 30.

If you shall answer the preceding interrogatories to the effect that there was no interchange of correspondence between yourself and said Chase National Bank prior to the execution of the agreement of March 2, 1936, then state whether there was any such communication after March 2, 1936.

Interrogatory No. 31.

If you shall answer Interrogatory No. 30 in the affirmative, then state whether any letters or telegrams were interchanged between yourself or any officer, agent or attorney of yours and the Chase National Bank in respect of said agreement of March 2, 1936.

1321 Interrogatory No. 32.

If you shall answer Interrogatory No. 31 in the affirmative, then attach a list of such letters and telegrams, giving the date written, by whom and to whom written.

Interrogatory No. 33.

If you shall answer Interrogatory No. 32 in the affirmative, then state whether the letters and telegrams received by you and copies of those written by you are in your possession.

Interrogatory No. 34.

If in answer to Interrogatories numbered 27 to 31, inclusive, you state that you had no interchange of correspondence with the Chase National Bank of New York in reference to the agreement of March 2, 1936, either before or after that agreement was executed, then state whether there were any oral negotiations, or conversations, or communications between you and said Chase National Bank of New York either before or after March 2, 1936, in respect of the execution or performance of said contract.

Interrogatory No. 35.

If you shall answer Interrogatory No. 34 in the affirmative, then give the dates of such conferences and what officer, representative or attorney of yours conducted the same on your behalf or participated therein.

Interrogatory No. 36.

Have you or any of your officers or stockholders
1322 agreed directly or indirectly, in writing or otherwise, to indemnify the Chase National Bank of New York for the costs or expenses of the suit commenced by it and now being prosecuted in the United States District Court as Cause No. 1844 in Equity, or agreed to become primarily responsible for any such costs or attorneys' fees?

Interrogatory No. 37.

Have you informed or caused said Chase National Bank of New York to be informed, directly or indirectly, of the payments which actually were made by the City of Indianapolis into the Indiana National Bank as escrow agent under the agreement of March 2, 1936?

Interrogatory No. 38.

If you shall answer Interrogatory No. 37 in the affirmative, then state whether such information was oral or written.

Interrogatory No. 39.

If you shall answer Interrogatory No. 38 that the advice so given was written, attach a list of all letters or telegrams exchanged between yourself and said Chase National Bank of New York, in respect of such deposits, the date of each letter or telegram, and the persons to whom written and the person by whom written.

Interrogatory No. 40.

Are the originals of the letters and telegrams received by you referred to in the last preceding interrogatory 1323 and the copies of those written by you in your possession?

Interrogatory No. 41.

Approximately how many gas consumers now receive service from the mains or pipes of The Indianapolis Gas Company?

Interrogatory No. 42.

Have you ever denied the validity of the lease of September 30, 1913?

Interrogatory No. 43.

Have you constantly asserted since July 10, 1935, that the lease of July 30, 1913, was valid and enforceable against the City of Indianapolis?

Interrogatory No. 44.

Has your Company ever entered into any negotiations with the City of Indianapolis or its representatives for the purpose of settling or adjusting the controversy between The Indianapolis Gas Company and the City of Indianapolis in disregard of the rights of the bondholders of The Indianapolis Gas Company?

Interrogatory No. 45.

What payments were made to or on behalf of your Company by the Citizens Gas Company of Indianapolis since September 9, 1935, and prior to March 2, 1936? Give a full list of all payments so made, the dates when made and the purpose for which such payments were made i. e., whether for interest, dividends, expenses, taxes, or the like.

1324-13626 • • • • • •

(Omitted pursuant to stipulation filed November 22, 1939.)

1327 CITY'S EXHIBIT 5-B.

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—1844) * *

ANSWER OF DEFENDANT THE INDIANAPOLIS GAS COMPANY TO INTERROGATORIES PROPOUNDED BY DEFENDANT AND COUNTER-CLAIMANT CITY OF INDIANAPOLIS AND THE INDIVIDUAL DEFENDANTS WHO ARE MEMBERS OF THE BOARD OF TRUSTEES AND DIRECTORS FOR UTILITIES OF THE CITY OF INDIANAPOLIS.

Comes now defendant The Indianapolis Gas Company and, in response to the interrogatories propounded to said defendant by defendant and counter-claimant City of Indianapolis, makes and presents its answers to the same, as follows:

1328-1331 * * * * *

1332 Interrogatory No. 23.

Ans. This company was first advised that the City of Indianapolis was denying the validity of and enforceability against it of said lease of September 30, 1913 by letter dated July 23, 1935, a copy of which is attached to these answers and marked Exhibit I.

Interrogatory No. 24.

Ans. No.

1333 Interrogatory No. 25.

Ans. No.

Interrogatory No. 26.

Ans. No answer required.

Interrogatories Nos. 27, 28, 29, 30, 31, and 32.

Ans. The only correspondence interchanged between the Chase National Bank and this company respecting said agreement of March 2, 1936, were had subsequent thereto and were letters of inquiry as to whether or not the pay-

ments provided for in said agreement were being made. A copy of said correspondence is included as part of this answer and marked exhibits 2 to 34.

Interrogatory No. 33.

Ans. Yes.

Interrogatory No. 34.

Ans. Yes.

Interrogatory No. 35.

Ans. On March 11, 1936, Mr. Arthur V. Brown, Vice-President, and Mr. Wm. R. Higgins, one of counsel for said company, attended a conference at the office of the trustee, Chase National Bank, at which conference they advised said trustee of the execution of said agreement of March 2, 1936.

Interrogatory No. 36.

Ans. No.

Interrogatory No. 37.

Ans. Yes, in answer to inquiries.

Interrogatory No. 38.

Ans. The Chase National Bank was so advised as to payments made by the City of Indianapolis under the agreement of March 2, 1935 into the Indiana National Bank as escrow agent, both orally and in writing.

1334 Interrogatory No. 39.

Ans. Copies of correspondence here requested is set out in answer to interrogatories Nos. 27, 28, 29, 30, 31 and 32 supra.

Interrogatory No. 40.

Ans. Yes.

Interrogatory No. 41.

Ans. We have no information or knowledge as to how many gas consumers now receive service from the mains or pipes of the Indianapolis Gas Company, its said property having been, since September 30, 1913, continuously under the operation and control of the Citizens Gas Com-

pany of Indianapolis, until September 9, 1935, since which time it has been under the operation and control of the City of Indianapolis.

Interrogatory No. 42.

Ans. No.

Interrogatory No. 43.

Ans. The validity and enforceability of the lease of September 30, 1913, executed between this company and the Citizens Gas Company of Indianapolis, and its successors and assigns, has always been asserted whenever the question has been raised.

Interrogatory No. 45.

Ans. No payments have been made to or on behalf of this company to its knowledge by the Citizens Gas Company of Indianapolis, since September 9, 1935, on which date the City of Indianapolis took over the operation and control of the said property of said last named company.

1335-1337 • • • • • •

Subscribed and sworn to before me, a Notary Public in and for said above named County and State, this 4th day of February, 1939.

(Signed) E. James Hayth,
(Seal) *Notary Public.*

My commission expires: Oct. 1, 1941.

"(Verification of William J. Yule, Secretary of The Indianapolis Gas Company, omitted in printing.)"

(Inserted pursuant to stipulation filed November 22, 1939.)

(Here follows proof of service.)

1338-1342 • • • • • •

(d) In place of Exhibits 1 to 34, inclusive, attached to these answers to interrogatories substitute the following:

"Here follows Exhibit 1, letter dated July 23, 1935, from Thompson, Rabb & Stevenson to The Indianapolis Gas Company, a copy of which is in evidence as Plaintiffs' Stipulation Exhibit 58.

"Exhibits 2 to 5, attached to these answers to interrogatories, have been omitted in printing by agreement of the parties.

"Exhibits 6 to 19, inclusive, to these answers to interrogatories, appear elsewhere in the record as follows:

"Exhibit to Indianapolis Gas answers No.	Appears in the Record as
6	Plaintiffs' Exhibit 121
7	Exhibit 4 to plaintiff's answers to interrogatories
8	" 6 " " "
9	" 7 " " "
10	" 12 " " "
11	Plaintiffs' Exhibit 111A
11	" " 111B
12	" " 112
12	" " 112A
13	" " 113
14	" " 114
15	" " 115
16	" " 116
17	" " 117
18	" " 118
19	" " 119

(Plaintiff's answers to the interrogatories propounded to it, and the exhibits thereto, are in evidence as City's Exhibit 6B.)

"Exhibits 20 to 34, attached to these answers to interrogatories, have been omitted in printing by agreement of the parties."

(Inserted pursuant to stipulation filed November 22, 1939.)

1343 (Exhibits 6 to 34, inclusive, to the answers of The Indianapolis Gas Company appear elsewhere in the record as follows:

Exhibit to Indianapolis Gas answers No.	Appears in the Record as
6	Plaintiffs' Exhibit 121
7	Exhibit 4 to plaintiff's answers to interrogatories
8	" 6 " " " "
9	" 7 " " " "
10	" 12 " " " "
11	Plaintiffs' Exhibit 111A
11	" " 111B
12	" " 112
12	" " 112A
13	" " 113
14	" " 114
15	" " 115
16	" " 116
17	" " 117
18	" " 118
19	" " 119
20	Exhibit 29 to plaintiff's answers to interrogatories
21	" 30 " " " "
22	City's Exhibit C
23	Exhibit 32 to plaintiff's answers to interrogatories
24	" 34 " " " "
25	" 35 " " " "
26	" 36 " " " "
27-34, inclusive	Exhibits 38-45, inclusive, to plaintiff's answers to interrogatories

(Plaintiff's answers to the interrogatories propounded to it, and the exhibits thereto, are in evidence as City's Exhibit 6B.)

1344 CITY'S EXHIBIT 6-A.

IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—1844) • •

INTERROGATORIES PROPOUNDED TO PLAINTIFF BY THE DEFENDANTS THE CITY OF INDIANAPOLIS AND THE INDIVIDUAL DEFENDANTS WHO ARE MEMBERS OF THE BOARD OF TRUSTEES AND DIRECTORS FOR UTILITIES OF THE CITY OF INDIANAPOLIS.

1345-1347 • • • • • •

1348 Interrogatory No. 21.

When did you first learn that the City of Indian-
1349 apolis was denying the validity of and the enforce ability against it of said lease of September 30, 1913, and from whom did you acquire this information?

Interrogatory No. 22.

Did you have any knowledge prior to March 2, 1936, that The Indianapolis Gas Company was proposing to enter into an agreement with the City of Indianapolis for the payment into The Indiana National Bank of certain sums of money pending the determination of this controversy?

Interrogatory No. 23.

If you answer Interrogatory No. 22 in the affirmative then state from whom you acquired this information?

Interrogatory No. 24.

Did you receive on March 30, 1936, the sum of $171,575, or approximately that amount, together with your regular charges for disbursing such sum of money?

Interrogatory No. 25.

If you answer Interrogatory No. 24 in the affirmative then state from whom and for what purposes this money was received.

Interrogatory No. 26.

If you answer Interrogatory No. 25 in the affirmative was there any accompanying letter explaining the terms under which this payment was made?

1350 Interrogatory No. 27.

If you answer Interrogatory No. 26 in the affirmative what is the date of such letter and by whom was it written?

Interrogatory No. 28.

Is the letter referred to in Interrogatory No. 27 in your possession?

Interrogatory No. 29.

Give a list of all sums received by you other than the $171,575 from the City of Indianapolis or The Indiana National Bank at any time subsequent to September 9, 1935, on account of interest on the bonds of The Indianapolis Gas Company.

Interrogatory No. 30.

Have you had any correspondence with The Indianapolis Gas Company or The Indiana National Bank in respect of the agreement of March 2, 1936, referred to in Interrogatory No. 29, supra; and if so, attach to your answer a list of such correspondence showing the date of each letter and by whom written.

Interrogatory No. 31.

If you shall answer Interrogatory No. 30 in the affirmative then state whether the letters received by you and copies of those written by you are in your possession?

Interrogatory No. 32.

If you shall answer the preceding interrogatories, that you did not know that the agreement of March 2,
1351 1936, was to be executed before its execution, then state when you first learned of the execution of such agreement and from whom you received this information?

Interrogatory No. 33.

Have you ever protested to the City of Indianapolis, to The Indiana National Bank or The Indianapolis Gas Company against payments being made in pursuance of such agreement?

Interrogatory No. 34.

If you shall answer Interrogatory No. 33 in the affirmative, then state when and to whom such protests were made?

1352 • • • • • •

1353 CITY'S EXHIBIT 6B.

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—1844) * *

ANSWERS OF PLAINTIFF, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, TO INTERROGATORIES PROPOUNDED TO IT ON DECEMBER 2, 1938, BY THE DEFENDANTS THE CITY OF INDIANAPOLIS AND THE INDIVIDUAL DEFENDANTS WHO ARE MEMBERS OF THE BOARD OF TRUSTEES AND DIRECTORS FOR UTILITIES OF THE CITY OF INDIANAPOLIS.

United States of America,
Southern District of New York, } ss.
County of New York.

Paul C. Beardslee, having been duly sworn, says that he is Assistant Trust Officer of The Chase National Bank of the City of New York, plaintiff in the above entitled cause, and that he is an officer competent to testify in behalf of said plaintiff and makes the following answers to the interrogatories propounded to plaintiff on December 2, 1938, by the defendants the City of Indianapolis and the individual defendants who are members of the Board of Trustees and Directors for Utilities of the City of Indianapolis:

1354 * * * * * *

1355 21. The plaintiff received this information on or about September 17, 1935, from Prudential Insurance Company of America.

22. No.

23. No answer necessary.

24-28. On March 28, 1936, the Chase National Bank received from The Indianapolis Gas Company a letter dated March 26, 1936, signed by Wm. J. Yule, Secretary, enclosing the company's check payable to its order in the sum of $168,575. A copy of said letter is attached hereto and marked "Exhibit 3." No funds were received until later to pay its regular charges for disbursing said sum.

29. On October 1, 1935 the Chase National Bank received authority from Indiana National Bank to charge its account with the sum of $168,575 for account of In-

dianapolis Gas Company bond interest due on that day. The Chase National Bank did not know when this money was received whether it was furnished by The Indianapolis Gas Company, the Citizens Gas Company, or the City of Indianapolis.

30. Attached hereto and marked "Exhibits 4 to 12-B," inclusive, are copies of all correspondence between the Chase National Bank and The Indianapolis Gas Company or the Indiana National Bank in respect of the Agreement of March 2, 1936.

Exhibit 4. Letter dated May 4, 1937, addressed to Indianapolis Gas Company by Chase National Bank.

Exhibit 5. Letter dated May 12, 1937, addressed to Chase National Bank by Indiana National Bank.

Exhibit 6. Letter dated November 19, 1937, addressed to Indianapolis Gas Company by Chase National Bank.

Exhibit 7. Letter dated November 23, 1937, addressed to Chase National Bank by Indianapolis Gas Company.

Exhibit 8. Letter dated April 11, 1938, addressed to Indiana National Bank by Chase National Bank.

Exhibit 9. Letter dated April 15, 1938, addressed to Chase National Bank by Indiana National Bank, together with transcript of Escrow Account referred to therein.

Exhibit 10. Letter dated April 18, 1938, addressed to Indianapolis Gas Company by Chase National Bank.

Exhibit 11. Letter dated April 20, 1938, addressed to Chase National Bank by Indianapolis Gas Company, together with the statement referred to therein.

Exhibit 12. Letter dated April 27, 1938, addressed to Chase National Bank by the Indianapolis Gas Company.

Exhibit 12-A. Letter dated October 26, 1938, addressed to Indiana National Bank by Chase National Bank.

Exhibit 12-B. Letter dated October 29, 1938, addressed to Chase National Bank by Indiana National Bank.

1356 31. Yes.

32. At a conference held in the office of the Chase National Bank on or about March 11, 1936, with an officer and counsel of The Indianapolis Gas Company the Chase National Bank learned for the first time of the Agreement dated March 2, 1936, that it had been executed, and was told generally of its terms.

33-34. Yes, the Chase National Bank brought the pending suit.

1356-7 • • • • • •

1358 "(Verification of Paul C. Beardslee omitted in printing)".
(Inserted pursuant to stipulation filed November 22, 1939.)

1359-1364 • • • • • •

"(Exhibits 1 to 3, attached to these answers to interrogatories, have been omitted in printing by agreement of the parties)".
(Inserted pursuant to stipulation filed November 22, 1939.)

1365 Exhibit 4.

Copy.

May 4, 1937.

Mr. Arthur V. Brown, Vice President
Indianapolis Gas Company
Indianapolis
Indiana.

Indianapolis Gas Company Mortgage
dated October 1, 1902

Dear Mr. Brown:

Will you please confirm to us that the City of Indianapolis is depositing in the Indiana National Bank, pursuant to the Agreement of March 2, 1936, a sum equal to the rental stipulated under the nine-ty-nine year lease.

Thanking you for your kind cooperation, we are

Very truly yours,

Paul C. Beardslee,
Assistant Trust Officer.

PCB:z

1366 Exhibit 5.

Copy.

The Indiana National Bank.
Indianapolis, Ind.

May 12, 1937.

Mr. Paul C. Beardslee, Assistant Trust Officer
The Chase National Bank
New York, New York

Dear Sir:

Referring to your letter of May 4th, regarding Indianapolis Gas Company Mortgage dated October 1, 1902, wish to advise that all "escrow deposits" have been made to date and are now on deposit with this bank in accordance with the stipulations of agreement of March 2, 1936, between the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis and The Indianapolis Gas Company.

Very truly yours,
(signed) R. M. Fletcher,
Vice President & Cashier.

RMF/MEF

1367 Exhibit 6.

Copy.

November 19, 1937.

Mr. William J. Yule, Secretary
The Indianapolis Gas Company
Indianapolis
Indiana.

The Indianapolis Gas Company Mortgage
dated October 1, 1902.

Dear Sir:

For the completion of our files, will you be good enough to advise us whether or not the Utilities District deposited with the Indiana National Bank, in escrow, a sum equivalent to the interest due October 1, 1937 on the First Mortgage 5% Bonds issued under the above described Mortgage.

Very truly yours,
Paul C. Beardslee,
Assistant Trust Officer.

PCB:z

1368 Exhibit 7.

Copy.

1004 Majestic Building,
Indianapolis, Indiana,
November 23, 1937.

The Chase National Bank
Trust Department,
11 Broad Street,
New York, N. Y.

Attention: Mr. Paul C. Beardslee, Assistant Trust Officer.

Gentlemen:

Replying to your letter of November 19th, escrow deposit in the amount of the interest due October 1, 1937, on the bonds of this Company was made with The Indiana National Bank of this City on September 28, 1937.

Yours very truly,
The Indianapolis Gas Company
By (signed) W. J. Yule
Secretary.

1369 Exhibit 8.

April 11, 1938.

The Indiana National Bank,
Indianapolis, Indiana.
Attention: Mr. R. M. Fletcher, Vice President and Cashier.

Re: Indianapolis Gas Company Mortgage
dated October 1, 1902.

Gentlemen:

For the purpose of our records as Trustee under the above Mortgage, we would appreciate your advising whether all "escrow deposits" have been made since your letter of May 12, 1937, in accordance with the stipulations of agreement of March 2, 1936 between the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis and the Indianapolis Gas Company.

Thanking you in advance for your kind cooperation in this matter, we are,

Yours very truly,
Paul C. Beardslee
Assistant Trust Officer.

545-dk

1370 **Exhibit 9.**

Copy.

The Indiana National Bank
Indianapolis, Ind.

April 15th, 1938.

Mr. Paul C. Beardslee, Assistant Trust Officer,
The Chase National Bank of New York
11 Broad Street,
New York City, New York.

Dear Mr. Beardslee:

Re: Indianapolis Gas Company Mortgage
dated October 1, 1902.

Refering to your letter of April 11th we are enclosing, herewith, transcript of the Escrow Account of the Indianapolis Gas Company.

Assuring you that we are glad to be of any service in the matter, we are,

Very truly yours,

R. M. Fletcher,
Vice President & Cashier.

RMF:EYG

1371 **Exhibit 9.**

Copy.

Statement of Your Account With
The Indiana National Bank

The Indianapolis Gas Company.
Escrow Account

Please Examine and Report any Differences at once.

Checks	Date	Deposits
Amount Brought Forward		
	Jul 1, 1936	60,000.00
	Sep 29, 1936	171,575.00
	Dec 31, 1936	60,000.00
	Mar 31, 1937	171,575.00
	Jun 30, 1937	60,000.00
	Sep 28, 1937	171,575.00
	Dec 30, 1937	60,000.00
	Mar 29, 1938	171,575.00
This Is Your Balance April 14, 1938		$926,300.00*

1372 Exhibit 10.

Copy.

April 18, 1938

Mr. Arthur V. Brown, Vice President,
Indianapolis Gas Company,
Indianapolis, Indiana.

Indianapolis Gas Company Mortgage
dated October 1, 1902.

Dear Sir:

In response to our inquiry to the Indiana National Bank as to whether the City of Indianapolis is making Escrow deposits in accordance with the March 2, 1936 Escrow Agreement, we have received from the Bank a transcript of the Escrow Account.

Apparently the sum of $171,575. is being deposited semi-annually as a sum equivalent to six months' interest on the outstanding bonds, whereas our records indicate such deposit should be $172,025. Should this difference be accounted for by eliminating the interest on the Treasury Bonds of the Indianapolis Gas Company, we believe that coupons appertaining to such bonds maturing October 1, 1936, April and October 1937, April 1, 1938 and subsequent coupon maturities for which funds are not deposited should be surrendered to us for cancellation.

Will you please give this matter your attention.

Yours very truly,

Paul C. Beardslee
Assistant Trust Officer.

B-h

1373 Exhibit 11.

Copy

1004 Majestic Building,
Indianapolis, Indiana
April 20, 1938.

The Chase National Bank,
Trust Department,
11 Broad Street,
New York, N. Y.

Attention: Mr. Paul C. Beardslee, Assistant Trust Officer.

Gentlemen:

We acknowledge your letter of April 18th in respect to the difference between the semi-annual interest on the outstanding bonds of our Company and the semi-annual escrow deposit which has been made on account thereof.

A statement of the outstanding bonds, unpaid interest and escrow deposits is enclosed.

The difference of $450 between the semi-annual interest due and the escrow deposit made is the interest on eighteen of our bonds which are held in the treasury of the Citizens Gas and Coke Utility of the City of Inianapolis. We have taken up with them the question of having these coupons sent in for cancellation and will advise further as soon as we have their reply.

Yours very truly,
The Indianapolis Gas Company,
By Arthur V. Brown,
Vice President.

1374 Exhibit 11.

First Consolidated Mortgage, Five Per-Cent Gold Bonds of The Indianapolis Gas Company

Dated October 1, 1902—Due October 1, 1952

Total Authorized Issue	$7,500,000.00		
Total Outstanding	$6,881,000.00		
			Semi-Annual interest
Public		$6,743,000.00	$168,575.00
I. G. Co. Treasury		120,000.00	3,000.00
		$6,863,000.00	$171,575.00*
Citizens Gas Co. now held by Citizens Gas & Coke Utility of the City of Indianapolis		$ 18,000.00	450.00**
Total		$6,881,000.00	$172,025.00
Escrow Deposits on account of Bond Interest due:			
October 1936	$171,575.00		
April 1937	171,575.00		
October 1937	171,575.00		
April 1938	171,575.00		
		$686,300.00	
No Deposit on account of Bond Interest Due on Bonds held by Citizens Gas & Coke Utility of the City of Indianapolis:			
October 1936	$ 450.00		
April 1937	450.00		
October 1937	450.00		
April 1938	450.00		
		1,800.00	
Total Bond Interest due and unpaid		$688,100.00	

*Semi-Annuel Escrow Deposit.

**Semi-annuel—No Deposit.

1375 **Exhibit 12.**

Copy

1004 Majestic Building,
Indianapolis, Indiana.
April 27, 1938.

The Chase National Bank,
Trust Department,
11 Broad Street,
New York, New York

Attention: Mr. Paul C. Beardslee, Assistant Trust Officer

Gentlemen:

Please refer to your letter of April 18th and to our acknowledgment of April 20th in respect to the eighteen bonds for which no escrow deposit has been made in the amount of the coupons which are due and unpaid subsequent to April 1, 1936.

As stated in our letter of April 20th, these bonds are held in the treasury of the Citizens Gas and Coke Utility of the Department of Utilities of the City of Indianapolis. They now advise they see no reason for sending these coupons in for cancellation at this time but will make proper disposition of the same when the other coupons are paid.

Yours very truly,
The Indianapolis Gas Company,
By Wm. Y. Yule,
Secretary.

1376 Exhibit 12-A.

Copy.

October 26, 1938.
3-27-645

The Indiana National Bank,
Indianapolis, Indiana.

Attention: Mr. R. M. Fletcher, Vice President and Cashier.

Re: The Indianapolis Gas Company Mortgage dated October 1, 1902.

Gentlemen:

For the purpose of our records as Trustee under the above mortgage, we would appreciate your advising whether all "escrow deposits" have been made since your letter of April 15, 1938 in accordance with the stipulations of agreement of March 2, 1936 between the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis and the Indianapolis Gas Company.

Thanking you in advance for your kind cooperation in this matter, we are,

Yours very truly,
Paul B. Beardslee,
Assistant Trust Officer.

1377 Exhibit 12-B.

Copy.

The Indiana National Bank,
Indianapolis, Ind.

October 29, 1938.

Mr. Paul C. Beardslee, Asst. Trust Officer,
The Chase National Bank of New York,
11 Broad Street,
New York, New York.

Re: The Indianapolis Gas Company Mortgage dated October 1, 1902.

Dear Mr. Beardslee:

We acknowledge receipt of your letter of October 26th, and wish to advise that all "Escrow Deposits" have been

made since our letter of April 15, 1938, in accordance with the stipulations of agreement of March 2, 1936 between the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis and the Indianapolis Gas Company.

We assure you that it is a pleasure to be of any service to you in this connection.

Very truly yours,
(Signed) R. M. Fletcher,
Vice President & Cashier.

RMF/clf

1378-1389 • • • •

(Exhibits 13 to 24, inclusive, to plaintiff's answers to the interrogatories propounded to it appear elsewhere in the record as follows:

Exhibit to Plaintiff's Answers No.	Appears in the Record as Plaintiffs' Exhibit No.
13	111A
14	111B
15	111C
16	112
17	112A
18-24, inclusive	113-119, inclusive.)

(Inserted pursuant to stipulation filed November 22, 1939.)

1390-1441 • • • •

(g) In place of Exhibits 25 to 45 insert:

(Exhibits 25 to 45, attached to these answers to interrogatories, have been omitted in printing by agreement of the parties.)

CITY'S EXHIBIT 7-A

Indianapolis, Indiana,
September 26, 1935.

Minutes of a Special Meeting of the Board of Directors

of

The Indianapolis Gas Company.

A called meeting of the Board of Directors of The Indianapolis Gas Company was held on Thursday, September 26, 1935, at 12:30 o'clock P. M.

Present: Messrs. Appel, Brown, Ewbank, Higgins and Irwin.

Absent: Mr. Reilly.

The meeting was called to order by the President, Mr. Irwin, who stated its purpose was to consider certain communications from the City of Indianapolis by the Board of Directors for Utilities in respect to the property of the Company leased to the Citizens Gas Company of Indianapolis, as follows:

"(Here follows copy of letter of July 23, 1935, which letter appears above as Plaintiffs' Stipulation Exhibit 58.)"

(Inserted pursuant to stipulation filed November 22, 1939.)

• • • • • •

"(Here follows copy of letter of August 31, 1935, which letter appears above as Plaintiffs' Stipulation Exhibit 59.)"

(Inserted pursuant to stipulation filed November 22, 1939.)

• • • • • •

"(Here follows copy of letter of September 9, 1935, which letter appears above as City's Stipulation Exhibit 60.)"

(Inserted pursuant to stipulation filed November 22, 1939.)

• • • • • •

"(Here follows copy of resolution for rejection of assignment of lease, rejection of assignment of lease, and resolution for temporary use of property of Indianapolis Gas Company, copies of which are attached to the answer

and counterclaim of the City of Indianapolis, et al. as Exhibit C (I. R. 200-204.)"
(Inserted pursuant to stipulation filed November 22, 1939.)

The Indianapolis Gas Company
1004 Majestic Building
Indianapolis, Indiana

Gentlemen:

Herewith we tender you the sum of $4,780.80, which we understand is equivalent to the amount due and owing by you for the third installment of your Federal Income Tax for the year 1934 payable in 1935.

This sum is tendered you as a payment on account of temporary use and occupancy of your property by the City of Indianapolis pursuant to the certain resolution, entitled "Resolution for Temporary Use of Property of The Indianapolis Gas Company" adopted by the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis, Indiana, on September 9, 1935; a copy of which resolution was that day transmitted to you.

Said sum is not tendered you under or on account of the certain lease between you and Citizens Gas Company of Indianapolis dated September 30, 1913, or any assignment thereof. The City of Indianapolis is not acting under said lease, or any assignment thereof, and has not recognized and does not recognize said lease as an obligation in any respect, either binding upon the City or upon any property acquired by the City from said Citizens Gas Company of Indianapolis.

If you do not accept this tendered payment or acquiesce in the temporary use of your property by the City of Indianapolis pursuant to said resolution, please inform the Board of Directors for Utilities of the City of Indianapolis accordingly.

Dated at Indianapolis, Indiana, September 14, 1935.

Board of Directors for Utilities
of the City of Indianapolis,
By Henry L. Dithmer.

Letter and check were returned personally by the Secretary with oral statement that it was outside his authority to accept same.

* * * * * *

"(Here follows copy of letter of September 24, 1935,

which letter appears above as City's Stipulation Exhibit 62.)"
(Inserted pursuant to stipulation filed November 22, 1939.)

* * * * * *

Letter and check returned personally by the Secretary without comment.

"(Here follows copy of letter of September 24, 1935, which letter appears above as City's Stipulation Exhibit 61.)"
(Inserted pursuant to stipulation filed November 22, 1939.)

* * * * * *

Letter and check returned personally by the Secretary without comment.

made since our letter of April 15, 1938, in accordance with the stipulations of agreement of March 2, 1936 between the Board of Directors for Utilities of the Department of Utilities of the City of Indianapolis and the Indianapolis Gas Company.

We assure you that it is a pleasure to be of any service to you in this connection.

Very truly yours,
(Signed) R. M. Fletcher,
Vice President & Cashier.

RMF/clf

1378-1389 • • • •

(Exhibits 13 to 24, inclusive, to plaintiff's answers to the interrogatories propounded to it appear elsewhere in the record as follows:

Exhibit to Plaintiff's Answers No.	Appears in the Record as Plaintiffs' Exhibit No.
13	111A
14	111B
15	111C
16	112
17	112A
18-24, inclusive	113-119, inclusive.)

(Inserted pursuant to stipulation filed November 22, 1939.)

1390-1441 • • • •

(g) In place of Exhibits 25 to 45 insert:

(Exhibits 25 to 45, attached to these answers to interrogatories, have been omitted in printing by agreement of the parties.)

CITY'S EXHIBIT 7-A.

Indianapolis, Indiana,
September 26, 1935.

Minutes of a Special Meeting of the Board of Directors
of
The Indianapolis Gas Company.

A called meeting of the Board of Directors of The Indianapolis Gas Company was held on Thursday, September 26, 1935, at 12:30 o'clock P. M.

Present: Messrs. Appel, Brown, Ewbank, Higgins and Irwin.

Absent: Mr. Reilly.

The meeting was called to order by the President, Mr. Irwin, who stated its purpose was to consider certain communications from the City of Indianapolis by the Board of Directors for Utilities in respect to the property of the Company leased to the Citizens Gas Company of Indianapolis, as follows:

"(Here follows copy of letter of July 23, 1935, which letter appears above as Plaintiffs' Stipulation Exhibit 58.)"

(Inserted pursuant to stipulation filed November 22, 1939.)

* * * * * *

"(Here follows copy of letter of August 31, 1935, which letter appears above as Plaintiffs' Stipulation Exhibit 59.)"

(Inserted pursuant to stipulation filed November 22, 1939.)

* * * * * *

"(Here follows copy of letter of September 9, 1935, which letter appears above as City's Stipulation Exhibit 60.)"

(Inserted pursuant to stipulation filed November 22, 1939.)

* * * * * *

"(Here follows copy of resolution for rejection of assignment of lease, rejection of assignment of lease, and resolution for temporary use of property of Indianapolis Gas Company, copies of which are attached to the answer and counterclaim of the City of Indianapolis, et al. as Exhibit C (I. R. 200-204.)"

(Inserted pursuant to stipulation filed November 22, 1939.)

* * * * * *

"(Here follows copy of letter of September 24, 1935, which letter appears above as City's Stipulation Exhibit 62.)"

(Inserted pursuant to stipulation filed November 22, 1939.)

* * * * * *

"(Here follows copy of letter of September 24, 1935, which letter appears above as City's Stipulation Exhibit 61.)"

(Inserted pursuant to stipulation filed November 22, 1939.)

* * * * * *

Letter and check returned personally by the Secretary without comment.

On motion of Mr. Brown, seconded by Mr. Appel, the following resolution was unanimously adopted.

Whereas, The Board of Directors for Utilities of the City of Indianapolis, through its counsel, have addressed several communications to this Company, its Officers or its Directors, relative to their attitude in respect to the lease executed by this Company to the Citizens Gas Company of Indianapolis on September 30, 1913; and

Whereas, It is the opinion of this Board that special counsel should be employed by the Company in the controversy thus presented;

Therefore Be It Resolved, That Messrs. Ewbank and Higgins of this Board be authorized and directed to visit Cleveland, Ohio, and endeavor to secure the services of Mr. Newton D. Baker as special counsel to the Company in the controversy presented.

On motion of Mr. Brown, seconded by Mr. Ewbank, the meeting was adjourned to 10:00 o'clock A. M., Monday, September 30, 1935.

William E. Irwin,
Chairman.

Wm. J. Yule,
Secretary.

CITY EXHIBIT 7-B.

Indianapolis, Indiana,
September 30, 1935.

Minutes of Adjourned Meeting of the Board of Directors of The Indianapolis Gas Company.

The Board of Directors of The Indianapolis Gas Company met on Monday morning, September 30, 1935, at 10:00 o'clock, pursuant to adjournment from September 26th.

Present: Messrs. Appel, Brown, Ewbank, Higgins and Irwin.

Absent: Mr. Reilly.

The meeting was called to order by the President, Mr. Irwin.

Thereupon Messrs. Ewbank and Higgins reported that they had, pursuant to the directions of the Board, interviewed Mr. Newton D. Baker at Cleveland, Ohio, on September 28th, and in conference with him had presented all available facts surrounding the lease and the communica-

tions received from the Board of Directors for Utilities of the City of Indianapolis in respect thereto, and that Mr. Baker had accepted employment by the Company as special counsel in the matter.

On motion of Mr. Ewbank, seconded by Mr. Brown, the following resolution was unanimously adopted.

Whereas, The Board of Directors for Utilities of the City of Indianapolis, through its counsel, Messrs. Thompson, Rabb & Stevenson, has addressed several communications to this Company, its Officers or its Directors, in respect to the lease executed by this Company to the Citizens Gas Company of Indianapolis on September 30, 1913;

Therefore Be It Resolved, That the Secretary of this Company be directed to execute and deliver the following letter to Messrs. Thompson, Rabb & Stevenson, Counsel for the Board of Directors for Utilities of the City of Indianapolis:

"(Here follows copy of letter of September 30, 1935, which letter appears above as Plaintiffs' Stipulation Exhibit 66)".

(Inserted pursuant to stipulation filed November 22, 1939.)

• • • • • •

The letter was executed by the Secretary and delivered to Mr. W. H. Thompson, of Thompson, Rabb & Stevenson, whereupon the following letter was received in reply thereto.

"(Here follows copy of letter of September 30, 1935, which letter appears above as City's Stipulation Exhibit 64)".

(Inserted pursuant to stipulation filed November 22, 1939.)

• • • • • •

On motion of Mr. Ewbank, seconded by Mr. Brown, the following resolution was unanimously adopted:

Resolved, That the Secretary of this Company be directed to execute and deliver the following letter:

"(Here follows copy of letter of September 30, 1935, which letter appears above as City's Stipulation Exhibit 65)".

(Inserted pursuant to stipulation filed November 22, 1939.)

• • • • • •

There being no further business, on motion duly seconded, the meeting adjourned.

William E. Irwin,
Chairman.

Wm. J. Yule,
Secretary.

CITY'S EXHIBIT 7-C.

Indianapolis, Indiana,
November 6, 1935.

Minutes of a Special Meeting of the Board of Directors of The Indianapolis Gas Company.

Pursuant to the call of the President, the Board of Directors of The Indianapolis Gas Company met on Wednesday, November 6, 1935, at twelve o'clock noon.

Present: Messrs. Appel, Brown, Ewbank, Higgins, Irwin and Reilly.

Absent: None.

The meeting was called to order by the President, Mr. Irwin.

On motion of Mr. Reilly, seconded by Mr. Brown, the following resolution was unanimously adopted:

Resolved, That the Secretary of the Company be instructed to formally notify The Chase National Bank of New York, as Trustee of the First Mortgage Bonds of The Indianapolis Gas Company, of the refusal of the City of Indianapolis to accept the assignment of the ninety-nine year lease made and executed in 1913 between this Company and the Citizens Gas Company of Indianapolis, and to further advise said Bank, Trustee, of the formal developments and situations surrounding the present operation of the Company's property, by sending them a letter stating substantially as follows:

"(Here follows a form of letter from The Indianapolis Gas Company to the Chase National Bank Company, which is identical with the letter of November 7, 1935, a copy of which is set forth as Plaintiffs' Exhibit 116)".

(Inserted pursuant to stipulation filed November 22, 1939.)

* * * * * *

There being no further business, on motion duly seconded, the meeting adjourned.

William E. Irwin,
Chairman.

Wm. J. Yule,
Secretary.

CITY EXHIBIT 7-D.

Indianapolis, Indiana,
March 4, 1936.

Minutes of a Called Meeting of the Board of Directors of The Indianapolis Gas Company.

The Board of Directors of The Indianapolis Gas Company met on call of the President, Wednesday, March 4, 1936, at twelve o'clock noon.

Present: Messrs. Brown, Ewbank, Higgins, Irwin and Smith.

Absent: Messrs. Appel and Reilly.

The meeting was called to order by Mr. Irwin, President.

Minutes of the last meeting, January 15, 1936, were read and approved.

The following agreement executed March 2, 1936, by the Officers of the Company with the Department of Utilities of the City of Indianapolis was offered for approval of the Board Directors.

"(Here appears a copy of the agreement of March 2, 1936 between The Indianapolis Gas Company and the Department of Utilities of the City of Indianapolis, a copy of which appears as part of Exhibit E to the answer and counter-claim of the City of Indianapolis, et al. (I. R. 205-207)".

(Inserted pursuant to stipulation filed November 22, 1939.)

• • • • • •

Mr. Ewbank offered the following resolution and moved its adoption.

Resolved, That the action of the Officers of this Company in executing on March 2, 1936, the agreement with the Department of Utilities of the City of Indianapolis be, and it is, hereby approved, ratified and confirmed.

The motion was seconded by Mr. Brown, whereupon the resolution was unanimously adopted.

There being no further business, on motion of Mr. Higgins, seconded by Mr. Smith, the meeting adjourned.

William E. Irwin,
Chairman.

Wm. J. Yule,
Secretary.

CITY'S EXHIBIT NO. 7-E.

Indianapolis, Indiana,
April 3, 1936.

Minutes of a Called Meeting of the Board of Directors
of
The Indianapolis Gas Company

Pursuant to call of the President, the Board of Directors of The Indianapolis Gas Company met on Friday, April 3, 1936, at 3:30 P. M.

Present: Messrs. Brown, Ewbank, Higgins, Irwin and Reilly.

Absent: Messrs. Appel and Smith.

The meeting was called to order by the President, Mr. Irwin, who stated the purpose of the meeting was to consider a letter received from Messrs. Thompson, Rabb & Stevenson, Counsel for the Department of Utilities of the City of Indianapolis, which letter is as follows:

* * * * * *

"(Here appears a copy of letter dated March 20, 1936 from Thompson, Rabb & Stevenson to The Indianapolis Gas Company, a copy of which is set forth as City's Stipulation Exhibit 78)."

(Inserted pursuant to stipulation filed November 22, 1939.)

On motion of Mr. Higgins, seconded by Mr. Ewbank, the following resolution was unanimously adopted.

Resolved, That the Secretary of this Company be, and he is hereby directed to acknowledge the letter dated March 20, 1936, addressed to this Company by Messrs. Thompson, Rabb & Stevenson, Counsel for the Department of Utilities of the City of Indianapolis, by transmitting to them the following letter which is hereby approved and authorized by this Board:

* * * * * *

"(Here follows a form of letter from the Indianapolis Gas Company to Thompson, Rabb & Stevenson, which is identical with the letter of April 6, 1936, a copy of which is set forth as City's Stipulation Exhibit 79)."

(Inserted pursuant to stipulation filed November 22, 1939.)

There being no further business, on motion duly seconded, the meeting adjourned.

William F. Irwin,
Chairman.

Wm. J. Yule,
Secretary.

CITY'S EXHIBIT NO. 7-G.

Indianapolis, Indiana,
June 3, 1936.

Minutes of a Called Meeting of the Board of Directors
of
The Indianapolis Gas Company

A called meeting of the Board of Directors of The Indianapolis Gas Company was held at twelve o'clock noon on Wednesday, June 3, 1936.

Present: Messrs. Appel, Brown, Ewbank, Higgins, Irwin, Reilly and Smith.

Absent: None.

The meeting was called to order by the President, Mr. Irwin.

Minutes of meetings held March 4, April 3 and May 12 were read and approved.

There was offered for consideration a letter from Messrs. Thompson, Rabb & Stevenson, Counsel for the Department of Utilities of the City of Indianapolis, in respect to a main extension agreement, which letter is as follows:

* * * * * *

"(Here appears a copy of letter dated May 23, 1936 from Thompson, Rabb & Stevenson to The Indianapolis Gas Company, a copy of which is set forth as City's Stipulation Exhibit 82)."

(Inserted pursuant to stipulation filed November 22, 1939.)

On motion of Mr. Higgins, seconded by Mr. Ewbank, the Secretary was instructed to send in reply the following letter to Messrs. Thompson, Rabb & Stevenson:

* * * * * *

"(Here appears a copy of letter dated June 3, 1936 from The Indianapolis Gas Company to Thompson, Rabb & Stevenson, a copy of which is set forth as City's Stipulation Exhibit 84)."

(Inserted pursuant to stipulation filed November 22, 1939.)

There being no further business, on motion duly seconded, the meeting adjourned.

William F. Irwin.
Chairman.

Wm. J. Yule,
Secretary.

1412 CITY'S EXHIBIT 8.

General Ordinance No. 82—1935.

An Ordinance concerning acquisition by the City of Indianapolis of the plant and property of Citizens Gas Company of Indianapolis, Indiana, and matters connected therewith.

• • • • • •

"(The part here omitted recites in appropriate 'Whereas' clauses certain historical facts in regard to Citizens Gas Company and its relationship to the City of Indianapolis, which appear elsewhere in this record)."
(Inserted pursuant to stipulation filed November 22, 1939.)

1414 Whereas on June 29, 1935 the City, by and through the Board of Directors for Utilities of the Department of Public Utilities of said City advanced and paid to said Citizens Gas Company the sum of $3,550,000, in trust for the purpose of redeeming and retiring all outstanding preferred stock of said Company and of paying and cancelling the certificates representing all outstanding common stock of the Company as provided in said franchise contract and the amended Articles of Incorporation of said Company, such sum so advanced and paid being sufficient for said purpose, which said fund was provided from the sale
1415 by said Board of Directors for Utilities of revenue bonds payable solely and exclusively out of revenues to be derived from the operation of said gas plant and property when acquired by said City, all as authorized by Chapters 77 and 78 of the Acts of 1929, Chapter 67 of the Acts of 1931, and Chapter 125 of the Acts of 1933 as amended by Chapter 311 of the Acts of 1935, of the General Assembly of the State of Indiana; and

Whereas thereafter on September 9, 1935 the plant and property of said Citizens Gas Company, as referred to in and contemplated by said franchise contract of 1905, was, by instruments of conveyance and assignment duly executed by the proper officers of said Company on authority of resolutions adopted by the Board of Directors and Board of Trustees of said Company, conveyed, assigned, transferred and delivered to the City of Indianapolis, subject to such of the legal obligations of said Company as the City of Indianapolis, under the terms of said franchise contract and of said public charitable trust, was bound to ac-

cept or recognize as a charge against such plant and property, (the City of Indianapolis expressly rejecting a tendered assignment of a lease between the Indianapolis Gas Company and said Citizens Gas Company, and refusing to recognize said lease as an obligation binding upon the City) which said instruments of conveyance and assignment were on said date of execution and delivery duly recorded in the office of the Recorder of Marion County, Indiana, in Deed Record 937 and Miscellaneous Record 265, respectively; and

Whereas prior to such conveyance, assignment, transfer and delivery of said plant and property of Citizens Gas Company to the City of Indianapolis, all notices to and demands upon Citizens Gas Company, its directors and trustees, and all other steps, conditions and things necessary or required by said franchise contract, by said public charitable trust or by the statutes of Indiana, to be done precedent to or in connection with the taking over of such
1416 plant and property, were, as this Common Council does now find, determine and declare, duly and fully given, made, done, performed, and executed for and in behalf of the City of Indianapolis by the Board of Public Works, the Board of Directors for Utilities and other proper officials of said City; and

Whereas the acquisition of said plant and property of the Citizens Gas Company, as contemplated in said franchise contract of 1905 and pursuant to the public charitable trust existing therein, is and will be to the advantage, benefit and welfare of the City of Indianapolis and its inhabitants and the consumers of gas therein; now therefore

Be It Ordained by the Common Council of the City of Indianapolis;

Section 1. That the acquisition and taking over of the plant and property of the Citizens Gas Company of Indianapolis, Indiana, on the 9th day of September, 1935, for and in behalf of the City of Indianapolis, by the Board of Directors for Utilities of said City, including the acceptance of deed of conveyance of real estate and assignments of personal property, and the rejection of an assignment of the certain lease from the Indianapolis Gas Company, and its refusal to recognize said lease as an obligation binding upon the City, and all acts, steps and proceedings whatsoever relating to such matter as on said date and theretofore done and taken, be and is hereby in all things ratified, approved, adopted and confirmed; and that the public charitable trust in all such plant and property so delivered

to and as accepted by said Board of Directors for Utilities be and is hereby received and accepted, and the City of Indianapolis hereby agrees to the conditions and terms accompanying such trust and acknowledges itself bound to carry them out.

1417 Sec. 2. This Ordinance, shall be in full force and effect from and after its passage.

* * * * * *

"(Certificate of City Clerk omitted in printing)."
(Inserted pursuant to stipulation filed November 22, 1939.)

CITY'S EXHIBIT 9.

1418 * * * * *

"(This exhibit entitled 'Rejection of Assignment of Lease and Refusal to Assume, Take Over, or be Bound Thereby' appears as part of paragraph 5 of the Resolution for Rejection of Assignment of Lease which is part of Exhibit C to the answer and counterclaim of City of Indianapolis, et al. (I R. 203-4))."
(Inserted pursuant to stipulation filed November 22, 1939.)

CITY'S EXHIBIT No. 10

Sheet No. 1

Utility District—City of Indianapolis

Gen. Ledger Acct.—Amounts Due I. G. Co., for use of Property—Accrued Amount Equal to Stock Interest

Account No. 621

Date 1935	Items	Folio	√	Debits	Date 1935	Items	Folio	√	Credits
Dec. 31		J445	√	√% 37,333.33	Sept. 30		J 23		7,333.33
					Oct. 31		J 30		10,000.00
					Nov. 30		J 39		10,000.00
					Dec. 31		J 43		10,000.00
				37,333.33					37,333.33
					1936				
					Jan. 31		J623		10,000.00
					Febr. 29		J 67		10,000.00
					Mar. 31		J 72		10,000.00
					Apr. 30		J 77		10,000.00
					May 31		J 83		10,000.00
					June 30		J 87		10,000.00
					July 31		J 93		10,000.00
					Aug. 31		J 99		10,000.00
					Sept. 30		J103		10,000.00
					Oct. 30		J108		10,000.00
					Nov. 30		J113		10,000.00
	Balance			120,000.00	Dec. 31		J118		10,000.00
				120,000.00					120,000.00
					1937				
					Jan. 1	Balance			120,000.00
					31		J136		10,000.00
					Feb. 28		J140		10,000.00

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City's Exhibit 10.

				Feb. 28	J140	10,000.00
				Mar. 31	J144	10,000.00
				Apr. 30	J149	10,000.00
				May 31	J153	10,000.00
				June 30	J157	10,000.00
				July 31	J161	10,000.00
				Aug. 31	J164	10,000.00
				Sept. 30	J166	10,000.00
				Oct. 31	J170	10,000.00
				Nov. 30	J174	10,000.00
	Balance		240,000.00	Dec. 31	J178	10,000.00
			240,000.00			240,000.00
1938				1938		
				Jan. 1	Balance Fwd.	240,000.00
24						Sheet No. 2
				Jan. 1	Balance Brot Fwd.	240,000.00
				31	J197	10,000 —
				Feb. 28	J200	10,000 —
				Mar. 31	J202	10,000 —
				Apr. 30	J205	10,000 —
				May 31	J208	10,000 —
				June 30	J214	10,000 —
				July 31	J217	10,000 —
				Aug. 31	J220	10,000 —
				Sept. 30	J223	10,000 —
				Oct. 31	J225	10,000
				Nov. 30	J230	10,000
	Balance		360,000.00	Dec. 31	J233	10,000 —
			360,000.00			360,000 —
				1939		
				Jan. 1	Balance	360,000.00

City's Exhibit 10.

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CITY'S EXHIBIT No. 10

Sheet No. 1

Utility District—City of Indianapolis

Gen. Ledger Acct.—Amounts Due I. G. Co. for use of Property—Accrued Amount Equal to Bond Interest

Account No. 622

Date 1935	Items	Folio	√	Debits	Date 1935	Items	Folio	√	Credits
Sept. 30		J24–25		20,970.28	Sept. 30		J 23		20,970.28
					Oct. 31		J 30		28,595.83
					Nov. 30		J 39		28,595.83
	Balance			85,787.49	Dec. 31		J 43		28,595.83
				106,757.77					106,757.77
1936					1936				
Mar. 31		J 73		171,575.00	Jan. 1	Balance			85,787.49
					31		J62–3		28,595.83
					Febr. 29		J 67		28,595.83
					Mar. 31		J 72		28,595.85
					Apr. 30		J 77		28,595.83
					May 31		J 83		28,595.83
					June 30		J 87		28,595.83
					July 31		J 93		28,595.83
					Aug. 31		J 99		28,595.83
					Sept. 30		J103		28,595.85
					Oct. 31		J108		28,595.83
					Nov. 30		J113		28,595.83
	Balance			257,362.49	Dec. 31		J118		28,595.83
				428,937.49					428,937.49
					1937				
					Jan. 1				257,362.49
					31		J136		28,595.83
					Febr. 28		J140		28,595.83

City's Exhibit 10.

			Feb
			Ma
			Apr
			Ma
			Jun
			July
			Aug
			Sep
			Oct
			Nov
	Balance	600,512.49	Dec
		600,512.49	
			Jan
26			19
			Jan
			"
			Feb
			Ma
			Apr
			Ma
			Jun
			July
			Aug
			Sep
			Oct
			Nov
	Balance	943,662.49	Dec
		943,662.49	
			1
			Jan

r. 28		J140	28,595.83
r. 31		J144	28,595.85
r. 30		J149	28,595.83
y 31		J153	28,595.83
e 30		J157	28,595.83
y 31		J161	28,595.83
g. 31		J164	28,595.83
t. 30		J166	83,595.85
. 31		J170	28,595.83
v. 30		J174	28,595.83
c. 31		J178	28,595.83
			600,512.49
. 1, 1938	Balance Fwd.		600,512.49
938			Sheet No. 2
. 1	Balance Brot Fwd.		600,512.49
31		J197	28,595.83
r. 28		J200	28,595.83
r. 31		J202	28,595.85
r. 30		J205	28,595.83
y 31		J208	28,595.83
e 30		J214	28,595.83
y 31		J217	28,595.83
g. 31		J220	28,595.83
t. 30		J223	28,595.85
. 31		J225	28,595.83
v. 30		J230	28,595.83
c. 31		J233	28,595.83
			943,662.49
939			
. 1	Balance		943,662.49

City's Exhibit 10.

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CITY'S EXHIBIT No. 10

Sheet No. 1

Utility District—City of Indianapolis

Gen. Ledger Acct.—Amounts Due I. G. Co., for use of Property—Accrued Amount Equal to State and Local Taxes

Account No. 623

Date 1935	Items	Folio	√	Debits	Date 1935	Items	Folio	√	Credits
					Sept. 30		J 23		6,479.53
					Oct. 31		J 30		8,639.44
					Nov. 30		J 39		8,050.44
					Dec. 31		J 43		8,050.44
	Balance			102,554.87	Dec. 31		J52–3		71,335.02
				102,554.87					102,554.87
1936					1936				
May 31		J 83		51,361.24	Jan. 1	Balance			102,554.87
Oct. 31		J108		51,193.63	31		J62–3		8,600.00
					Febr. 29		J 67		8,600.00
					Mar. 31		J 72		8,600.00
					Apr. 30		J 77		8,600.00
					May 31		J 83		8,600.00
					June 30		J 87		8,600.00
					July 31		J 93		8,600.00
					Aug. 31		J 99		8,600.00
					Sept. 30		J103		8,600.00
					Oct. 31		J108		8,600.00
					Nov. 30		J113		8,600.00
					Dec. 31		J118		8,600.00
	Balance			110,005.85	31		J122		6,805.85
				212,560.72					212,560.72
1937					1937				
Apr. 30		J149		55,002.94	Jan. 1				110,005.85
Oct. 31		J168		55,002.91	31		J136		9,200.00
					Febr. 28		J140		10,000.00
							J144		10,000.00

City's Exhibit 10.

				Mar. 31		J144	10,000.00
				Apr. 30		J149	10,000.00
				May 31		J153	10,000.00
				June 30		J157	10,000.00
				July 31		J161	10,000.00
				Aug. 31		J164	10,000.00
				Sept. 30		J166	10,000.00
				Oct. 31		J170	10,000.00
				Nov. 30		J174	10,000.00
Nov. 30	Fwd.		110,005.85		Fwd.		219,205.85
28							Sheet No. 2
Nov. 30	Brot Fwd.		110,005.85	Nov. 30	Brot Fwd.		219,205.85
Dec. 31		J182	1,033.58	Dec. 31		J178	10,000.00
	Balance		118,166.42				
			229,205.85				229,205.85
1938				1938			
Apr. 30		J206	59,083.24	Jan. 1	Balance		118,166.42
Nov. 30		J228	59,083.20	" 31		J197	10,000 —
Dec. 31		J237	3,029.55	Feb. 28		J200	10,000 —
				Mar. 31		J202	10,000 —
				Apr. 30		J205	10,000 —
				May 31		J208	10,000 —
				June 30		J214	10,000
				July 31		J217	10,000 —
				Aug. 31		J220	10,000 —
				Sept. 30		J223	10,000 —
				Oct. 31		J225	10,000 —
				Nov. 30		J230	10,000 —
	Balance		116,970.43	Dec. 31		J233	10,000.—
			238,166.42				238,166.42
				1939			
				Jan. 1	Balance		116,970.43

CITY'S EXHIBIT No. 10

Sheet No. 1

Utility District—City of Indianapolis

Gen. Ledger Acct.—Amounts Due I. G. Co., for use of Property—Accrued Amount Equal to Federal Taxes

Account No. 624

Date 1935	Items	Folio	√	Debits	Date 1935	Items	Folio	√	Credits
Sept. 30		J24–25	√	1,168.64	Sept. 30		J 23		1,168.64
Dec. 31		J44–5	√	4,780.79	Oct. 31		J 30		1,593.60
					Nov. 30		J 39		1,593.60
					Dec. 31		J 43		1,593.59
				5,949.43					5,949.43
1936					1936				
Mar. 31		J 73		4,782.36	Jan. 31		J62–3		1,593.60
June 30		J 88		4,782.36	√ Feb. 29		J 67		1,593.60
Sept. 30		J104		4,782.36	Mar. 31		J 72		1,595.16
Dec. 31		J119		4,782.36	Apr. 30		J 77		1,593.60
					May 31		J 83		1,593.60
					June 30		J 87		1,595.16
					July 31		J 93		1,595.16
					Aug. 31		J 98		1,593.60
					Sept. 30		J103		1,593.60
					Oct. 31		J108		1,593.60
					Nov. 30		J113		1,593.60
					Dec. 31		J118		1,595.16
				19,129.44					19,129.44
					1937				
					Jan. 31		J136		1,593.60
					Feb. 28		J140		1,593.60
					Mar. 31		J144		1,595.16

City's Exhibit 10.

			Mar. 31		J146	1,595.16
			Apr. 30		J149	1,593.60
			May 31		J153	1,593.60
			June 30		J157	1,595.16
			July 31		J161	1,593.60
			Aug. 31		J164	1,593.60
			Sept. 30		J166	1,595.16
			Oct. 31		J170	1,593.60
			Nov. 30		J174	1,593.60
	Balance	19,129.44	Dec. 31		J178	1,595.16
		19,129.44				19,129.44
			1938			
			Jan. 1	Balance Fwd.		19,129.44
30						Sheet No. 2
			Jan. 1	Balance Brot. Fwd.		19,129.44
			Jan. 31		J197	1,593.60
			Feb. 28		J260	1,593.60
			Mar. 31		J202	1,595.16
			Apr. 30		J205	1,593.60
			May 31		J208	1,593.60
			June 30		J214	1,595.16
			July 31		J217	1,593.60
			Aug. 31		J220	1,593.60
			Sept. 30		J223	1,595.16
			Oct. 31		J225	1,595.16
			Nov. 30		J230	1,593.60
	Balance	38,258.88	Dec. 31		J233	1,593.60
		38,258.88				38,258.88
			1939			
			Jan. 1	Balance		38,258.88

City's Exhibit 10.

CITY'S EXHIBIT No. 10

Sheet No. 1

Utility District—City of Indianapolis

Gen. Ledger Acct.—Amounts Due I. G. Co., for use of Property—Accrued Amount Equal to Other Items

Account No. 625

Date 1935	Items	Folio	√	Debits	Date 1935	Items	Folio	√	Credits
Dec. 31		J445	√	93.33	Sept. 30		J 23		18.33
					Oct. 31		J 30		25.00
					Nov. 30		J 39		25.00
					Dec. 31		J 43		25.00
	Balance			1,140.65	Dec. 31		J 45		1,140.65
				1,233.98					1,233.98
1936					1936				
Jan. 31		J 61	√	1,140.66	Jan. 1	Balance			1,140.65
					31		J 63		25.00
					Feb. 29		J 67		25.00
					Mar. 31		J 72		25.00
					Apr. 30		J 77		25.00
					May 31		J 83		25.00
					June 30		J 87		25.00
					July 31		J 93		25.00
					Aug. 31		J 99		25.00
					Sept. 30		J103		25.00
					Oct. 31		J108		25.00
					Nov. 30		J113		25.00
					Dec. 31		J118		25.00
	Balance			300.00	31		J120		.01
				1,440.66					1,440.66
					1937				
					Jan. 1				300.00
					31		J136		25.00
					Feb. 28		J140		25.00
					May 31		J144		25.00

1028

City's Exhibit 10.

				Apr.	30	J149	25.00
				May	31	J153	25.00
				June	30	J157	25.00
				July	31	J161	25.00
				Aug.	31	J164	25.00
				Sept.	30	J166	25.00
				Oct	31	J170	25.00
				Nov.	30	J174	25.00
				Nov.	30	Fwd.	575.00
32				1937			Sheet No. 2
Nov.	30		—	Nov.	30	Brot. Fwd.	575.00
		Balance	600.00	Dec.	31	J178	25.00
			600.00				600.00
				1938			
				Jan.	1	Balance	600.00
				Jan.	31	J197	25.00
				Feb.	28	J200	25 —
				Mar.	31	J202	25 —
				Apr.	30	J205	25 —
				May	31	J208	25 —
				June	30	J214	25 —
				July	31	J217	25 —
				Aug.	31	J220	25 —
				Sept.	30	J223	25 —
				Oct.	30	J225	25 —
				Nov.	30	J230	25 —
		Balance	900 —	Dec.	31	J233	25 —
			900 —				900 —
				1939			
				Jan.	1	Balance	900 —

33

CITY'S EXHIBIT No. 10

Sheet No. 1

Utility District—City of Indianapolis

Gen. Ledger Acct.—Amounts to Indianapolis Gas Co., for use of Property Amount Equal to Indiana Gross Income Taxes

Account No. 954

Date 1935	Items	Folio	√	Debits	Date 1935	Items	Folio	√	Credits
Oct. 31		J 31		1,772.46	Dec. 31		J 55		2,913.11
Dec. 31		J 45		1,140.65					
				2,913.11					2,913.11
1936 Apr. 30		J 78		1,778.25	1936 Dec 31		J131		1,778.25

CITY'S EXHIBIT No. 10

Sheet No. 1

Utility District—City of Indianapolis

Gen. Ledger Acct.—Amounts to Indianapolis Gas Co., for use of Property Amount Equal to Miscellaneous Charges

Account No. 959

Date 1935	Items	Folio	√	Debits	Date 1935	Items	Folio	√	Credits
1935 Oct. 31		J31		421.44	1935 Dec. 31		J 55		421.44
1936 Jan. 31		J 61		277.10	1936 Dec. 31		J131		698.55
Apr. 30		J 78		421.44					
Dec. 31		J120		.01					
				698.55					698.55

City's Exhibit 10.

CITY'S EXHIBIT NO. 11.

Transcript.

The Department of Public Utilities
Indianapolis, Indiana

City of Indianapolis Gas Plant Revenue Bonds
$8,000,000.00

Dated June 1, 1935

Proceedings of Board of Trustees for Utilities and Board of Directors for Utilities and Various Certificates.

(In Quadruplicate)

• • • • • •

MINUTES OF A MEETING OF THE BOARD OF DIRECTORS FOR UTILITIES HELD JUNE 5, 1935.

A meeting of the Board of Directors for Utilities for the City of Indianapolis was held on Wednesday, June 5, 1935, at 2 o'clock P. M. at 1350 Consolidated Building, Indianapolis, Indiana.

Present: Messrs. Dithmer, Jungelaus, Elsey, Sahm and Woodward.

Upon motion duly made, seconded and unanimously adopted, The Union Trust Company of Indianapolis was designated as one of the paying agents for the proposed City of Indianapolis Gas Plant Revenue Bond issue, a bid for which by Halsey Stuart & Co. and Otis & Company was accepted on May 29, 1935.

Upon motion duly made, seconded and unanimously adopted, The Cleveland Trust Company of Cleveland, Ohio, was designated as another paying agent under said bond issue and the offices of Halsey Stuart & Company at Chicago, Illinois and in New York City were likewise designated.

Upon motion duly made, seconded and unanimously adopted, the following form for such bonds was approved, viz.:

UNITED STATES OF AMERICA,

State of Indiana, County of Marion,
City of Indianapolis.

No. 1,000

City of Indianapolis Gas Plant Revenue Bond.

The City of Indianapolis, in Marion County, State of Indiana, for value received, hereby promises to pay to the bearer, or if this bond be registered then to the registered holder, solely out of the revenues derived from operation of its gas utility system, the principal sum of One Thousand Dollars on the first day of June, 19....., and to pay interest thereon from the date hereof until the principal is paid at the rate of four and one-half per cent (4½%) per annum, payable on the first day of December, 1935, and semi-annually thereafter on the first day of June and December in each year, upon presentation and surrender of the annexed coupons as they severally become due. Both principal and interest of this bond are payable at The Union Trust Company, in the City of Indianapolis, Indiana, or, at the option of the holder, at The Cleveland Trust Company, in the City of Cleveland, State of Ohio, or at the offices of Halsey, Stuart & Co., in the City of Chicago, State of Illinois and in the City of New York, State of New York, in such funds as are, on the respective dates of payment of the principal of and interest on the bonds, legal tender in the United States of America for such purposes.

This bond is one of an issue of eight thousand bonds of the City of Indianapolis, Indiana, of like date and tenor, except as to dates of maturity, in a total amount of Eight Million Dollars ($8,000,000), numbered 1 to 8,000, both inclusive, issued for the purpose of providing funds to acquire and take over property owned by Citizens Gas Company of Indianapolis and/or in which it has an interest, including moneys required to be paid for redemption or extinguishment of its capital stock and/or for payment of certain of its obligations and for necessary expenses incurred in connection therewith, including expenses of the City incident to obtaining such funds, as well as for the purpose of making necessary betterments, improvements, extensions and additions to such property, pursuant to a resolution adopted by the Board of Direc-

tors for Utilities of the City of Indianapolis, Indiana, on the 7th day of May, 1935, entitled "A Resolution (No. 2—1935) for the Issuance of Gas Plant Revenue Bonds", and in compliance with all applicable provisions of law, including the provisions of Chapter 78 of the Acts of 1929, and Chapter 77 of the Acts of 1929, Chapter 67 of the Acts of 1931, and Chapter 125 of the Acts of 1933, as amended by Chapter 311 of the Acts of 1935, of the General Assembly of the State of Indiana; the proceeds of said bonds to be applied solely to the purposes hereinabove described and as stated in said resolution.

The principal and interest of this bond and all other bonds of said issue are equally and ratably secured by and constitute a charge upon all the income and revenues derived from the operation of all of the gas utility system now or hereafter owned and/or operated by the City of Indianapolis, an amount of which income and revenues sufficient to pay the principal and interest of this bond and all other bonds of said issue as the same fall due is hereby irrevocably pledged to such purpose; and the City covenants to fix, maintain and collect reasonable and just charges for all gas service, and faithfully to comply with all pertinent provisions of law, including the requirement of Chapter 190 of the Acts of 1933 of the General Assembly of the State of Indiana, viz: that a reasonable and just charge shall be such as produces sufficient revenue to pay, among other things, interest upon bonds, provide a sinking fund for liquidation of bonds, maintenance costs, operating charges, adequate funds for working capital, repairs and upkeep, which requirement as written in said Act is hereby independently adopted and made a part of this bond. This bond and all other bonds of said issue shall be paid solely and exclusively from the income and revenues of such gas utility property and not otherwise, and shall not in any respect be a corporate indebtedness of such City nor of the Utility District of the City of Indianapolis as a special taxing district payable out of taxes.

The City covenants that it will cause to be deposited with a national bank in Indianapolis, Indiana (reserving the right to transfer such account or any part thereof to any other one or more responsible banks or trust companies) in a special account, under such conditions as that a trust therein shall be created for the purpose of payment of the interest on and principal of this bond and

all other bonds of said issue and that moneys can not be withdrawn from such account or accounts except for such purpose, on the 15th day of each month, so long as any of said bonds remain outstanding and unpaid, out of the revenues derived from the operation of said gas utility system, a sum equal to one-twelfth of the amount due and payable for principal during said year plus a sum equal to one-sixth of the amount due and payable for interest on the next succeeding interest payment date of said bonds.

This bond and all other bonds of said issue shall have the qualities of negotiable instruments in the hands of good faith holders, and shall be exempt from taxation as to principal and income as prescribed by the statutes of the State of Indiana.

This bond may be registered as to principal in the name of the holder, but unless so registered shall pass by delivery. The interest coupons annexed hereto shall at all times pass by delivery.

It is hereby certified and recited that all acts, conditions and things required to be done or performed precedent to and in the execution, issuance and delivery of this bond have been done and performed in regular and due form as provided by law.

In Witness Whereof, the City of Indianapolis, in Marion County, Indiana, has caused this bond to be signed in its corporate name by its Mayor and attested by its City Controller and its corporate seal to be hereunto affixed and attested by its City Clerk, and the interest coupons hereto attached to be executed with the facsimile signatures of said Mayor and City Controller, as of the first day of June, 1935.

City of Indianapolis,
By .....
Mayor.

Attest:

.....
City Controller,

.....
(Seal) *City Clerk.*

• • • • • •

Certificate of Execution of Bonds
and Non-Litigation.

We, the undersigned, being the officers of the City of Indianapolis, Indiana, who are duly authorized by law and by resolution of the Board of Directors for Utilities of said City to sign and execute the bonds herein referred to, do hereby certify that we did on the 24 day of June, 1935, officially sign and execute each of the City of Indianapolis Gas Plant Revenue Bonds, numbered from 1 to 8,000 both inclusive, dated June 1, 1935, bearing interest at 4½% per annum, denomination of One Thousand Dollars ($1,000) each, payable serially from June 1, 1938 to June 1, 1967, inclusive, as provided in Resolution No. 2—1935 adopted by said Board of Directors for Utilities on the 7th day of May, 1935; and that the facsimile signatures of the Mayor and of the Controller of said City are imprinted upon the coupons of said bonds, and that the corporate seal of said City has been impressed upon all of said bonds.

We further certify that no litigation of any kind is now pending or threatened in either state or federal courts seeking to restrain or enjoin, or in any manner questioning the authority or proceedings for, the issuance, sale, execution and delivery of the aforesaid bonds, or in any manner questioning the validity thereof, or the right, authority or power of said City of Indianapolis to acquire, own, and operate or lease to others to operate, the gas plant and property of the Citizens Gas Company of Indianapolis referred to in the above mentioned Resolution and in said bonds; that neither the corporate existence of said City nor the title of its present officers to their respective offices is being contested, and that no proceeding or authority for the issuance, sale, execution and delivery of said bonds has been rescinded, revoked or repealed.

Witness our respective hands this 27 day of June, 1935.

Oliver Kern,
Mayor.

Davin J. O'Neil,
Clerk.

Walter C. Bortiter,
Controller.

• • • • • •

"(Only those parts of the transcript which are material to the present appeal have been printed.)"

(Inserted pursuant to stipulation filed November 22, 1939.)

1419 CITY'S EXHIBIT 12.

Minutes of Meeting of the Board of Directors for Utilities of the City of Indianapolis Held September 9, 1935. (Pages 178 to 236, inclusive, of Minute Book.)

A meeting of the Board of Directors for Utilities of the City of Indianapolis, Indiana, was held on Monday, September 9, 1935, at 1:30 P. M., at 1350 Consolidated Building, Indianapolis, Indiana, pursuant to call.

Present: Messrs. Dithmer, Elsey, Jungclaus, Sahm and Angus. Messrs. Mooney, Hitz and Glossbrenner of the Board of Trustees also attended. Mayor Kern was present, and, by invitation of the Boards, ex-Mayor Sullivan was present.

President Dithmer announced that this was the time and place fixed for the receipt from Citizens Gas Company of Indianapolis of instruments evidencing the transfer of its property to the City of Indianapolis pursuant to the terms of the public charitable trust established with respect to such property.

On behalf of the Citizens Gas Company of Indianapolis, Mr. Frederick G. Rastenburg, its Secretary, and Mr. William G. Sparks, of counsel for the Company, appeared before the Board and presented to the Board certified copies of resolutions adopted earlier in the day by the Board of Directors of the Citizens Gas Company of Indianapolis and by its Trustees, which copies of resolutions, with the form of indemnity agreement therein referred to, are as follows, and are hereby spread of record in the minutes of this meeting:

(Here follows (pp. 179-181) a certified copy of a resolution of the Board of Trustees of Citizens Gas Company adopted on September 9, 1935, a copy of which resolution is in evidence as Plaintiffs' Stipulation Exhibit 87.)

1420-1422 • • • •

(Inserted pursuant to stipulation filed November 22, 1939.)

"(Here follows a certified copy of a resolution of the Board of Directors of the Citizens Gas Company as to the irrevocability of certain trust deposits for the payment of the preferred and common stock of said Company)".
(Inserted pursuant to stipulation filed November 22, 1939.)

1423 (Here follows (pp. 185-7) a certified copy of a resolution of the Board of Directors of Citizens Gas Company adopted on September 9, 1935, a copy of which resolution is in evidence as Plaintiffs' Stipulation Exhibit 86.) (Inserted pursuant to stipulation filed November 22, 1939.)

(Here follows (pp. 188-9) a form of indemnity agreement which is identical with the form of indemnity agreement actually executed, a copy of which appears as Exhibit J to the second amendment and supplement to plaintiff's bill of complaint.)

1424 Upon motion duly made, seconded, and unanimously adopted it was:

Resolved, That the Board of Directors for Utilities of the City of Indianapolis execute to Citizens Gas Company of Indianapolis, as one step in the transfer to the City of Indianapolis of the property of said Company, and in consideration of such transfer, an Indemnity Agreement substantially in the form specified in the foregoing resolution adopted by the Board of Directors of said Company and by its Trustees; and

Be It Further Resolved, That Henry L. Dithmer be and he is hereby authorized and directed to sign and deliver a copy of such indemnity agreement for and on behalf of this Board.

President Dithmer thereupon signed and delivered to the said Secretary of the Citizens Gas Company of Indianapolis a copy of said indemnity agreement; a duplicate original of which is as follows:

(Here follows (pp. 191-2) an executed copy of the Indemnity Agreement, a copy of which appears as Exhibit J to the second amendment and supplement to plaintiff's bill of complaint.)
(Inserted pursuant to stipulation filed November 22, 1939.)

1425 Thereupon said Frederic G. Rastenburg as Secretary of said Citizens Gas Company of Indianapolis and on its behalf tendered to Henry L. Dithmer as President of the Board of Directors for Utilities of the City of Indianapolis on behalf of the City of Indianapolis instruments of transfer of property of said Company as follows, viz:

(1) Deed of Conveyance of Real Estate;
(2) Assignment of Personal Property;
(3) Assignment of Majestic Building Lease;

(4) Assignment of Indianapolis Gas Company lease; copies of which documents are here spread of record:

(Here follow copies of:

I. "Deed of Conveyance of Real Estate" (pp. 194-7), a copy of which is in evidence as Plaintiffs' Stipulation Exhibit 55.

II. "Instrument of Transfer and Assignment of Personal Property" (pp. 198-204), a copy of which appears as Exhibit E to the bill of complaint (I. R. 122-127.)

III. "Assignment of Lease" (pp. 205-8), a copy of which is in evidence as Plaintiffs' Stipulation Exhibit 56.

IV. "Assignment of Lease" (pp. 209-212), assigning the lease dated September 30, 1913 from The Indianapolis Gas Company to the Citizens Gas Company, a copy of which appears as Exhibit F to the bill of complaint (I. R. 127-129).

(Inserted pursuant to stipulation filed November 22, 1939.)

1426 The Secretary of said Citizens Gas Company and its said counsel having retired from the meeting, the Board then deliberated upon the said tender of such instruments of transfer.

Mention being made that Messrs. Dithmer and Elsey, with counsel, had conferred with officials of The Indianapolis Gas Company upon several occasions, and that subsequently an inquiry was addressed to such officials on behalf of this Board to which no answer had been received though answer was requested before this date, such inquiry being as follows:

(Here follows (p. 214) a copy of a letter, a copy of which is in evidence as Plaintiffs' Stipulation Exhibit 59.)

(Inserted pursuant to stipulation filed November 22, 1939.)

1427 And discussion following with respect to the rights of the City to condemn and purchase the property of The Indianapolis Gas Company; to building a system substantially duplicating its property to the extent necessary to render service to consumers; and to leasing its property; as well as with respect to the provisions of the lease, assignment of which was tendered, in relation to the rights and duties of the City and of this Board on behalf of the City, and its probable effect upon the operations of the gas system, a resolution was offered

by Mr. Jungclaus, seconded by Mr. Angus, and unanimously adopted, as the President so announced, as follows:

(Here follows (pp. 216-18, part of 219) "Resolution for Rejection of Assignment of Lease", a copy of which appears as part of Exhibit C to the answer and counterclaim of the City of Indianapolis, et al. (I. R. 202-204)). (Inserted pursuant to stipulation filed November 22, 1939.)

1428 (Conclusion of p. 219.)

President Dithmer thereupon executed a copy of such "Rejection of Assignment of Lease and Refusal to Assume, Take Over, Or Be Bound Thereby", which was attested by Secretary Sahm and duly acknowledged, and delivered the same to the said representatives of the Citizens Gas Company of Indianapolis. Another copy was likewise executed and directed to be recorded in the office of the Recorder of Marion County, Indiana. A duplicate original is here spread of record, as follows:

1429 (Here follows (p. 220) an executed copy of a document entitled "Rejection of Assignment of Lease and Refusal to Assume, Take Over, or Be Bound Thereby", a copy of which appears as part of Exhibit C to the answer and counterclaim of the City of Indianapolis, et al. (I. R. 203-4)).
(Inserted pursuant to stipulation filed November 22, 1939.)

1430 With respect to the tendered assignment of the lease between the Receiver of the Majestic Building Company and said Citizens Gas Company of Indianapolis, the Board was made acquainted with the fact that while the present Receiver had been informed of the Board's desire to negotiate a new lease, no negotiations were in progress, and negotiations could not have been consummated prior to September 9, 1935. Thereupon it was duly:

"Resolved, That this Board accept the tendered assignment of the certain lease between the Receiver of Majestic Building Company, an Indiana corporation, and Citizens Gas Company of Indianapolis, an Indiana corporation, on condition that the right of termination prior to the expiration date of such lease be preserved and available for exercise by the City".

—which resolution the President declared to be unanimously adopted.

The Board being informed that such lease had not been recorded in the office of the Recorder of Marion County, Indiana, counsel was directed to write said Receiver that such assignment had been conditionally accepted. Counsel subsequently reported that a letter had accordingly been written to L. Ert Slack as Receiver to such effect.

At this point the Board recessed to meet with representatives of the public press, and to permit recordation of the pertinent papers.

After recess, counsel reported that the said deed of conveyance of real estate had been recorded in the office of the Recorder of Marion County, Indiana, at
1431 3:45 P. M. on this September 9, 1935, in Deed Record 937 as Instrument No. 22602, the Auditor of Marion County having theretofore noted the transfer on his records pertaining to taxation; and that the said Assignment and Transfer of Personal Property had been recorded at the same time as Instrument No. 22603 in Miscellaneous Record 265 in said Office. Also that the tendered assignment of the said lease between The Indianapolis Gas Company and Citizens Gas Company of Indianapolis having been recorded at the instance of said latter company (being Instrument No. 22604 in Miscellaneous Record 265 in said office), counsel had caused an executed copy of said "Rejection of Lease" (hereinbefore authorized) to be placed of record in said office as Instrument No. 22605 in Miscellaneous Record 265.

Counsel also stated that at 4:05 P. M. on said day he served a certified copy of the resolution of this Board with respect to rejecting the tendered assignment of said The Indianapolis Gas Company lease, as well as an executed copy of said "Rejection of Lease" upon William J. Yule as Secretary of said The Indianapolis Gas Company at the office of said Company at Room 1004 Majestic Building in the City of Indianapolis, and left such copies with such Secretary.

It appearing that the City of Indianapolis was now the record owner of property formerly owned by said Citizens Gas Company of Indianapolis, and that the City was prepared to operate such property, consideration was given to the continuati of service to consumers of gas formerly served by aid of property belonging to said The Indianapolis Gas Company.

Mr. Elsey thereupon moved and Mr. Sahm seconded, the adoption of the following resolution:

1432 (Here follows (pp. 223-5) "Resolution for Temporary Use of Property of The Indianapolis Gas Company", a copy of which appears as part of Exhibit C to the answer and counterclaim of the City of Indianapolis, et al. (I. R. 200-202))
(Inserted pursuant to stipulation filed November 22, 1939.)

1433 Said resolution was duly adopted by the unanimous vote of the Board, and the President so announced.

A copy of said resolution was thereupon duly certified by the Secretary of the Board, and transmitted to the Secretary of said The Indianapolis Gas Company forthwith, at its office in the Majestic Building in the City of Indianapolis, Indiana.

* * * * * *

"(Here appear several miscellaneous resolutions relating to the affairs of the Department of Utilities of the City of Indianapolis, none of which resolutions is material to this appeal.)"
(Inserted pursuant to stipulation filed November 22, 1939.)

1434-1442 * * * * *

1443 There being no further business the meeting adjourned.

(Signed) Henry L. Dithmer,
President.

Attest:
(Signed) Roy Sahm,
Secretary.

1443 CITY'S EXHIBIT 13.

Letter Head of
Smith, Remster, Hornbrook & Smith

September 10, 1935.

Messrs. Thompson, Rabb & Stevenson,
Consolidated Building,
Indianapolis.
Attention of Mr. Rabb.

Gentlemen:

This will acknowledge the delivery of the following papers which bear the following titles:

1. Resolution for rejection of assignment of lease between The Indianapolis Gas Co. and Citizens Gas Company of Indianapolis.
2. Rejection of assignment of lease and refusal to assume, take over, or be bound thereby.

It is, of course, understood that this letter merely acknowledges the physical delivery of such papers, as we have not been authorized by the Citizens Gas Company of Indianapolis to accept such papers or to take any action in regard thereto.

Very truly yours,
Smith, Remster, Hornbrook & Smith.

WGS;FF

1443B-1464 • • • • •

1465 CITY'S EXHIBIT 28-A.

January 4, 1937.

Halsey Stuart & Co., Inc.,
201 S. LaSalle Street,
Chicago, Illinois.

Gentlemen:

We have a copy of the proposed revised circular pertaining to the City of Indiana 4½% Gas Plant Revenue Bonds.

The third paragraph of the proposed circular contains a reference to the Indianapolis Gas Company. The statement is made that the City has not "as yet" assumed or adopted the former lease. The quoted words give rise to an impli-

cation that the City may have under consideration the adoption of such lease. The implication would be incorrect inasmuch as the City has definitely and unqualifiedly rejected an assignment of such lease and is not negotiating for a new lease. The further statement is made that "lease rentals" have been paid. This is not correct. Sums have been paid by the City equivalent to figures specified in the lease but such payments have been accompanied by the definite caution to the Indianapolis Gas Company that the payments were not lease rentals and were not made in recognition of the lease. The property of the Indianapolis Gas Company is being operated by the City of Indianapolis under an interim agreement pending final determination of questions raised between the City and the Indianapolis Gas Company and the parties interested in the property of the Company. The further statement is then made that "while litigation has developed relative to the City's position with respect to this lease, it is in our opinion not of direct significance as regards these Gas Plant Revenue Bonds which are adequately secured as hereinafter set forth". We recognize that such a statement represents your own opinion. We should have thought that rather than say that such litigation is not of direct significance, you would have said that such litigation has not directly affected these revenue bonds.

The statements you make as to the appraisal of the Indianapolis Gas Company property are based upon in-

formation obtained, as we understand, by an engineer of your selection and the proposed statement that such appraisal has been made by "an independent engineer" perhaps negatives any implication that the engineer was selected by the City. But we should not want any misunderstanding about this or any possibility of a representation by the City that the Indianapolis Gas property is of the value indicated by such independent engineer.

The new water gas set mentioned in the proposed circular has now been completed and is in operation.

The statement that the "coal requirements of Citizens Gas Company" have been purchased principally from the Milburn" etc. Company "the entire capital stock of which is owned by Citizens Gas Company" is incorrect in that the Citizens Gas Company no longer owns or operates the

Milburn Company; also, while large quantities of coal from the Milburn Company have been used by Citizens Gas & Coke Utility, the name used by the City of Indianapolis in operating its municipal gas system, substantial quantities of coal are bought elsewhere due to the requirements for blending purposes.

We appreciate that the draft of circular has been submitted to us merely as a matter of courtesy on your part. It is your wish that such draft be submitted to the members of the Board of Directors for Utilities?

Very truly,

1467 CITY'S EXHIBIT 29.

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Consolidated Caption—1844 and 1959) * *

OBJECTIONS BY DEFENDANTS, CITY OF INDIANAPOLIS AND THE INDIVIDUAL DEFENDANTS WHO ARE MEMBERS OF THE BOARDS OF TRUSTEES AND DIRECTORS OF THE DEPARTMENT OF UTILITIES OF THE CITY OF INDIANAPOLIS TO CERTAIN SUBDIVISIONS OF THE STIPULATION IN THIS CAUSE AND TO CERTAIN EXHIBITS THERETO ATTACHED AND THEREIN IDENTIFIED.

Edward H. Knight,
Corporation Counsel of Indianapolis;
Michael B. Reddington,
City Attorney of Indianapolis,
City Hall, Indianapolis,
William H. Thompson,
Albert L. Rabb,
Patrick J. Smith,
1350 Consolidated Building, Indianapolis,
Solicitors for Said Defendants.

1468 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption.) * *

OBJECTIONS BY DEFENDANTS, CITY OF INDIANAPOLIS AND THE INDIVIDUAL DEFENDANTS WHO ARE MEMBERS OF THE BOARDS OF TRUSTEES AND DIRECTORS OF THE DEPARTMENT OF UTILITIES OF THE CITY OF INDIANAPOLIS TO CERTAIN SUBDIVISIONS OF THE STIPULATION IN THIS CAUSE AND TO CERTAIN EXHIBITS THERETO ATTACHED AND THEREIN IDENTIFIED.

The defendants, City of Indianapolis and the individual defendants who are members of the Boards of Trustees and Directors of the Department of Utilities of the City of Indianapolis hereby object to the introduction in evidence of each of the following parts and portions of the Stipulation signed by all the parties to this cause (the right to make such objection being reserved by the terms of such stipulation) and to certain exhibits thereto attached and referred to therein, upon the grounds stated as follows:

1. To subdivisions 7 (a), (b), (c), (d), (e), and (f) and each of them of said Stipulation and to each of the following exhibits referred to or described in said subdivisions of said Stipulation or attached thereto: Exhibit D to plaintiff's bill of complaint in Cause No. 1844, Exhibit E to plaintiffs' bill of complaint in Cause No. 1950, Exhibits 5, 6, 7, 8 and 9 to said Stipulation, for each of the following reasons:

First. Said Public Service Commission in considering the lease here in question acted only in a legislative and administrative capacity and not in a judicial capacity.

Second. The Public Service Commission acts for the people of Indiana and in considering this lease, could under the law, consider it only as it affected the rights of the citizens served by the utility companies and had no power or authority to determine the judicial question of the validity of such lease as between the parties.

Third. Inasmuch as the City was not a party to the lease, was not obligated to accept an assignment of it, did

not accept an assignment of it, has not adopted it, 1469 has not recognized it as binding in any way, and has

rejected an assignment thereof evidence as to approval of the lease by the Commission is inadmissible.

2. To subdivisions 9 (a), (b), (c), (d), (e), (f), (g), (h), (i) and (j) of said Stipulation and to each of the following exhibits referred to or described in said subdivisions of said Stipulation or attached thereto, viz.: Exhibits 13 and 14 to said Stipulation, Exhibit D to plaintiff's bill of complaint in Cause No. 1844, and Exhibit E in Cause No. 1950, and each of them, for each of the following reasons:

First. The City of Indianapolis was not a party to said judgment inasmuch as the plaintiff, Fishback, dismissed as to the City of Indianapolis as a party before any judgment was entered in said cause. Said judgment therefore cannot operate as an estoppel against these defendants.

Second. Under the statutes in effect at the time of the commencement of said action and continuously until the appeal of said Fishback was dismissed by the Supreme Court of Indiana no appeal could be taken from any order of the Public Service Commission of Indiana except from an order fixing rates or regulations, practices, acts or service, and said order of said Commission in approving said lease of September 30, 1913, was not appealable; that the action commenced and prosecuted by said Fishback in said Court of Marion County, Indiana, was not an appeal under a statute, but was a suit in equity to set aside and vacate in its entirety said order of the Public Service Commission of Indiana approving said lease of September 30, 1913; that the sole question which could lawfully be heard and determined by the court in such action was whether said order of the Public Service Commission was valid or invalid; that inasmuch as said Public Service Commission of Indiana could exercise no judicial power and had no authority to determine or adjudicate the validity of said lease, the Superior Court of Marion County, Indiana, in the case commenced and maintained by said Fishback could not adjudicate or determine the validity of said lease or its binding effect on the City of Indianapolis.

Third. The cause of action in the Fishback case and the cause of action in this case are essentially different in that in the Fishback case the sole question involved and which could have been litigated under the issues formed in that case was whether the administrative order of the Public Service Commission approving said lease was valid or invalid, whereas in this case the question involved is the binding effect of said lease on these defendants subsequent

to September 9, 1935, on which date the gas plant and property formerly operated by said Citizens Gas Company of Indianapolis as Trustee was transferred to the City of Indianapolis as Successor Trustee. Inasmuch as the causes of action are different, the Fishback decree cannot be res adjudicata of any questions except those actually litigated therein; and none of the questions involved in this case was or could properly have been litigated in the Fishback case.

Fourth. At the date of the rendition of the judgment of the Marion Superior Court in the Fishback case 1470 and at the time Fishback's appeal was dismissed by the Supreme Court of Indiana there was not in effect in the State of Indiana any declaratory judgment statute and the Superior Court of Marion County was without power to determine or try questions which had not then arisen but which might arise in the future, that is to say, the binding effect of said lease of September 30, 1913, against these defendants, subsequent to the date of the transfer of the trust property to the City of Indianapolis as Successor Trustee.

Fifth. That in the joint demurrer filed by the Public Service Commission of Indiana, The Indianapolis Gas Company and the Citizens Gas Company of Indianapolis to the sixth paragraph of Fishback's amended complaint there appears the following:

"The lease set out in the complaint itself provides that if for any reason the lease should be held to be for too long a term, it shall be valid such length of time as a lease could lawfully be made."

That said Fishback case was heard and determined on the theory that whether said lease of September 30th, 1913 was valid for its entire term or not, the action of the Public Service Commission of Indiana in approving the same could not be vacated or set aside.

Sixth. That the estoppel of the Fishback case can only extend to facts as they were in issue at the time the judgment was rendered and cannot prevent a re-examination of even the same questions between the same parties where, in the interval, the facts have changed or new facts have occurred which may alter the legal rights or relations of the parties thereto; that since the judgment and decree in the Fishback case was entered and rendered facts have occurred which occurred which alter the rights and relations of the parties hereto, towit: The transfer of the trust property to the City of Indianapolis as Successor Trustee on September 9, 1935, and the judgment and

decree rendered in the Fishback case is therefore not a determination of the rights of the parties thereto as of this date.

Seventh. That in said Fishback case both the City of Indianapolis and The Indianapolis Gas Company were defendants, but on the pleadings in that case no issue was raised, heard or determined as between said defendants involving the validity of said lease of September 30, 1913, or its enforceability against the City or its property, and the City of Indianapolis was not a party to the final judgment.

Eighth. That in said Fishback case all of the defendants thereto were sued in their individual capacities and not as Trustees; that no issue was heard, determined or decided by the court and none raised by any pleading filed in said cause involving the existence of said Public Charitable Trust or the effect of that legal status upon the validity of said lease of September 30, 1913, as against the City of Indianapolis as Successor Trustee or upon the beneficiaries of said trust.

Ninth. That the plaintiffs in these cases assert an independent and not a derivative right of action; that
1471 neither these plaintiffs nor any bondholder of The Indianapolis Gas Company were parties in the Fishback case; that no decree entered in said cause could bind these plaintiffs who were not parties thereto or be effective as an estoppel against the City of Indianapolis or the Board of Directors or Trustees of Utilities for the City of Indianapolis in respect of an independent cause of action which is in no sense derivative.

Tenth. That it is now claimed by the plaintiffs in these cases that the City of Indianapolis is bound to pay the rent reserved and all other obligations of the lessee under said lease of September 30, 1913, not merely out of the revenues arising from the operation of said leased property or of said trust property, but even out of revenues raised by taxation; that no issue was ever raised in said case in respect of the liability of the City of Indianapolis to meet the obligations of said lease out of revenues raised by taxation or otherwise and there can be no estoppel against the City of Indianapolis in connection with the present determination of such asserted liability.

Eleventh. Evidence as to approval of the lease or of its validity as such is inadmissible against the City in the absence of evidence that the City was a party to the lease,

or an assignee of it, or obligated to accept an assignment of it, or that the City adopted or recognized the lease as binding upon it.

3. To subdivisions 13 (a), (b), (c), (d), (e), (f), (g), (h), (i), (j) and (k) of said Stipulation and each of them and to each of the following exhibits referred to or described in said subdivisions of said Stipulation or attached thereto, viz.: Exhibits 30, 31 and 32 to said Stipulation, for each of the following reasons:

First. Neither The Indianapolis Gas Company, these plaintiffs, any trustee of the Mortgage Deed of Trust of The Indianapolis Gas Company, nor any stockholder of The Indianapolis Gas Company were parties plaintiff, defendant, or intervenors in the Todd case and these plaintiffs were not represented in that litigation by anyone. Inasmuch as the decree in the Todd case could not have operated as an adjudication against there plaintiffs, that the lease of September 30, 1913 was unenforceable against the City of Indianapolis or its property, the decree in that case cannot operate as an estoppel against the City of Indianapolis. Unless there is a mutuality of estoppel no decree is res adjudicata in subsequent litigation as against any of the parties in the former suit.

Second. The cause of action in the Todd case and in this case are essentially different. The plaintiff in this case is attempting to assert an independent right to have a declaration of the validity of said lease of September 30, 1913, an issue which was not and could not have been determined in the Todd case.

Third. The causes of action not being the same in the two cases, there can be no estoppel by way of judgment except as to the issues actually adjudicated by this court in the Todd case. The court in the Todd case did not hear,

1472 determine, or decide any of the issues involved in this case and no issues involving such questions were even presented to the court for determination, no evidence was heard in respect of said questions, and no decision rendered thereon.

Fourth. The only way in which the question of whether a public charitable trust has been created in the property of the Citizens Gas Company arose in the Todd case was because the plaintiff in that case was asserting that the franchise contract of August 30th, 1905, violated the rule against perpetuities, and the court held that inasmuch as a public charitable trust had been created, title to the trust res had vested when said franchise contract was

executed and there was no violation of the rule. No issue involving the question of the validity of the lease of September 30, 1913, was tendered or decided in that case.

Fifth. The estoppel of a judgment extends only to the facts in question as they existed at the time the judgment was rendered and does not prevent an examination of the same questions even between the same parties, where by a later time the facts have changed or new facts have occurred which may alter the legal rights or relations of the parties. At the time of the entry of the decree in the Todd case there was no existing controversy between The Indianapolis Gas Company, its stockholders or bondholders on the one side and these defendants, or any of them, on the other, with respect to the validity of said lease. The Todd case was heard and finally determined on May 29, 1930. The facts and circumstances have altered and changed since the date of the decree in the Todd case by reason of the transfer of the trust property on September 9, 1935, to the City of Indianapolis as Successor Trustee and because of the fact that shortly before the time of such transfer and in, to wit: July, 1935, the first indication of a controversy arose as to the binding effect of said lease on the City of Indianapolis.

Sixth. There was not in force at the date of the entry of the final decree in the Todd case any Federal Declaratory Judgment Act which empowered the court to decide any question involving any difference between The Indianipolis Gas Company and the City of Indianapolis with respect to the rights of the parties under said lease of September 30, 1913, prior to a refusal upon the part of the City of Indianapolis to be bound by the terms of said lease; no such refusal had occurred and at the time of the Todd decree, the Citizens Gas Company of Indianapolis was regularly and promptly making, as and when due, the payments required by said lease, and had not asserted that it was not liable thereunder, or in any manner refused to comply with the terms of said lease.

Seventh. It is now claimed by the plaintiffs in these cases that the City of Indianapolis is bound to pay the rent reserved and to perform all other obligations of the lessee under the terms of said lease of September 30, 1913, not merely out of the revenues arising from the operations of said leased property or of said trust property, but also out of public revenues raised by taxation. No issue was raised in the Todd case in respect of the liability of the City of Indianapolis to meet the obliga-

tions of said lease out of revenue raised by taxa-
1473 tion or otherwise and there can be no estoppel against the City of Indianapolis in connection with the present determination of such asserted liability.

Eighth. There has been no showing that the City was either a party to the lease, or was obligated to accept an assignment of it, or did accept an assignment of it, or adopted it, or recognized it as binding in any respect.

4. To subdivisions 14 (a), (b), (c), (d), (e), (f), (g), (h), (i) and (j) and each of them and to each of the following exhibits referred to or described in said subdivisions of said Stipulation or attached thereto, viz.: Exhibits 35, 36, 37, 38, 39 and 40, to said Stipulation, for each of the following reasons:

First. The estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered and does not prevent a re-examination of the same questions between the same parties where in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the parties. The Williams case was heard, tried and determined prior to September 9, 1935, and the facts and circumstances have been altered and changed since the date of said adjudication by reason of the transfer of the property of the trust on said last named date to the City of Indianapolis as Successor Trustee.

Second. The cause of action involved in the Williams case was different from that involved in these cases in that a taxpayer of the City of Indianapolis there attempted to procure a determination of the invalidity of said lease on the ground that the execution of the same violated the Constitution of the United States and of the State of Indiana and that the execution of the same had been obtained as the result of a conspiracy: that none of the questions involved in this cause was actually litigated or determined by the Court in said case. Inasmuch as the causes of action in the two cases are not the same it is only matters which were actually determined and litigated in the Williams case which could bind any of the parties thereto and the judgment in that case is therefore not res adjudicata on the questions here involved.

Third. That the cause of action attempted to be asserted in these cases is an independent one and is not in any sense derived from the rights of The Indianapolis

Gas Company. Inasmuch as this is not a derivative cause of action, it is an essentially different cause of action from that involved in the Williams case and, inasmuch as the validity of the lease of September 30, 1913, was not challenged on the grounds now asserted by these defendants, the decree in that case is not res adjudicata of any question here involved.

Fourth. In the Williams case said The Indianapolis Gas Company and the City of Indianapolis were co-defendants. The causes of action in the Williams case and in this case are different. No issue was presented for determination or was adjudicated in said Williams case as between the co-defendants thereto, and under such circumstances the estoppel of the Williams judgment 1474 is applicable only as between those who were adverse parties in that case.

Fifth. That it is now claimed by the plaintiff in this case that the City of Indianapolis is bound to pay the rent reserved and all other obligations of the lessee under said lease of September 30, 1913, not merely out of the revenues arising from the operation of said leased property or of said trust property, but also out of revenues raised by taxation; that no issue was ever raised in the Williams case in respect of the liability of the City of Indianapolis to meet the obligations of said lease out of revenues raised by taxation or otherwise and there can be no estoppel against the City of Indianapolis in connection with the present determination of such asserted liability.

Sixth. No evidence as to judicial recognition or approval of the validity of the lease as such is admissible against the City in the absence of a showing that the City was a party to the lease, or assignee, or obligated to accept an assignment thereof, or adopted it, or recognized its validity.

5. To subdivision 15 (c) and to Exhibit "B" attached to the answer and counterclaim of defendants, the City of Indianapolis, and its Trustees and Directors for Utilities for each of the following reasons:

First. A city cannot be estopped expressly. It follows it cannot be estopped impliedly or in a quasi manner. Furthermore such circular has no probative force since it would not tend to prove or disprove any of the issues in this cause.

Second. Such admission to be admissible must be an ad-

mission of fact. In the instant case to have probative value it would have to be one of law, namely that the lease was valid.

Third. Such admission must be sufficiently certain without the aid of a forced or strained construction to bear out the interpretations placed on it. In the instant case it is not possible even by the most tortured construction of the language of the circular to put any words in the mouth of the city respecting the validity of this lease.

Fifth. The admission must have been made by a person having knowledge. This prospectus at the bottom of the front page recites: "The information contained herein has been carefully compiled from sources considered reliable and while not guaranteed as to completeness or accuracy, we believe it to be correct as of this date.

July 1, 1935."

Sixth. Since the City of Indianapolis is the party against whom this prospectus is being offered in evidence, it must be shown that the statement was made, or the prospectus written, authorized or ratified by someone having the legal right and power to do so and that such statement was made or such prospectus written, authorized or ratified within the scope of such authority. No one in this case had that authority with the possible exception, (which is not conceded) of the Board of Directors for Utilities and unless it can be shown that they had such authority and did in a proper legal manner either write, authorize or
1475 ratify the prospectus, it is not admissible in evidence.

Seventh. The entire prospectus is irrelevant and immaterial to the issues in this cause for the reason that there is nothing in such prospectus relating to any statement by the City of Indianapolis in respect to the validity of such lease. It is not shown who issued the prospectus since no signatures appear on it, nor is there any indication as to who the author or publisher is.

Eighth. As to the City of Indianapolis the prospectus is pure hearsay as is borne out by the many statements on its face.

Ninth. There can be no showing that plaintiffs relied on this prospectus for revenue bonds in their purchase of Indianapolis Gas Company bonds.

Tenth. There has been no showing that the lease is binding on or enforceable against the City; no showing that the City was a party to the lease, an assignee of the lease, or obligated to accept an assignment thereof or obligated by reason of recognition or adoption of the lease.

6. To subdivisions 21 (a) and (b) and to each of the following exhibits referred to or described in said subdivisions of said stipulation or attached thereto: Exhibits 86 and 87 to said stipulation and Exhibit J attached to the Second Amendment and Supplement to Plaintiff's Bill of Complaint in Cause No. 1844 and to the Amendment and Supplement to Plaintiff's Bill of Complaint in Cause No. 1950, for each of the following reasons:

First. The Indemnity Agreement executed by the Board of Directors for Utilities on September 9, 1935, only purports to indemnify the Citizens Gas Company in respect of actions brought "on account of the conveyance, transfer and assignment of any or all of the property of the Company to said City." As the City on the same day and as a part of the same transaction refused to accept an assignment of said lease of September 30, 1913, the Indemnity Agreement by its own terms does not apply and was not intended to apply to the Lease of September 30, 1913.

Second. A municipal corporation cannot be estopped by the conduct of any of its officers. There is no statutory authority for the execution of this agreement if it be construed as an approval of the lease of September 30, 1913 (which it is not), but if so construed the agreement would be void and unenforceable.

Third. If this agreement be construed as an approval, express or implied, of the lease of September 30, 1913, it is void and unenforceable because in violation of the express provisions of the Indiana Statutes, particularly Sections 48-1507 and 84-7302 Burns' Indiana Statutes Annotated 1933, which require that no such contract shall be made for a period of more than 25 years and that such a contract to be valid must be approved by the Board
1476 of Public Works and the Common Council of the City of Indianapolis. Any contract attempted to be made in violation of those statutes is void and cannot be ratified.

Edward H. Knight,
Corporation Counsel of Indianapolis;
Michael B. Reddington,
City Attorney of Indianapolis,
William H. Thompson,
Albert L. Rabb,
Patrick J. Smith,
1350 Consolidated Building,
Indianapolis,
Solicitors for Said Defendants.

1477-1481 • • • • •

"(City's Exhibit 30 is a typewritten statement offering various exhibits on behalf of plaintiff. Copies of this statement were furnished to the Court and counsel and the statement was read into the record just prior to the calling of the first witness, Franklin Vonnegut)."
(Inserted pursuant to stipulation filed November 22, 1939.)

335 And afterwards towit at the November Term of said Court, on the 7th day of April, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit: Entered Apr. 7, 1939.

Come now the parties by their respective counsel and the Court now makes its rulings upon the admissibility of certain exhibits offered in evidence at the trial of this cause on March 2nd, 3rd and 4th, 1939, the Court having reserved its rulings as to the admissibility of said exhibits at the time of said trial.

The objections to Plaintiff's Exhibit 135 are sustained, to which ruling plaintiff at the time excepts.

All other exhibits and evidence offered by plaintiff to which objections are pending or as to which the Court made no specific ruling at the time of said trial, including all the parts of the Stipulation of the parties (Plaintiff's Exhibit 1) which were offered by the plaintiff, are admitted and any objections thereto are overruled, to which ruling defendant, City of Indianapolis, excepts. As to plaintiff's offer of Paragraph 4 of the Stipulation of Facts in the case of Todd *vs.* Citizens Gas Company, et al., appearing on pages 192 and 193 of Plaintiff's Exhibit 2 for identification, said offer is considered as
336 an offer of the entire Stipulation and said entire Stipulation, appearing on pages 186 to 248, both inclusive, of Plaintiff's Exhibit 2 for identification, is admitted as Plaintiff's Exhibit 139. As to Plaintiff's Exhibit 89, being part of Section 18 of the answer of the City of Indianapolis, et al., in the case of Cotter, et al. *vs.* Citizens Gas Company, et al. (case No. 1192 on the docket of this Court), the offer is considered as an offer of the entire answer of the City of Indianapolis, et al., and said entire answer is admitted as Plaintiff's Exhibit 89.

All of the exhibits offered by plaintiff (except Plaintiff's Exhibit 135 which has been excluded as hereinbefore indicated) are hereby admitted and read in evidence.

All exhibits offered by the City of Indianapolis to which objections by plaintiff are pending are admitted and such objections are overruled, to which ruling plaintiff at the time excepts.

The motions of defendant City of Indianapolis to suppress the deposition of Robert E. Simond, taken in Chicago, and the deposition of Chester M. Clark and Joseph Edwards Baker, taken in New York, are overruled, to

which ruling said defendant at the time excepts. All objections taken by any of the defendants to the evidence or exhibits offered by plaintiff from said depositions are overruled, to which ruling defendant, the City of Indianapolis, excepts; all objections taken by the plaintiff to any of the evidence or exhibits offered by the defendant City of Indianapolis from said depositions are overruled, to which ruling the plaintiff excepts; and all exhibits offered as part of any of said depositions are admitted and read in evidence, to which ruling the respective objecting parties at the time except.

337 The request of the City of Indianapolis for the production of certain correspondence passing between William R. Higgins, one of the attorneys for The Indianapolis Gas Company, and Baker, Hostetler, Sidlo & Patterson prior to May 14, 1936, is denied, and the claim of privilege asserted by The Indianapolis Gas Company in connection therewith is sustained, to which ruling defendant, the City of Indianapolis, at the time excepts.

338 (Further Entry for April 7, 1939.)

Parties file approval of exhibits, which is as follows:

Filed Apr. 7, 1939.

339 In the District Court of the United States.

* * (Consolidated Caption--1844 and 1950) * *

APPROVAL OF EXHIBITS.

We hereby agree that the attached papers may be marked as plaintiffs' exhibits 127 (3 pages), 128, 128-a, 128-b, 130, 131 and 132, and that photostatic copy of plaintiffs' exhibit 129 may be used in place of the original letter, and that the three letters with reference to the filing of briefs in the Circuit Court of Appeals which were heretofore produced after the trial may be marked as plaintiffs' exhibits 136, 137, and 138 and become part of the record in the above entitled causes, and be read in evidence. This stipulation is to supersede stipulation heretofore made on the same subject as it has now appeared that there were already exhibits bearing numbers 133, 134 and 135.

Dated April 6, 1939.

(Here follow the signatures of counsel.)

340 The following is the request of The Chase National Bank of the City of New York, Trustee, for findings of fact and conclusions of law, submitted May 4, 1939:

341 IN THE DISTRICT COURT OF THE UNITED STATES. Submitte May 4, 1939.
* * (Caption—1844) * *

REQUEST OF THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

William L. Taylor,
John Adams,
Howard F. Burns,
Solicitors for Plaintiff.

Baker, Hostetler & Patterson,
Union Commerce Building,
Cleveland, Ohio,
Of Counsel.

342 * * * * * *

343 Now comes The Chase National Bank, Trustee, plaintiff in the above entitled cause, and respectfully submits and requests the adoption of the following proposed Findings of Fact and Conclusions of Law:

Proposed Findings of Fact.

(1) The Court hereby adopts the Stipulation of the parties offered in evidence as Plaintiffs' Exhibit 1 and each of the exhibits identified therein as part of these Findings of Fact, as though said Stipulation and each of the exhibits referred to therein were specifically set forth herein. Throughout these findings the parties and the documents will be described as they are described in said Stipulation. (PX 1.)

(2) Each of the exhibits from the record referred to in the following findings is incorporated herein and made a part hereof as if specifically set forth in these findings.

(3) There is complete diversity of citizenship in this cause between the plaintiff and all of the defendants. (Stip. 1, pp. 2-3.)

(4) This suit was brought at the request of holders and owners of $415,000 principal amount of the Bonds. (PX 125, 126; Stip. 3(d) p. 6.)

Note: For the convenience of the Court and the parties all references herein to the pleadings are, as in the brief, to the pleadings in the Trustee's case.

(5) There is now and has been at all times since this cause was filed a real and actual controversy between plaintiff, on the one side, and the defendants, and each of them, on the other, as to:

(a) The validity and binding effect of the Lease for its full term of ninety-nine years on said defendants, and each of them, and upon the property transferred to the City by Citizens Gas.

(b) The rights of the plaintiff and the holders and owners of Indianapolis Gas Bonds (hereinafter called "Bondholders") and the obligations of said defendants, and each of them, under the Lease.

(c) Whether the Trustee of the Mortgage or the Bondholders or both are entitled to assert the rights under the Lease.

(6) The joint petition filed by Indianapolis Gas and Citizens Gas with the Public Service Commission on May 21, 1913, is correctly set forth on pages 3 and 4 of Plaintiffs' Exhibit 13 (the complaint in Fishback *vs.* Public Service Commission of Indiana, et al.).

(7) The intervening petition of Frank S. Fishback filed with the Public Service Commission opposing
344 the approval of the proposed Lease from Indianapolis Gas to Citizens Gas is correctly set forth on pages 4 to 7 of Plaintiffs' Exhibit 13 (the complaint in Fishback *vs.* Public Service Commission of Indiana, et al.).

(8) Following the approval by the Public Service Commission of the proposed Lease from Indianapolis Gas to Citizens Gas, Frank S. Fishback filed a petition for rehearing before the Public Service Commission (Bill, par. 8, admitted by all defendants), a true copy of which appears on pages 8 and 9 of Plaintiffs' Exhibit 13 (the complaint in Fishback *vs.* Public Service Commission of Indiana, et al.).

(9) On November 28, 1913, the Public Service Commission of Indiana overruled Fishback's petition for rehearing. (Bill, par. 8, admitted by all defendants.)

(10) Citizens Gas took the Lease from Indianapolis Gas with the full consent and approval of the City of Indianapolis. (PX 89, p. 85.)

(11) In all of the proceedings before the Public Service Commission of Indiana, upon the joint petition of Citizens Gas and Indianapolis Gas, upon the intervening petition of the said Frank S. Fishback, and upon the petition for a rehearing filed by the said Frank S. Fishback, the defendant, the City of Indianapolis, was duly

served with notice to appear and through its duly appointed and authorized counsel did in fact appear and participate therein. No objection by petition to said Commission or otherwise was ever made by said City of Indianapolis either to the execution of said Lease or to the orders made by said Commission, and said City has never, by any proceeding, act or suit, sought in any court to have set aside or vacated the determinations or orders of said Public Service Commission of Indiana, or to enjoin the enforcement thereof, or to prevent in any way such orders or determinations from being effective. (Bill, par. 8, admitted by all defendants.)

(12) Immediately after November 28, 1913, Citizens Gas took possession and control of the gas plant and system and other property of Indianapolis Gas described in the Lease and operated said plant and system as a unified part of its own plant and system continuously thereafter until September 9, 1935. (Crosier, R. 56-9.)

(13) At the time of the making of the Lease on September 30, 1913, the system of Indianapolis Gas had 383.15 miles of mains and the system of Citizens Gas had 184.52 miles of mains, and on the same date Citizens Gas had 11,165 meters in use and Indianapolis Gas had 41,541 meters in use. (PX 93, pp. 1-2.) At the same time a new battery of 41 modern coke ovens was just being completed at the Langsdale Avenue Plant of Indianapolis Gas and was turned over to Citizens Gas with the other leased property. (PX 93, p. 1.)

(14) In his complaint filed November 28, 1913, and the amendments thereto in the case of Fishback *vs.* Public Service Commission of Indiana, et al., Fishback was asserting his rights as a stockholder of Citizens Gas, a resident freeholder of Indianapolis, and a beneficiary of the public charitable trust, against Indianapolis Gas, Citizens Gas as original trustee, and the City as successor trustee of said public charitable trust. (PX 13, p. 2; PX 14, p. 4; Stip. 9(a) pp. 14-15.)

(15) In said case of Fishback *vs.* Public Service Commission of Indiana, et al., said Fishback attacked the Lease on the following grounds, among others (Bill, par. 9, admitted by all defendants; PX 14, p. 4):

(a) That Citizens Gas had no power to make such a Lease.

345 (b) That the City of Indianapolis had not consented to such Lease.

(c) That the Lease was improvident and burdensome from the point of view of Citizens Gas.

(d) That the Lease constituted a lien and incumbrance upon the property and earnings of Citizens Gas and thus impaired the obligation of the contract between the company, its stockholders, and the City.

(e) That the trustees, directors, and officers of Citizens Gas were not authorized to enter into a Lease for ninety-nine years.

(f) That the Lease would prevent the carrying out of the contract between the City and Citizens Gas and would prevent the City from taking over the Citizens Gas plant.

(16) Both the City and Citizens Gas opposed each of the contentions thus advanced by Fishback. (Stip. 9(b) and (c), p. 15.)

(17) Each of the contentions thus advanced by Fishback was adjudicated against him and in favor of the validity of said Lease. (Stip. 9(e), (h), (i). pp. 16, 17.)

(18) During the pendency of said Fishback case the City of Indianapolis, through its Board of Public Works, required extensions to be made in the lines and mains of Indianapolis Gas, as provided in subsection 6 of Section 27½ of the Lease, which provision had been inserted in said Lease at the instance of the City. (Bill, par. 9, p. 10; admitted by all defendants.)

(19) The position taken by the City and Citizens Gas in said Fishback case was a practical, contemporaneous construction of the existing contract between them, to the effect that Citizens Gas had the right to take the Lease of the Indianapolis Gas property for ninety-nine years, and that such Lease thereupon became part of the public charitable trust.

(20) In connection with the sale of its Indianapolis Gas Bonds to Blodget & Company, brokers who dealt in said Bonds, Citizens Gas represented to Blodget & Company and through Blodget & Company to the purchasing public that:

(a) Citizens Gas had a ninety-nine year Lease on the property of Indianapolis Gas;

(b) Said Lease for ninety-nine years had been approved by the Public Service Commission of Indiana;

(c) Citizens Gas guaranteed payment of the interest and the refunding of principal at maturity of said Indianapolis Gas Bonds;

(d) Citizens Gas had a monopoly on the gas business of Indianapolis.

Such representations appear more fully in Plaintiffs' Exhibits 3, 4, 5, 7, 8, and 9 to the New York Deposition.

(21) During the period from 1915 to 1935, both inclusive, Citizens Gas, through publications in Poor's Manual of Public Utilities and Moody's Manual of Public Utilities, made the same representations as those contained in the preceding finding, as more fully shown by Plaintiffs' Exhibits 95A to 98A, inclusive, and 99 to 110, inclusive. (Hill, R. 164-5.) Poor's Manual of Public Utilities and Moody's Manual of Public Utilities are, and during said period from 1915 to 1935 were, standard works of reference customarily relied upon by brokers, bankers, and the investing public generally in acquiring information about securities. (Payne, R. 48-9; Jewett, R. 74-5.)

(22) On the basis of and relying upon the representations so made (see findings 20 and 21), Blodget & 346 Company purchased Indianapolis Gas Bonds from Citizens Gas and the investing public purchased said Bonds from Blodget & Company and generally upon the market, and holders of said Bonds continued to hold them.

(23) By reason of the wide circulation given to said representations (see Findings 20 and 21) over a long period of years, the City is charged with notice of such representations.

(23½) The representations made by Citizens Gas (see Findings 20 and 21) and the acquiescence therein by the City was a practical contemporaneous construction by Citizens Gas and the City of the existing contract between the parties, to the effect that Citizens Gas had the right to take and had taken the Lease of the Indianapolis Gas property for ninety-nine years, and that such Lease thereupon became part of the public charitable trust.

(24) During the period from 1913 to September 9, 1935, Citizens Gas, the City, and the residents and inhabitants of Indianapolis accepted and enjoyed the benefits resulting from the use of the Indianapolis Gas property under said ninety-nine year Lease and the protection thus given to the public charitable trust, and were relieved from the waste and expense of competition and duplication of facilities.

(25) By the resolution of its Board of Public Works, adopted March 20, 1929 (PX 22), the City indicated to Citizens Gas its acceptance of the outstanding offer from Citizens Gas to purchase all of the property of Citizens Gas, including the Lease from Indianapolis Gas, subject to all obligations of Citizens Gas.

(26) Chapter 78 of Indiana Acts of 1929 was prepared by the legal department and special counsel of the City of Indianapolis employed for the purpose of bringing about a transfer of the plant and property of Citizens Gas to the City. Said Chapter 78 was passed in the exact form in which it was prepared and submitted by said counsel for the City, without any change or amendment of any kind or character. (PX 31, p. 126 of PX 2.)

(27) Chapter 77 of Indiana Acts of 1929 was evidently, as its context discloses, prepared and passed for the purpose of authorizing the transfer of the plant and property of Citizens Gas, including the plant and property leased from Indianapolis Gas, to the City. (Stip. 23, p. 34.)

(28) In the cases of Todd *vs.* Citizens Gas Co., and others, and Cotter *vs.* Citizens Gas Co., and others, filed in this Court in 1929, both the City and Citizens Gas took the position by their pleadings filed therein that there was a valid existing ninety-nine year Lease from Indianapolis Gas to Citizens Gas and that such Lease had been made with the full consent and approval of the City. (PX 89, p. 85.)

(29) The position taken by the City and Citizens Gas in their pleadings in said Todd and Cotter cases was a practical contemporaneous construction of the existing contract between the parties and of the City's acceptance by its resolution of March 20, 1929 (PX 22), of the outstanding offer from Citizens Gas, to the effect that the City had agreed to take all of the Citizens Gas property, including the Indianapolis Gas Lease.

(30) In his complaint filed March 12, 1930, in the case of Williams, et al. *vs.* Citizens Gas Co., et al., Williams sued on behalf of himself and all other inhabitants and taxpayers of Indianapolis as beneficiaries of the public charitable trust, was seeking to protect the rights of
347 the public charitable trust, and the City of Indianapolis was made a party defendant as the trustee of said public charitable trust. (PX 35; pp. 111, 113, 114, 221 of PX 3.)

(31) In his complaint filed March 12, 1930, Williams claimed (Bill, par. 14; PX 35, pp. 201, 214 of PX 3):

(a) That the Lease between Indianapolis Gas and Citizens Gas was invalid.

(b) That the action of the Public Service Commission approving the Lease was unlawful.

(c) That the Lease was improvident from the stand-

point of the lessee and was therefore burdensome upon the trust estate.

(d) That the Lease "was ultra vires said Citizens Gas Company."

(32) Citizens Gas and the City of Indianapolis defended said suit brought by Williams upon the following grounds, among others (PX 37, pp. 4 and 5; PX 135, pp. 10-13):

(a) That the decision of the Public Service Commission of Indiana approving said Lease was conclusive on the parties and could not be collaterally attacked.

(b) That after the lapse of seventeen years and the expenditure of many millions of dollars in reliance upon the validity of the Lease, all persons claiming through or under the lessee, including Williams, were precluded by laches from attacking the validity of the Lease for its full term of 99 years.

(33) In affirming the judgment of the Superior Court of Marion County in the Williams case, the Supreme Court of Indiana denied the contentions advanced by Williams (See Finding 31) and upheld the contentions advanced by Citizens Gas and the City (see Finding 32). (Stip. 14(i), p. 25; *Williams* v. *Citizens Gas Co., et al.*, 206 Ind. 448; 188 N. E. 212.)

(34) The position taken by the City and Citizens Gas in the Williams case was a practical construction by them of the existing contract between them and of the City's acceptance by the resolution of March 20, 1929 (PX 22) of the outstanding offer from Citizens Gas, to the effect that the Lease was part of the public charitable trust for its full term of ninety-nine years, and that the City had agreed to take over all of the Citizens Gas property, including the Lease from Indianapolis Gas.

(35) In connection with the public offering of its Revenue Bonds the City represented:

(a) That said bonds were to be issued to obtain funds to take over "property owned by Citizens Gas Company of Indianapolis and/or in which it has an interest." (PX 47, p. 1.)

(b) That the City was about to take over "the property operated by Citizens Gas Company." (PX 47, p. 16.)

(c) That the payment of the bonds would be "secured by a charge upon all the revenue from the operation of all of the gas system owned and/or operated by the City of Indianapolis." (PX 47, p. 5.)

(d) That the City was about to secure a system which

had enjoyed the exclusive right to supply gas to the inhabitants of Indianapolis. (PX 110, Chi. Dep., pp. 4-5.)

(e) That the system which the City was about to secure from Citizens Gas included property leased from Indianapolis Gas for a term of ninety-nine years, under a lease in which the lessee was obligated to pay the interest on the outstanding Mortgage Bonds and on any refunding bonds. (PX 110, Chi. Dep., pp. 4-5.)

348 (f) That the City would use all reasonable efforts to maintain the exclusive right to serve gas in the City of Indianapolis and in Marion County. (PX 47, p. 16.)

(36) The necessary implication of the representations made by the City, in connection with the public offering of its Revenue Bonds (as set forth in Finding 35), was that the City was taking over all the property either owned or operated by Citizens Gas, including the property leased from Indianapolis Gas.

(37) The City authorized and approved the representations made in Plaintiff's Exhibits 102, 104 and 105 to the Chicago depositions, the Halsey-Stuart circular and newspaper advertisements, except those representations relating to the value of the Citizens Gas and Indianapolis Gas property. (PX 111-114, Chi. Dep.) Said newspaper advertisements were published in the papers and on the dates shown in Plaintiff's Exhibit 116, Chicago Deposition.

(38) Halsey, Stuart & Company, and Otis & Co. purchased the City's Revenue Bonds and said bonds were in turn purchased by the public in reliance upon the representations made by the City set forth in Finding 35 and the representations authorized by the City which appear in Plaintiffs' Exhibits 102, 104, 105.

(39) The representations authorized by and made by the City in connection with the sale of its Revenue Bonds were a practical construction by the City of its resolution of acceptance on March 20, 1929, and of its contract with Citizens Gas, to the effect that the City had agreed to take all of the Citizens Gas property, including the Indianapolis Gas Lease.

(40) During the months of July, August and September, 1935, the City caused various sums to be paid to the holders of the common stock, preferred stock and bonds of Citizens Gas, in satisfaction of their respective rights, and said payments were made by the City, and the entire assets of Citizens Gas were received by the City, with full knowledge:

(a) Of the ninety-nine year Lease between Indianap-

olis Gas and Citizens Gas, and of the obligations of Citizens Gas under said Lease.

(b) Of the fact that, after the transfer of its property to the City, Citizens Gas would have no assets remaining with which to meet its obligations.

(41) On September 9, 1935 the City, through its Board of Directors for Utilities, accepted delivery from Citizens Gas (Sparks, R. 447-450) of:

(a) A deed of conveyance of real estate. (PX 55.)

(b) An instrument of transfer and assignment of personal property. (Ex. E to Bill in Cause 1844.)

(c) An assignment of lease assigning a lease to part of the Majestic Building. (PX 56.)

(42) On September 9, 1935 the City, through its Board of Directors for Utilities, accepted delivery from Citizens Gas of an assignment of lease (Ex. F to Bill in Cause 1844) assigning to the City the Lease from Indianapolis Gas to Citizens Gas. (Sparks, R. 447-450.)

(43) On September 9, 1935 the City, acting through its Board of Directors for Utilities, caused three of the four instruments of conveyance received from Citizens Gas Company (to wit, Exs. E and F to the Bill in Cause 1844 and PX 55) to be filed for record with the Recorder of Marion County, Indiana. (R. 16-17.)

(44) On September 9, 1935 the City, through its Board of Directors for Utilities, took possession and control
349 of all property of Citizens Gas, including that under lease from Indianapolis Gas, and has operated said plant and system as one unified plant continuously from September 9, 1935 to the present time. (Crosier, R. 59.)

(45) Since taking possession of the property of Citizens Gas the City has negotiated with Indianapolis Gas for a revision or cancellation of the Lease. (PX 58, 66, 67, 75, 76.)

(46) By reason of the provisions of the Mortgage (Ex. A to Bill), including the after-acquired property clause therein, all rights of the lessor under the Lease (Ex. B to Bill) became and ever since have been a part of the property covered by the Mortgage.

(47) The provisions of said Lease requiring the lessee to pay the interest on the Bonds to the holders thereof were made for the benefit of the Bondholders.

(48) The provisions of said Lease requiring the lessee to perform all of the lessor's obligations under the Mortgage (except as to the payment of the principal amount

of the Bonds) were made for the benefit of the Trustee and the Bondholders for whom it is Trustee.

(49) When the City took possession of the property of Citizens Gas, including that leased from Indianapolis Gas, on September 9, 1935, it made no arrangement or agreement with either the Trustee under the Mortgage or the Bondholders allowing it to take such possession, except as assignee of and subject to the provisions of the Lease originally made to Citizens Gas. Since September 9, 1935, the City has made no such arrangement or agreement with either the Trustee or the Bondholders, and neither the Trustee nor the Bondholders have consented to, acquiesced in, or ratified any arrangement or agreement permitting the City to take possession of and use the property of Indianapolis Gas, except as assignee of and subject to the provisions of the Lease.

(50) The property of Indianapolis Gas leased to Citizens Gas has become so merged with the Citizens Gas property that it is no longer practicable or economical to separate those properties or to operate either of them as independent or competing properties. (Crosier, R. 57-9.)

(51) On or about October 1, 1935 the City, through its Board of Directors for Utilities, paid the sum of $171,575, to be used in the payment of the coupons on Indianapolis Gas Bonds falling due October 1, 1935 and, on or about October 23, 1935, surrendered its 18 coupons maturing on October 1 1935, of the face value of $450.00, to the Trustee for cancellation, without the payment of any consideration therefor. (Yule, R. 109-110; PX 131.)

(52) At the time of the payment of the interest on the Indianapolis Gas Bonds by the City, on or about October 1, 1935, neither the Trustee under the Mortgage nor the Bondholders had any notice that such money was paid under any arrangement other than the acceptance of the Lease by the City. (Yule, 126-7.)

(53) Neither the City nor Indianapolis Gas gave any notice to the Trustee or the Bondholders that the City was denying its liability under the Lease, until November 7, 1935 and neither the Trustee nor the Bondholders had any knowledge that the City was denying its liability under the Lease until some time after the transfer of the Citizens Gas property to the City on September 9, 1935. (PX 116; Yule, R. 106; Beardsley, R. 181.)

(54) Neither the Trustee nor the Bondholders had any knowledge of the proposed execution of the agreement of

March 2, 1936 (Ex H to Bill in Cause 1844), or of the
350 fact that said agreement had been executed, until sometime after March 2, 1936, and neither the Trustee nor the Bondholders have in any way agreed to, acquiesced in or ratified said agreement.

(55) The necessary result of the agreement of March 2, 1936 (Ex. H to Bill in Cause 1844) was to bring about a default in the payment of interest on the Bonds, to depreciate the value of the outstanding Bonds, and to place the income derived from the operation of the mortgaged property beyond the reach of the Bondholders, and the fact that these results would necessarily follow from the execution and carrying out of the agreement was known to the City and Indianapolis Gas when the agreement was made.

(56) During the period since September 9, 1935, the City has paid (Yule, R. 111-126):

(a) All the State, county and municipal taxes on the property covered by the Lease becoming due after September 9, 1935;

(b) All the insurance premiums for insurance on the property covered by the Lease;

(c) All installments of Federal income taxes of Indianapolis Gas falling due between September 9, 1935 and December 31, 1936, on account of sums paid by either Citizens Gas or the City to Indianapolis Gas during the years 1934 and 1935;

(d) All installments of Indiana gross income tax of Indianapolis Gas falling due after September 9, 1935, to and including the payment of said tax due on April 15, 1936.

(57) During the period from September 9, 1935 to the present time the City has paid out various amounts for the maintenance of the Indianapolis Gas property covered by the Lease (Hill R. 168-170), but the Court reserves for future determination the question whether the City has adequately maintained said property or paid such amounts for maintenance as it was obligated to pay.

(58) During the period from September 9, 1935 to December 31, 1938, the City made various extensions and additions to the Indianapolis Gas property covered by said Lease at an aggregate cost exceeding $95,000. (Yule R. 129; PX 122.)

(59) Indianapolis Gas has no property of any sort except the following (Yule R. 107-109):

(a) $120,000 principal amount of its Bonds, which are

pledged to secure a loan of $28,700 at the Indiana National Bank;

(b) Office furniture and equipment with an aggregate worth of less than $500;

(c) The property leased to Citizens Gas and now in the possession of the City;

(d) Any rights which Indianapolis Gas may have against either the City, or the property transferred to the City by Citizens Gas, or Citizens Gas, or any one or more of them.

(60) The only consideration which the City gave for the property of Citizens Gas, other than its assumption of the liabilities and obligations of Citizens Gas, was paid by it directly to the Citizens Gas stockholders and bondholders and therefore, at no time since the transfer of its property to the City on September 9, 1935, has Citizens Gas had any property of any kind or description except such rights as it may have against either the City, or the property which was transferred to the City, or both.

(61) Neither the Bondholders who requested the Trustee to bring this suit nor Indianapolis Gas, nor any other person, firm or corporation, agreed to indemnify
351 the Trustee for its costs, attorneys' fees or expenses in bringing this suit.

(62) There has been no collusion between the Trustee and Indianapolis Gas in the bringing or prosecution of this suit.

CONCLUSIONS OF LAW.

(1) This Court has jurisdiction of this cause on the ground of diversity of citizenship between the parties thereto.

(2) The plaintiff has no plain, complete, or adequate remedy at law and adequate relief can only be secured by the granting of equitable relief.

(3) This suit is brought by the Trustee pursuant to rights granted in the Mortgage and on behalf of the Bondholders.

(4) The Lease (Exhibit B) upon its approval by the Public Service Commission became and at all times thereafter was and still is a valid, binding, and effective Lease for the term of ninety-nine years between Indianapolis Gas and Citizens Gas.

(5) The finding and order of the Public Service Com-

mission of Indiana (Exhibit D to Bill in Cause 1844), approving the Lease from Indianapolis Gas to Citizens Gas, is a binding and conclusive determination upon all parties to this case and upon the public charitable trust that the Lease was fair and reasonable and in the public interest.

(6) By reason of the position taken by Citizens Gas and the City in approving the proposed Lease and their failure to object to or raise any question about the validity of said Lease or the order of the Public Service Commission approving the same, said Citizens Gas and the City are

(a) estopped from denying, and

(b) precluded by their own laches from denying

that the Lease is a valid and binding obligation of Citizens Gas, of the City as successor trustee of the public charitable trust, and of the property received by the City from Citizens Gas, for its full term of ninety-nine years.

(7) The adjudications of the Superior Court of Marion County in the case of Fishback *vs.* Public Service Commission, et al., are binding in the present case upon all parties who were parties to said cause.

(8) By reason of the position taken by Citizens Gas and the City in the case of Fishback *vs.* Public Service Commission of Indiana, et al., said Citizens Gas and City are:

(a) estopped from denying, and

(b) precluded by their own laches from denying

that the Lease is a valid and binding obligation of Citizens Gas, of the City as successor trustee of the public charitable trust, and of the property received by the City from Citizens Gas, for its full term of ninety-nine years.

(9) The action of the City of Indianapolis through its Board of Public Works in requiring extensions to be made in the lines and mains of Indianapolis Gas in accordance with the provisions of the Lease was a formal acceptance and recognition of said Lease.

(10) In view of the representations made by Citizens Gas in the sale of Indianapolis Gas Bonds both the City and Citizens Gas are:

(a) estopped from denying, and

352 (b) precluded by their own laches from denying

that the Lease is a valid and binding obligation of Citizens Gas, of the City as successor trustee of the public charitable trust, and of the property received by the

City from Citizens Gas, for its full term of ninety-nine years.

(11) In view of the acceptance of the benefits of said ninety-nine year Lease by Citizens Gas, the City, and the inhabitants of Indianapolis for almost twenty-two years, Citizens Gas and the City are:

(a) estopped from denying, and

(b) precluded by their own laches from denying

that the Lease is a valid and binding obligation of Citizens Gas, of the City as successor trustee of the public charitable trust, and of the property received by the City from Citizens Gas, for its full term of ninety-nine years.

(12) The resolution of the Board of Public Works of the City adopted March 20, 1929 (PX 22), was in acceptance by the City of the outstanding offer from Citizens Gas to purchase all of the property of Citizens Gas, including the Lease from Indianapolis Gas, subject to all obligations of Citizens Gas.

(13) By reason of the position taken by the City and Citizens Gas in the cases of Todd *vs.* Citizens Gas Co., et al., and Cotter *vs.* Citizens Gas Co., et al., the City and Citizens Gas are:

(a) estopped from denying, and

(b) precluded by their own laches from denying

that the Lease is a valid and binding obligation of Citizens Gas, of the City as successor trustee of the public charitable trust, and of the property received by the City from Citizens Gas, for its full term of ninety-nine years.

(14) The judgment of the Superior Court of Marion County in Williams *vs.* Citizens Gas Co., et al., is a binding and conclusive determination upon all parties to this case and upon the public charitable trust of the following matters:

(a) That Williams had the right to sue on behalf of the public charitable trust.

(b) That the Lease is a binding obligation of said public charitable trust for the full term of ninety-nine years.

(c) That the Lease is a binding obligation of Indianapolis Gas, Citizens Gas, and the City of Indianapolis as successor trustee for the full term of ninety-nine years.

(d) That the decision of the Public Service Commission approving said Lease is conclusive and cannot be collaterally attacked.

(e) That Williams and all other beneficiaries of said public charitable trust and the trustees of said trust are

precluded by laches from attacking the validity of said Lease or its binding effect upon the public charitable trust or upon Indianapolis Gas, Citizens Gas, or the City as successor trustee, for the full term of ninety-nine years.

(15) By reason of the position taker by the City and Citizens Gas in the case of Williams *vs.* Citizens Gas Co., et al., the City and Citizens Gas are:

(a) estopped from denying, and

(b) precluded by their own laches from denying

that the Lease is a valid and binding obligation of Citizens Gas, of the City as successor trustee of the public charitable trust, and of the property received by the City from Citizens Gas, for its full term of ninety-nine years.

353 (16) By reason of the representations made by the City in connection with the sale of its Revenue Bonds the City is:

(a) estopped from denying, and

(b) precluded by its own laches from denying

that the Lease is a valid and binding obligation of the City as successor trustee of the public charitable trust and of the property received by the City from Citizens Gas, for its full term of ninety-nine years.

(17) By the acceptance of the instruments of transfer and conveyance delivered to the City on September 9, 1935, which expressly recited that the conveyances were made subject to all legal obligations of Citizens Gas, the property so conveyed to the City has at all times remained subject to all obligations of Citizens Gas, including its obligations under the Indianapolis Gas Lease.

(18) By accepting and recording the Assignment of Lease (Ex. F in Cause 1844) and by taking possession of the property covered by the Lease so assigned, the City became obligated on all the covenants of said Lease, by privity of estate, and has remained and still is obligated on all the covenants of said Lease for its full term of 99 years.

(19) By reason of its taking possession of the Indianapolis Gas property and its continuous operation thereof since September 9, 1935, the City is:

(a) estopped from denying, and

(b) precluded by its own laches from denying

that the Lease is a valid and binding obligation of the City as successor trustee of the public charitable trust

and of the property received by the City from Citizens Gas, for its full term of ninety-nine years.

(20) By reason of its taking possession of the Indianapolis Gas property, operating the same and receiving the income therefrom, the City has become liable under the Lease and is obligated to carry out all the terms and conditions thereof for its full term of 99 years.

(21) By reason of the provisions of the Mortgage (Exhibit A to Bill), including the after-acquired property clause therein, all rights of the lessor under the Lease (Exhibit B to Bill) became and ever since have been a part of the property covered by the Mortgage.

(22) The provisions of said Lease requiring the lessee to pay the interest on the Bonds to the holders thereof were made for the benefit of the Bondholders, and upon the execution and delivery of said Lease, the Bondholders became vested with a distinct and independent right to require the lessee and its successors and assigns to perform the lessee's obligation to pay the interest on the Bonds.

(23) The provisions of said Lease requiring the lessee to perform all of the lessor's obligations under the Mortgage (except as to the payment of the principal amount of the Bonds) were made for the benefit of the Trustee and the Bondholders for whom it is trustee, and said Trustee became vested with a distinct and independent right to require the lessee and its successors and assigns to perform all of the lessee's obligations and engagements, in so far as the same affect the rights of the Bondholders.

(24) Under the Indemnity Agreement (Exhibit J to Bill) the liability of the City to indemnify Citizens Gas accrues as soon as any liability is adjudicated against Citizens Gas.

(25) Under the Indemnity Agreement (Exhibit J to Bill) either the Trustee or the Bondholders or both,
354 upon securing a judgment against Citizens Gas, are entitled to have a judgment for the same amount entered against the City.

(26) The Lease of September 30, 1913, between Indianapolis Gas and Citizens Gas and all obligations thereof are binding for the full term of ninety-nine years upon Indianapolis Gas, as lessor, Citizens Gas, as lessee, the City of Indianapolis, as successor trustee and assignee of the Lease, and upon the property conveyed to the City by Citizen Gas.

(27) Neither the Trustee nor the Bondholders in any way agreed to, acquiesced in, or ratified the agreement of March 2, 1936, between the City and Indianapolis Gas. Said agreement of March 2, 1936, does not in any way alter or impair the rights of the Trustee or the Bondholders and does not in any way affect the liabilities or obligations of either the City, Citizens Gas, or Indianapolis Gas to the Trustee or the Bondholders.

(28) The question whether the Lease either was at the time it was made or now is onerous or burdensome is wholly immaterial to the determination of any issue in this cause now on trial, and the City is not entitled to defend against any of the obligations of the Lease on the ground that said Lease either was or is burdensome. It is therefore unnecessary to try or determine the issue presented by the City on that subject.

(29) By reason of the fact that the City took over all the assets of Citizens Gas and that whatever consideration was paid was given by it directly to the stockholders and bondholders of Citizens Gas, leaving Citizens Gas with no assets out of which to satisfy its obligations, the City is obligated to pay all the liabilities of Citizens Gas.

(30) In succeeding Citizens Gas as trustee of the public charitable trust the City accepted the trust property subject to all outstanding legal obligations of Citizens Gas and as successor trustee became liable for all obligations of Citizens Gas.

(31) By reason of

(A) The position taken by Citizens Gas and the City in approving the proposed Lease and their failure to object to said Lease or the order of the Public Service Commission approving said Lease,

(B) The position taken by Citizens Gas and the City in the case of Fishback *vs.* Public Service Commission of Indiana, et al.;

(C) The representations made by Citizens Gas in the sale of Indianapolis Gas Bonds and the City's acquiescence therein;

(D) The acceptance of the benefits of the Lease by Citizens Gas, the City, and the inhabitants of Indianapolis for almost twenty-two years;

(E) The position taken by the City and Citizens Gas in the cases of Todd *vs.* Citizens Gas Co., et al., and Cotter *vs.* Citizens Gas Co., et al.;

(F) The position taken by the City and Citizens Gas in the case of Williams *vs.* Citizens Gas Co., et al.;

(G) The representations made by the City in connection with the sale of its Revenue Bonds;

(H) The taking possession of the Indianapolis Gas property by the City and its continuous operation thereof since September 9, 1935;

355 the City and Citizens Gas are:

(a) estopped from denying, and

(b) precluded by their own laches from denying that the Lease is a valid and binding obligation of Citizens Gas, of the City as successor trustee of the public charitable trust, and of the property received by the City from Citizens Gas, for its full term of ninety-nine years.

(32) The plaintiff is entitled to judgment for the unpaid interest on the Bonds of Indianapolis Gas against

(a) Indianapolis Gas.

(b) Citizens Gas.

(c) The City.

(d) The property of the City transferred to it by Citizens Gas.

(33) The judgment to which plaintiff is entitled against said defendants and said property should include:

(a) The amount of all interest coupons falling due on and after October 1, 1936, to and including the date of judgment, being the sum of $172,025 falling due semi-annually on October 1 and April 1 of each year.

(b) Interest on unpaid interest at the rate of 6% per annum from the date when the respective coupons fell due to the date of judgment.

(c) The costs, attorneys' fees and expenses of the prosecution of this suit, the amount of such costs and expenses to be reserved for later determination after the conclusion of this litigation.

(34) The defendants herein and the property of the City transferred to it by Citizens Gas should be held liable for said judgments for interest, interest on interest, and the costs and expenses of the prosecution of this suit, in the following order:

First: The City of Indianapolis, and the property received by said City from Citizens Gas.

Second: The Citizens Gas Company of Indianapolis.

Third: The Indianapolis Gas Company.

(35) By reason of the fact that all sums on deposit with the Indiana National Bank as escrow agent have

been derived from and are part of the proceeds of the City's operation of the property transferred, conveyed, and assigned to it by Citizens Gas and the property of Indianapolis Gas covered by the Lease (Stip. 20(a), p. 33), all of said funds in the hands of the Indiana National Bank are liable for and subject to the satisfaction of all obligations of Citizens Gas and of the property transferred to the City by Citizens Gas.

(36) The fund now on deposit with the Indiana National Bank under the agreement of March 2, 1936, may be used by the City to discharge its obligations to the plaintiff herein, but no part of said fund should be distributed either to Indianapolis Gas, Citizens Gas or the City until the determination of the issues presented in this cause which are reserved for later hearing.

Respectfully submitted,

William L. Taylor,
John Adams,
Howard F. Burns,
Solicitors for Plaintiff in Cause 1844.

Baker, Hostetler & Patterson,
Union Commerce Building,
Cleveland, Ohio,
Of Counsel.

Filed May 4, 1939.

356 The following is the request of the City of Indianapolis for findings of fact and conclusions of law submitted July 5, 1939:

Submitted July 5, 1939.

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—1844) * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY CITY OF INDIANAPOLIS.

Edward H. Knight
Corporation Counsel,
Michael B. Reddington,
City Attorney,
William H. Thompson,
Albert L. Rabb,
Patrick J. Smith,
Solicitors for City of Indianapolis and individual defendants who are members of the Board of Trustees and Directors of the Department of Utilities of said City.

* * * * * *

The City of Indianapolis and the individual defendants who are members of the Boards of Trustees and directors of the Department of Utilities of the City of Indianapolis submit for the Court's consideration and hereby request the adoption of the following findings of fact and conclusions of law in the above case:

SUGGESTED FINDINGS OF FACT.

1. Plaintiff (hereafter referred to as "Chase") is a corporation established and existing under and by virtue of the banking laws of the United States with its principal place of business located in the City of New York in the Sate of New York and is engaged in and authorized to engage in a general banking and trust business. It is a resident and citizen of the State of New York.

2. Each of the defendants, The Indianapolis Gas Company (hereafter referred to as "Indianapolis Gas")

and Citizens Gas Company of Indianapolis (hereafter referred to as "Citizens Gas") is a corporation duly created and existing under the laws of the State of Indiana with its principal place of business in the City of Indianapolis, State of Indiana, and is a citizen and resident of the State of Indiana.

3. The City of Indianapolis (hereafter referred to as "City") is a municipal corporation existing under and by virtue of the laws of the State of Indiana and is located in the Southern United States Judicial District, Indianapolis Division.

4. Defendants, Thomas D. Sheerin, A. Dallas Hitz, Edward W. Harris and Charles Rauh are members of the Board of Trustees for Utilities of the City and each of them is a citizen and resident of the City and of the State of Indiana.

5. Defendants, Henry L. Dithmer, Brodehurst Elsey, Roy Sahm, Donald J. Angus, Isaac E. Woodard, LeRoy J. Keach and John E. Ohleyer are members of the Board of Directors for Utilities of the City and each of them is a citizen and resident of the City and of the State of Indiana.

6. The amount in controversy in this cause, exclusive of interest and costs, exceeds the sum or value of $3,000.

7. There are now issued and outstanding in the hands of the public, bonds of Indianapolis Gas secured by the mortgage hereafter described in the aggregate principal amount of $6,881,000 (which includes $120,000 and $18,000 principal amounts, respectively, of such bonds held by Indianapolis Gas and the City). Each of said bonds and the coupons attached thereto are in the form set forth in the mortgage, a copy of which, marked Exhibit "A" is attached to the bill of complaint in this case and incorporated into these Findings by reference.

8. The Massachusetts Mutual Life Insurance Company, New England Mutual Life Insurance Company and Savings Bank of Baltimore are the owners and holders of the following amounts, respectively, of such Indianapolis Gas bonds, together with all interest coupons due on October 1, 1936, and thereafter attached thereto, viz.: $265,000, $150,000 and $163,000.

9. Massachusetts Mutual life Insurance Company purchased its bonds between March 13, 1925, and May, 1931; New England Mutual Life Insurance Company purchased its bonds between July 14, 1916, and August, 1931;

Savings Bank of Baltimore purchased its bonds during the years 1924, 1925, 1927 and 1928.

10. There is no evidence in this case that Massachusetts Mutual Life Insurance Company, New England Mutual Life Insurance Company, Savings Bank of Baltimore, or any other owner or holder of Indianapolis Gas bonds other than defendant City purchased any of their bonds at any time subsequent to August, 1931, except those purchased by Citizens Gas in 1932.

There is no evidence in this case that any present owner of Indianapolis Gas bonds purchased his or its bonds relying on any acts done or representations made by Citizens Gas or the City or any of their authorized officers or agents.

11. The last coupons attached to said Indianapolis Gas bonds which have been paid were those falling due April 1, 1936. When that interest was paid coupons were presented for payment by and payment was made to more than 940 individual and 210 corporate bondholders.

12. On October 1, 1902, Indianapolis Gas executed its mortgage deed of trust of which Chase is successor and sole trustee. A correct copy of said mortgage marked Exhibit A is attached to the bill of complaint in this cause and is by reference made a part of these findings. Said mortgage was given to secure the payment of principal and interest of bonds which were authorized to be issued in the total principal amount of $7,500,000. Said mortgage was duly recorded.

13. The bonds issued under Indianapolis Gas mortgage were in the denomination of $1,000 each payable on October 1, 1952.

The mortgage covers the entire operating property of Indianapolis Gas and contains provisions to secure the payment of such bonds and the ordinary covenants of a large corporate trust deed. The mortgage contains an after-acquired property clause and in addition to covering the physical property covers the rents, issues, income, tolls, and profits arising therefrom.

Subdivision 14 of the mortgage contains the following provisions:

* * * * * *

"(Here follows the 5th grammatical paragraph of Subdivision XIV of the Mortgage (Exhibit A to the bill of complaint, I. R. 46, lines 13-36))."

(Inserted pursuant to stipulation filed Nov. 22, 1939.)

14. Citizens Gas was organized in 1906 under the general laws of Indiana providing for the incorporation of manufacturing and mining companies. Citizens Gas, although organized as a corporation for profit, was and always has been actually a quasi public corporation, its purposes and objects being fixed and controlled by a certain franchise and contract (granted and entered into on August 25, 1905, by and between the City and three individuals who were assignors of Citizens Gas) and other relevant trust instruments.

15. As a result of such franchise, contract and other relevant trust instruments a public charitable trust was created. The settlors, beneficiaries, trustees and trust res were as follows:

(a) The settlors were the public spirited citizens of Indianapolis who subscribed for stock of Citizens Gas;

(b) The beneficiaries of the trust were the then and future gas users of Indianapolis;

(c) The initial trustee was Citizens Gas with a definitely fixed and limited term of trusteeship, viz.: 25 years and as soon thereafter as the property of the trust could be conveyed to the successor trustee;

(d) The City was the successor trustee;

(e) The trust res was the property and plant of Citizens Gas, being the property formerly owned by the Consumers Gas Trust Company.

16. The franchise contract creating the public charitable trust referred to in the last preceding finding requires the individual grantees to organize an Indiana corporation to which the franchise should be assigned and whose Articles of Incorporation should provide as follows:

(a) The capital stock to be not less than $1,000,000 to be divided into shares of $25 each;

(b) No increase of the capital stock shall be made unless the new stock shall be sold at public auction;

(c) The Company shall make and publish a semi-annual public statement of its affairs and the City Controller shall have the right to examine its books and the City Engineer its plant and property;

(d) The entire capital stock shall be placed in the hands of five trustees, one of whom shall be nominated by the Mayor and the capital stock shall be voted as a unit in the selection of directors. Any vacancy occurring on the Board shall be filled by the remaining directors

except if a vacancy is created in the case of the member of the Board appointed by the Major it shall be filed by him;

(e) The voting trustees shall issue to each subscriber to the capital stock a beneficial certificate which shall entitle him to receive dividends at a rate not exceeding ten per cent per annum;

(f) The earnings of the Company shall be used in the following order:

First. To the payment of maturing debts and operating expenses;

Second. To the payment of dividends at the rate of ten per cent per annum; and

Third. In providing for extensions and betterments ordered by the Board of Public Works.

Fourth. The excess to the payment in whole or part of the amounts subscribed for stock.

(g) The franchise provides

* * * * * *

"(Here follows paragraph 1(g) of the Franchise Contract of August 25, 1905 (part of Exhibit C to the bill of complaint, I R. 84, lines 13-26))."

(Inserted pursuant to Stipulation, filed Nov. 22, 1939.)

(h) The business and prudential affairs are to be managed by a Board of nine Directors elected annually.

(i) Subdivision 2 of the franchise reads as follows:

* * * * * *

"(Here follows paragraph 1(i) of the Franchise Contract (part of Exhibit C to the bill, I R. 84-85))."

(Inserted pursuant to Stipulation, filed Nov. 22, 1939.)

(j) The company to be organized shall secure, acquire or construct and put in operation a fuel gas plant with not less than 100 miles of mains within eighteen months from the sale of the Consumers Gas Trust Company mains then pending and failing therein shall forfeit all rights hereunder, provided that the Board of Public Works may at any time after the sale of the Consumers Gas Trust Company mains require the individual grantees or their assigns to file a bond in the penalty of $25,000 conditioned for the performance of the contract and the acquisition or construction of such fuel gas plant;

(k) The grantees and their assigns are to hold the city harmless from any damages occasioned by the construction of mains and there are elaborate provisions cov-

ering the doing of work in the streets, the supervision of that work, the construction of mains and the quality of gas to be furnished;

(l) The grantees agreed never to charge the consumer in excess of sixty cents per 1,000 cubic feet of gas and it is provided that if the price exceeds sixty cents the franchise becomes void and the city shall have the right to acquire said plant as upon the termination of the franchise period;

(m) There are also elaborate provisions for extensions of gas lines upon order of the Board of Public Works, the installation of meters, the testing of meters and the like;

(n) Subdivisions 21, 22, 23 and 24 of the franchise read as follows:

* * * * * *

"(Here follow subdivisions 21, 22, 23 and 24 of the Franchise Contract (part of Exhibit C to the bill, I R. 93-94))."

(Inserted pursuant to Stipulation, filed Nov. 22, 1939.)

17. The Articles of Incorporation adopted by Citizens Gas contain the essential provisions required by the Franchise Contract. Subdivision 7 of such Articles reads as follows:

"Any member of the Board of Trustees may be removed by the Marion Circuit Court upon the showing that said trustee is an employee or holder of any of the securities or capital stock of or delivering gas to consumer residing in, or in the vicinity of the city of Indianapolis, or for any corrupt practice or any misconduct which said court may deem detrimental to the interests of said company. Removal from the city of Indianapolis shall, ipso facto, vacate the office of any trustee."

18. There are no provisions in the franchise contract, the Articles of Incorporation of Citizens Gas or its by-laws authorizing the issuance of preferred stock or the execution of any mortgage, except that a mortgage shall be executed at the time of the transfer of the property to the City, if necessary, to pay the obligations and stock of Citizens Gas. There is no provision in any of the trust instruments authorizing Citizens Gas to become the Lessee of a competing gas property.

19. On September 30, 1913, Indianapolis Gas executed and delivered to Citizens Gas a certain written instrument of lease (hereafter called "Lease"). A correct copy of said

lease marked Exhibit "B" is attached to the bill of complaint in this case and is by reference made a part of these Findings. All the property leased by Indianapolis Gas to Citizens Gas was covered by and included in Indianapolis Gas mortgage. The trust res did not include any part of the property of Indianapolis Gas or any lease on any part of such property.

20. The lease contains the following provisions:

(a) The entire operating plant of Indianapolis Gas is leased to Citizens Gas for a period of 99 years from the 1st day of October, 1913.

Subdivision 32 of the lease contains the following provision affecting the term:

"In event it should be determined by a court of final jurisdiction that the contract is ultra vires or void because of the length of the term created, and that such term is in excess of the authority of either party hereto to contract, then this lease shall nevertheless be binding upon the parties hereto for the longest term for which the parties hereto might lawfully contract."

(b) Subdivision 1 of the lease reads, in part, as follows:

* * * * * *

"(Here follows all of the first paragraph of subdivision 1 of the Lease except the last sentence thereof (Exhibit B to the bill of complaint, I R. 55-56))."

(Inserted pursuant to stipulation filed November 22, 1939.)

(c) The right is given to the Lessee to sell worn or damaged property and to procure a release of such property from the lien of Indianapolis Gas mortgage;

(d) The rent provided for in the lease is the payment of $120,000 a year, which amounts to six per cent dividends on the outstanding stock of Citizens Gas and, in addition, five per cent interest on all outstanding bonds.

When the lease was executed there were outstanding $4,833,000 of bonds and at the present time there are outstanding $6,881,000.

It is further provided that when the maximum price of gas to general consumers shall be fixed at a sum more than forty-five and not more than fifty cents per 1,000 cubic feet the rent shall be increased $10,000 a year and when such price of gas shall be fixed at a sum not more than forty-five cents the increased annual rental shall be $15,000 instead of $10,000.

(e) Provision is made for the issuance of additional

bonds to reimburse Lessee for expenditures made in betterments and extensions to the leased plant which can be drawn down by the Lessee to the extent of eighty-five (85%) per cent of sums so expended.

(f) The Lessee agrees to refund the mortgage debt during the entire period of the lease and if the bonds are sold at a discount to pay the Lessor the difference in cash and if sold at a premium to retain such premium.

(g) An inventory was made of the personal property and at the termination of the lease Lessee agrees to deliver to the Lessor usable merchandise of like value or to pay the Lessor in money the difference between the value of the property returned and the total value of the inventory.

(h) It is agreed that Lessee will do everything necessary to preserve its right to do business in the city. There then appears the following provision:

"That it will so far as the same may be necessary to that end, secure new franchises from time to time from the city of Indianapolis or other public authorities having power to grant said franchises to do business in the city of Indianapolis. That at or before the termination of the corporate life of the lessee, the lessee will so far as it is legally able so to do, either extend its corporate life or cause a new corporation to be formed to which it will transfer all its then property and assets and cause said new company expressly to assume all the obligations of this lease. And the like duty shall be assumed by all successive companies acquiring said property as such successors in title. All of which agreements however are expressly subject to the rights now held by the city of Indianapolis under the terms of the franchise granted to the lessee by said city."

(i) In addition to the agreed rental Lessee agrees to pay all taxes, general and special, ordinary and extraordinary, of every nature and description, not only upon the property but upon the rent reserved so far as such income constitutes the basis for an income tax.

(j) The provisions in respect of maintenance are as follows:

* * * * * *

"(Here follows the first grammatical paragraph of subdivision 15 of the Lease (Exhibit B to the bill, I R. 64))." (Inserted pursuant to stipulation filed November 22, 1939.)

(k) The right of the Lessor to surrender its existing franchise and accept an indeterminate permit is not to be abridged by the execution of the lease.

(l) Lessee also covenants to insure the leased property but may provide protection against loss by fire by the establishment of an insurance fund.

(m) Lessee agrees to operate the plant leased and to perform all grants to Lessor or contracts by it with the state or any municipal subdivision.

(n) Subdivision 22 of the lease reads as follows:

* * * * * *

"(Here follows subdivision 22 of the Lease (Exhibit B to the bill, I R. 72))."

(Inserted pursuant to stipulation filed November 22, 1939.)

(o) Upon the approval of the lease by the Public Service Commission, Indianapolis Gas shall file a declaration of a surrender of its franchise and state therein that it desires to receive in lieu thereof by operation of law an indeterminate permit.

(p) That in valuations for rate-making purposes only property actually used and useful shall be included in the rate base and unnecessary duplications of plant shall not be included.

(q) The power to regulate rates remains in the Public Service Commission and while this lease is in force Citizens Gas will permit regulation by the Commission.

(r) Lessee binds itself to extend the mains of the combined plants to the extent of at least three miles in any one year. In addition to these minimum requirements Lessee agrees to comply with any orders for extensions made by competent authority.

(s) A schedule of rates is set forth in the lease.

(t) There is a provision for arbitration of disputes.

21. On September 30, 1913, the property of Indianapolis Gas included a plant for making and distributing gas to consumers in the City, and about 375 miles of mains located in the streets and alleys of the City which mains were connected with meters of more than 41,000 customers who were served thereby.

22. The City is not named as a party obligated by the lease.

23. No ordinance or resolution was ever at any time adopted by the Common Council or the Board of Public Works of the City authorizing the execution of the lease or ratifying it, or agreeing to be bound by its terms.

24. No action has ever been taken at any time by the Boards of Trustees or Directors of the Department of Utilities of the City authorizing the acceptance of an as-

signment of said lease, ratifying the lease or agreeing to be bound by its terms.

25. The City took over the property of Citizens Gas on September 9, 1935, as successor trustee. More than a month prior to said date the City advised Citizens Gas that it would decline to accept an assignment of the lease and for that reason an assignment was made by Citizens Gas in a separate written instrument and was rejected by the City. The assignment made by Citizens Gas of the lease was physically delivered to the City and recorded and at the same time the City, through the Board of Directors for Utilities, adopted resolutions declining to accept an assignment of the lease, caused these resolutions to be recorded in the Recorder's Office of Marion County, Indiana, and a duly certified copy of them to be served on Citizens Gas and Indianapolis Gas.

26. Citizens Gas operated under the terms of said franchise contract and the amendments thereto from the date of the assignment thereof by the individuals to whom the franchise had originally been granted until August 27, 1921, at which time, pursuant to the terms of an Indiana statute authorizing it to do so, it filed with the Public Service Commission of Indiana its declaration of surrender of said franchise and accepted an indeterminate permit with the result that from August 27, 1921, until September 9, 1935, Citizens Gas operated as a public utility under an indeterminate permit. Said surrender and the acceptance of said indeterminate permit did not have the effect of modifying or rendering nugatory the terms of said franchise contract insofar as they created a public charitable trust and defined the terms and conditions thereof and the rights, duties and liabilities of Citizens Gas as original trustee, of the City as successor trustee and of the gas users of Indianapolis as the beneficiaries of said trust.

27. On September 9, 1935, Citizens Gas transferred its gas producing and distributing plant and system to the City and since that time City has operated said gas producing and distributing plant and system. Since September 9, 1935, Citizens Gas has not been engaged in any business of any nature whatsoever.

28. On or about May 21, 1913, Indianapolis Gas, Lessor, and Citizens Gas, Lessee, jointly submitted a tentative form of lease to the Public Service Commission of the State of Indiana and jointly petitioned said Commission to adopt and approve the terms and conditions set forth in said form of lease and to authorize them to enter into and ex-

ecute said lease. A correct copy of the finding and order of said Commission with respect to said lease is attached to the bill of complaint in this cause marked Exhibit D and is by reference made a part of these findings.

29. It appears in the finding and order of the Public Service Commission last referred to that Joseph B. Kealing, Corporation Counsel of the City, appeared for the City in said proceeding, but there is no evidence in this case that the Corporation Counsel for the City had any power or authority to bind the City in respect of said lease or the approval of the lease by said Commission.

30. Newton Todd, a beneficial certificate holder of Citizens Gas commenced an action in the United States District Court for the Southern District of Indiana on April 30, 1929. The only defendants in that case were Citizens Gas, the individuals who were voting trustees of its common stock, the City, the Mayor, Clerk and Members of the Board of Public Works of the City.

Neither Indianapolis Gas, Chase nor any predecessor trustee under Indianapolis Gas mortgage, nor any bondholder of Indianapolis Gas was a party plaintiff, a party defendant, or an intervenor in said cause.

No pleading was filed in the Todd case asserting either the validity or invalidity of the lease.

The issues tendered by the bill in the Todd case were:

(a) That the original agreement between the City and Citizens Gas contained in the franchise contract of 1905 was abrogated and annulled when Citizens Gas surrendered the franchise and accepted an indeterminate permit.

(b) That the surrender of the franchise and the acceptance of an indeterminate permit created a new contract between the State and Citizens Gas, one of the terms of which was that the City should have the right to acquire the property of Citizens Gas at a value to be determined by the Public Service Commission.

(c) That an Act of the Indiana General Assembly of 1929 purporting to legalize all of the provisions of the Articles of Incorporation of Citizens Gas and particularly those in respect of the mode of acquiring the plant and property of Citizens Gas by the City, resulted in an impairment of the obligations of the contract above referred to in violation of the Constitutions of Indiana and of the United States.

(d) That the franchise contract of 1905 merely gave an option to the City to purchase the property of the Citi-

zens Gas and this resulted in a violation of the rule against perpetuities.

The issues involved in the present case are wholly different from those involved in the Todd case. The question of the validity and enforceability against the City of the lease was neither involved nor determined in the Todd case and could not have been determined under the issues presented to this court in that case.

The Todd case was finally disposed of on May 18, 1931, when the Supreme Court of the United States denied Todd's application for a writ of certiorari and that no controversy had ever arisen or existed in connection with the validity or invalidity of the lease prior to July, 1935. Until the transfer of the trust res by Citizens Gas to the City, all payments provided for by the terms of said lease had been made as required therein and there had been no breach or threatened breach by Citizens Gas of its covenants under said lease.

31. Indianapolis Gas and Citizens Gas filed with the Public Service Commission of Indiana a joint petition asking for the approval of the lease. One Frank S. Fishback intervened, raised certain objections to the approval of the lease and after the Commission had entered an order approving the same filed a petition for a rehearing which was overruled.

Neither Chase nor any predecessor trustee of Indianapolis Gas, nor any bondholder of Indianapolis Gas, was a party to such proceedings.

When the Public Service Commission of Indiana approved the execution of the lease no claim had been asserted that the franchise contract of 1905 and other related papers resulted in the creation of a public charitable trust and at the time the Commission's approval was given to the lease it was 17 years before the date when a transfer of the trust property was required to be made to the City. Fishback did not intervene or resist the approval of the lease by the Public Service Commission as the beneficiary of a public charitable trust.

32. On November 28, 1913, Fishback commenced an action in the Superior Court of Marion County, Indiana, against the Public Service Commission of Indiana, Citizens Gas, Indianapolis Gas, and the City to vacate and set aside the order approving the execution of the lease.

Fishback sued as a stockholder of Citizens Gas and a resident freeholder of the City and not as a beneficiary of a public charitable trust.

Citizens Gas and the City were not made parties defendant as the initial and successor trustees of a public charitable trust. There was no averment in any of the ten paragraphs of complaint filed by Fishback that a public charitable trust had been created by the franchise contract of 1905.

Fishback sought to set aside the Commission's order on the following grounds:

(a) That the rentals fixed in the lease were excessive and that their payment by the Citizens Gas would result in a waste and misapplication of its funds and its inability to pay dividends due its stockholders.

(b) That the Citizens Gas was without power to enter into the lease without the consent of the owners of three-fourths (¾) in amount of its capital stock, which consents had not been obtained.

(c) That the City had not given its consent to such lease, had not joined in the execution thereof, and had granted to Citizens Gas no right to operate the property of Indianapolis Gas.

(d) That the findings and order of the Public Service Commission were not sustained by sufficient evidence and were contrary to law.

(e) That Citizens Gas had no power to enter into the agreement contained in the lease permitting the Public Service Commission to fix rates at which it should sell gas.

(f) That the obligation assumed by the Citizens Gas under the terms of said lease to pay interest on the bonds and dividends on the stock of Indianapolis Gas impaired the obligation of the contract existing between the Citizens Gas and plaintiff and other stockholders of that company in that it prevented Citizens Gas from executing a mortgage at the end of the franchise term in order to pay the stockholders of that company the par value of their stock and accumulated dividends thereon.

Prior to the entry of final judgment in the Fishback case, Fishback dismissed the City as a party defendant and the following order book entry was made in connection with such dismissal:

"Come now the parties and the plaintiff now dismisses the action, as against the defendant City of Indianapolis, upon which dismissal the court now enters judgment for costs against the plaintiff."

Fishback elected to stand upon his complaint and to abide the ruling of the court upon demurrers which had been

sustained to each paragraph of said complaint and judgment was rendered against him.

The City was not a party to the judgment rendered in the cause.

Neither Chase nor any other trustee under Indianapolis Gas mortgage nor any bondholder of Indianapolis Gas was a party plaintiff, defendant or intervenor in the Fishback case.

Fishback prayed an appeal from the decree of the Marion Superior Court to the Supreme Court of Indiana which dismissed the appeal because it was not perfected in time.

The first Indiana Declaratory Judgment Act became effective on May 16, 1927. At the date of the final disposition of the Fishback case there was neither an existing controversy nor the ripening seeds of such controversy between Indianapolis Gas, the trustees of its mortgage or its bondholders and the City as to the enforceability of the lease against the City or the trust property.

Up to the date when Fishback dismissed his cause against the City no issue had been presented between the City and Indianapolis Gas as to the validity of the lease.

There was neither in issue nor decided by the Court in the Fishback case any question as to the validity or enforceability against the City of the lease.

The Fishback case was tried and decided on the theory that whether the lease was valid for its entire term or not the action of the Public Service Commission of Indiana in approving the same could not be vacated or set aside.

Since the determination of the Fishback case new facts have occurred which alter the legal rights and relations of the parties thereto, viz.: the transfer of the trust res to the City as successor trustee on September 9, 1935.

After the City had been dismissed as a party defendant in said cause it was not again made a party thereto.

33. On May 12, 1930, Allen G. Williams as a resident and taxpayer of the City on behalf of himself and all others similarly situated commenced an action in which Citizens Gas, its voting trustees and directors, Indianapolis Gas, the then trustees under Indianapolis Gas mortgage, the Mayor, City Clerk, Board of Public Works, Boards of Trustees and Directors for the Department of Utilities of the City and the Public Service Commission of Indiana were defendants. A demurrer to plaintiffs' complaint was filed by the Public Service Commission, another by Indianapolis Gas and its mortgage trus-

tees and a third by the remaining defendants. The demurrers so filed were sustained, judgment was rendered against Williams and the case was appealed to the Supreme Court of Indiana and affirmed.

Neither a controversy nor the ripening seed of such a controversy existed at any time prior to the date of the final disposition of the Williams case between the City and Indianapolis Gas or its mortgage trustees or bondholders as to the enforceablity against the City of the lease. The transfer of the trust res from Citizens Gas to the City as successor trustee was not made until long after the final disposition of the Williams case.

In the Williams case plaintiff attempted to procure a determination of the invalidity of the lease on the ground that execution of the lease violated the Constitutions of the United States and the State of Indiana and had been obtained as the result of conspiracy. None of the questions involved in this case were actually litigated in the Williams case nor could such questions have been litigated under the issues in that case.

No issue was made between Indianapolis Gas, its mortgage trustees or its bondholders and the City or the Boards of Trustees and Directors of the Department of Utilities in connection with the enforceability of said lease against the City, although the City had pointed out in a joint motion filed by it and Citizens Gas to strike out parts of plaintiffs' complaint that the validity of the public charitable trust was in nowise affected by the validity of such lease.

It was stated in said motion:

"If the lease is valid the leasehold interest created thereby constitutes a part of the public charitable trust and is subject to be administered in the same way as the property owned by the Citizens Gas Company in its own right. If for any reason the lease is invalid it will fall outside the scope of the trust."

34. At the date of the execution and delivery of the lease $4,833,000 total face amount of Indianapolis Gas Bonds were outstanding. Between June 22, 1914, and February 11, 1932, upon the request of Indianapolis Gas, the mortgage trustees authenticated and delivered to Indianapolis Gas additional bonds in the total principal amount of $2,048,000. Pursuant to the provisions of the lease Indianapolis Gas, in turn, delivered $1,971,000 principal amount of said additional bonds to Citizens Gas for the purpose of reimbursing Citizens Gas for eighty-five per

cent. (85%) of its capital expenditures on account of extensions and betterments to the plant and system of Indianapolis Gas made and paid for by Citizens Gas. As a result of such expenditures for extensions and betterments and the reimbursement by issuance of bonds, citizens Gas has expended for additions and betterments to the plant of Indianapolis Gas approximately $200,000 for which it has received no reimbursement. All additions and betterments to the plant of Indianapolis Gas for which bonds were issued were made with its consent and under the terms of said lease said additions and betterments became and are the property of Indianapolis Gas. All of said bonds in the principal amount of $1,971,000 were sold by Citizens Gas except bonds in the principal amount of $18,000 which were retained by it. The proceeds of the bonds sold by Citizens Gas were received and used by it. It was many years after the execution of the lease before Chase received a copy of the same and in certifying such additional bonds as Chase certified, above referred to in this subdivision, Chase did not rely upon the validity or enforceability of said lease against the City and did not consider the lease as of any importance as security given to Chase under the terms of the mortgage.

There is no proof that any predecessor trustee of Chase which certified bonds either knew of the existence of the lease or relied upon it as a basis for a certification of any Indianapolis Gas bonds.

35. Citizens Gas operated the plant and property of Indianapolis Gas under said lease from November 28, 1913, until September 9, 1935. From October 2, 1913, until September 9, 1935, Citizens Gas from time to time duly paid the interest on the outstanding Indianapolis Gas bonds by making payment thereof to the holders of the bonds either at the office of the trustee or directly to such holders. During that period Citizens Gas paid all the rentals payable in cash under the terms of the lease and also paid all the taxes required to be paid by the Lessee under the terms of the lease; that the total payments so made by Citizens Gas are shown in Exhibit 20 attached to the Stipulation in this case, which exhibit, by reference, is made a part of and incorporated into these Findings.

That for the five (5) year period immediately preceding September 9, 1935, the aggregate payments made by Citizens Gas on account of the lease were approximately $600,000 annually.

36. From the period of its organization in 1906 to June

30, 1935, Citizens Gas paid dividends to the holders of its common stock at the rate of ten per cent per annum. On September 9, 1935, when Citizens Gas conveyed, transferred and assigned its property to the City it turned over a sum of approximately $411,000 in cash or current funds to the City.

37. On March 20, 1929, the City, through its Board of Public Works, adopted a resolution, a correct copy of which marked Exhibit 22 is attached to the Stipulation in this case and is by reference made a part of these findings. On April 3, 1929, the Directors of Citizens Gas unanimously adopted two resolutions, copies of which, marked Exhibits 23 and 24, are attached to the Stipulation in this case and by reference made a part of this finding. On April 3, 1929, the Board of Trustees of the Citizens Gas unanimously adopted a resolution approving the resolutions adopted by the Board of Directors of Citizens Gas. The resolutions referred to above in this subdivision of this stipulation contain demands by the City upon Citizens Gas that in accordance with the provisions of the franchise contract "the plants, property and assets of said Company be conveyed to said City of Indianapolis" and a recognition by Citizens Gas that it was obligated to make such conveyance.

38. In pursuance of a resolution adopted on May 7, 1935, by the Board of Directors for Utilities of the City, a public offering of $8,000,000 of Indianapolis Gas Plant Revenue Bonds was made on May 28, 1935. A copy of said Resolution, adopted May 28, 1935, is identified as Exhibit 47 to the Stipulation in this case and is by reference incorporated into these findings. A correct copy of the notice by the City Controller of the City pursuant to said resolution marked Exhibit A is attached to the answer and counter-claim of the City in this case and is by reference made a part of this Finding. Resolutions similar to that of May 7th, 1935, were adopted by the Board of Directors for Utilities for the City on April 5th, April 10th and April 12th, 1935, and advertisements were published in pursuance of said resolutions on April 8th, April 12th, and April 18th, 1935, respectively. Said resolutions were substantially identical with Exhibit 47 to said Stipulation. Said advertisements were substantially identical with Exhibit A to the answer and counter-claim of the City. No bid resulting from said advertisements of April 8th, April 12th and April 18th, 1935, was acceptable to the City.

Later, viz. on May 29, 1935, a joint bid of Halsey Stuart

& Company, of Chicago, Illinois, and Otis & Co., of Cleveland, Ohio, for said revenue bonds was accepted by the City. The proceeds of the sale of said Revenue Bonds were received by the City June 27, 1935.

39. The purchasers of said revenue bonds issued an advertising circular, a correct copy of which marked Exhibit B is attached to the answer and counter-claim of the City and is by reference made a part of this finding.

Before the issuance of said advertising circular Halsey, Stuart & Company and Otis & Co., asked the City to approve the circular which was to be issued by them and were advised by the City and its representatives that the only authority which the City had in connection with the sale of revenue bonds was to make a public offering and that the City had no authority to approve or become responsible for any representations made in connection with the resale of said revenue bonds by the purchasers thereof.

That the circular and newspaper advertising issued by the purchasers of said revenue bonds were issued solely on their own authority and without authorization by the City and that there is no evidence to show that any persons who purchased said Gas Plant Revenue Bonds of the City did so on the faith of any representation made by the City or its authorized agents.

Any representations made by the purchasers of such bonds were never ratified or approved by the City or any of its authorized representatives.

40. The City caused the sum of $2,500,000 to be paid on or about July 1, 1935, for the retirement of all of the Citizens Gas common stock. Said $2,500,000 included $2,000,000 as the par value of said common stock and $500,000 as dividends thereon at the rate of ten per cent. per annum from January 1, 1933, to June 30, 1935. The City also caused the sum of $1,050,000 to be paid on or about September 1, 1935, for the redemption of all of the Citizens Gas preferred stock in full satisfaction of the preferred stockholders' interest in the property and assets of Citizens Gas. Said $1,050,000 included $1,000,000 as the par value of said preferred stock and $50,000 as the premium of five per cent. on the redemption thereof required by the terms of said preferred stock. Citizens Gas paid all the dividends on said preferred stock up to the time of said redemption. All of said common stock was retired and all of said preferred stock was redeemed.

41. On August 9, 1935, the Board of Directors for Utilities of the City adopted a resolution with respect to the

payment of the mortgage bonds of the Citizens Gas dated July 1, 1912, a copy of which resolution is attached to the Stipulation in this cause, marked Exhibit 48 and by reference made a part of this Finding. In pursuance of said resolution the City on August 10, 1935, published a notice, a copy of which, marked Exhibit 49, is attached to the Stipulation in this cause and in September, 1935, published a notice, a copy of which, marked Exhibit 50, is attached to the Stipulation in this cause, both of which exhibits marked 49 and 50 are by reference made a part of this Finding. The principal amount of Citizens Gas bonds outstanding on August 12, 1935, was $2,745,000. All of said bonds have been paid and surrendered excepting bonds aggregating the principal amount of $32,000.

Before payment of said bonds had been made by the City it was advised by its counsel that said Citizens Gas mortgage had been executed in violation of the terms of said public charitable trust, but that the moneys which Citizens Gas had received from the sale of the mortgage bonds had been used in additions to and betterments of the trust res and that the holders of the bonds had an equitable lien on the property for their debt; that it was in pursuance of this advice that the City paid said mortgage bonds.

That in the payment of the common and preferred stock of Citizens Gas and the dividends thereon and the premiums on the retirement of the preferred stock the City proceeded in accordance with the decree of this court and the Circuit Court of Appeals in the Todd and Cotter cases, above referred to, and that it was required to make said payments before taking over the res of the public charitable trust hereinbefore described and that in so doing it did not recognize directly or by implication the validity or enforceability against the City of the lease.

42. Prior to the transfer to the City of the plant and property of Citizens Gas on September 9, 1935, neither the City nor its Department of Utilities gave any notice to Chase or any formal notice to any holder of Indianapolis Gas bonds that said transfer and conveyance was to be made, but Indianapolis Gas was fully advised of said transfer and as early as July 23, 1935, was advised that the City would not accept an assignment of the lease; that wide publicity of the fact that said transfer was to be made appeared in the newspapers, including the publicity incident to the sale of the revenue bonds.

43. That in pursuance of agreements made between City and Indianapolis Gas, which agreements have been

continuously in effect since September 9, 1935, City has operated the gas producing and distributing plant and system of Indianapolis Gas. Such agreements provided in substance that such operation by the City should not prejudice the rights of either the City or Indianapolis Gas and further provided that the City by operating such plant did not recognize the validity of the lease and Indianapolis Gas by consenting to such operation did not admit that the lease was invalid.

That such agreements between City and Indianapolis Gas were made for the purpose of preventing the interruption of public service and in order that approximately 50,000 gas consumers on the mains of Indianapolis Gas should continue to receive a necessary public utility service.

That such operation by the City in pursuance of the terms of such agreements did not amount to an admission of the validity of the lease.

44. On March 2, 1936, the City and Indianapolis Gas entered into a written agreement, a correct copy of which is attached to the complaint in this case, marked Exhibit H and is by reference made a part of these Findings; that said agreement has never been modified or supplemented in any respect.

No settlement agreement as provided for in said contract of March 2, 1936, has ever been agreed upon between the City and Indianapolis Gas; that since the date of the execution of said agreement the City has made an effort to obtain a judicial determination of the validity of the lease and the non-enforceability against it of said lease as follows:

(a) On October 1, 1936, the City filed a counter-claim in this cause asserting the invalidity of said lease and asking a judicial determination of such invalidity.

(b) On October 28, 1938, the City filed a counter-claim in a suit brought by bondholders of Indianapolis Gas in this court in which it likewise asserted the invalidity of such lease and sought a judcial determination of such invalidity.

(c) On December 24, 1937, the City commenced an action to obtain a judicial determination of the invalidity of said lease, which cause is now pending as No. 13873 in the Circuit Court of Boone County, Indiana.

45. Indianapolis Gas did not pay any of the interest coupons due on October 1, 1936, April 1, 1937, October 1, 1937, April 1, 1938 and October 1, 1938, on any of the In-

dianapolis Gas bonds and all of said interest coupons remain unpaid.

46. The City, pursuant to the terms of the agreement of March 2, 1936, has from time to time made deposits with the escrow agent, The Indiana National Bank of Indianapolis, which deposits on December 31, 1938, aggregated the sum of $1,217,875 which sum is now held by said Bank. Said Bank has never at any time paid out any of the sums so deposited with it. All of the sums so deposited with said Bank have been derived from and are part of the proceeds of the City's operation of the property transferred, conveyed and assigned to it by Citizens Gas and the property of Indianapolis Gas covered by the lease.

47. The City also has paid pursuant to the terms of the agreement of March 2, 1936, the sum of approximately $171,000, being an amount equal to the interest due on Indianapolis Gas bonds on March 30, 1936.

48. That all payments made by the City of sums of money equal to the interest on the Indianapolis Gas bonds, dividends payable under the terms of the lease of September 30, 1913, or any of the moneys now in escrow at The Indiana National Bank of Indianapolis, would not have been made in the absence of the agreement of March 2, 1936, for the temporary use of the property of Indianapolis Gas, and certain correspondence exchanged between Indianapolis Gas and attorneys for the City in connection with the payments so made, in which contract of March 2, 1936, and correspondence it was agreed that neither the temporary operation of the property nor the payment of such monies by the City should in any way prejudice the City's rights or without such operation and payments or the execution of the agreements constituting an admission on the part of the City of the validity or binding effect upon the City of the lease.

The agreement of March 2, 1936, did not result in the default of interest payments due on the bonds because in the absence of such agreement the City would not have made payments of sums equal to the interest.

49. On March 11, 1936, and prior to the date when the City paid the money equal to the interest referred to in subdivision 47 of this finding and before it had deposited any sums in escrow with The Indiana National Bank as escrow agent, the trustee and two of the principal bondholders of Indianapolis Gas were advised of the making of such agreement and the terms thereof and be-

lieving said agreement to be in the interest of the bondholders and of Chase made no objection thereto but received and accepted the sum of $171,000 with full knowledge of the terms of said agreement and have been interested continuously since in seeing that said agreement was carried out by the City and that the sums agreed to be paid by the City were actually paid.

The averment in the complaint in this case that said agreement was made in violation of the rights of Chase and its bondholders and was inimical to their interests is not true and was never believed by Chase to be true.

50. On September 9, 1935, the Directors of Citizens Gas adopted a resolution, a copy of which, marked Exhibit 86, is attached to the Stipulation and is by reference made a part of this finding. On the same day, the Board of Trustees of Citizens Gas adopted a resolution, a copy of which, marked Exhibit 87, is attached to the stipulation in this case and by reference made a part of this finding.

Pursuant to the requirements contained in each of said resolutions, the City on September 9, 1935, executed and delivered to Citizens Gas an indemnifying agreement, a correct copy of which, marked Exhibit J, is attached to the second amendment to the complaint in this cause and by reference made a part hereof.

51. Prior to the commencement of this action neither Chase nor any of the bondholders of Indianapolis Gas made any request or demand upon Indianapolis Gas that it commence or prosecute an action in a court of competent jurisdiction to obtain a determination or declaration of the validity or invalidity of the lease.

52. The City has been a first class city within the meaning of the Indiana Statutes continuously since January 1, 1910. No other city of Indiana has been a first class city during any of said period. The City has had a population exceeding 300,000 continuously since January 1, 1920, and no other city of Indiana has had such a population of 300,000 during any of such period.

53. As early as September 19, 1935, Chase was advised by its bondholders who had seen newspaper reports that the City was attempting to abrogate the lease. In a letter of that date addressed to the President of Indianapolis Gas Chase stated.

"We are receiving numerous inquiries from holders of bonds of the above described issue with respect to newspaper reports that the City Utilities District is attempt-

ing to abrogate the lease made by your Company with Citizens Gas Company in 1913. Bondholders state that such action would materially affect the security of their bonds and we would be obliged if you will be good enough to write us such information as we can pass on to bondholders with respect to this situation."

Neither the City nor Citizens Gas concealed the attitude of Citizens Gas and the City in respect of the City's rejection of an assignment of the lease.

Chase knew at all times from September 19, 1935, of the City's attitude and there was no reason why either City or Citizens Gas should have advised them of such attitude.

54. On September 28, 1935, the firm of which Newton D. Baker was the senior member, was employed by Indianapolis Gas as special counsel in the controversy respecting the validity and enforceability against the City of the lease. That firm gave an opinion on the question of the validity and enforceability against the City of the lease in November, 1935. Mr. Baker's firm continued to represent Indianapolis Gas until May 13, 1936.

On March 11th and April 10th, 1936, meetings were held at the office of Chase in New York attended by representatives of Chase, Indianapolis Gas and two of the principal bondholders of Indianapolis Gas, at which it was agreed:

(a) That the two insurance companies there represented: Massachusetts Mutual and New England Life, would request Chase to obtain an opinion from Mr. Baker's firm as to the validity and enforceability against the City of the lease and whether the costs and expenses including attorneys' fees of Chase in the prosecution of a suit against Indianapolis Gas, the City and Citizens Gas would be a lien against Indianapolis Gas property ahead of its mortgage debt;

(b) Chase would then write to Mr. Baker's firm requesting such an opinion;

(c) If the opinion of Mr. Baker's firm were favorable Chase would request Mr. Baker's firm to bring such a suit.

(d) Thereupon Mr. Baker's firm would ask to be released from its employment to Indianapolis Gas. Indianapolis Gas would accede to this request, Mr. Baker's firm would accept Chase's employment and would thereupon sue Indianapolis Gas, which, up to that time, it had represented.

This plan was carried out as projected.

55. Attorneys for Indianapolis Gas and Mr. Baker's firm then representing Indianapolis Gas, started the work of preparing a complaint against Indianapolis Gas and at the time this complaint was drafted, and towards the stage of completion, it had been wholly prepared by attorneys representing Indianapolis Gas and no one else.

After Mr. Baker's firm had been released from its employment by Indianapolis Gas it consulted and advised with Indianapolis Gas attorneys residing in Indianapolis as to the preparation and form of the complaint, accepted suggestions made by Indianapolis Gas attorneys in respect thereof and co-operated with Indianapolis Gas attorneys in the preparation and filing of the complaint.

After the complaint was filed Mr. Baker's firm then representing Chase, and local attorneys for Indianapolis Gas, consulted and advised with each other both as to the facts and the law in the presentation and prosecution of the case.

The temporary relief asked for in the complaint was never intended to be urged upon the court and that in fact in the three years in which this case has been pending no such temporary relief has been requested except by the formal prayer in the complaint.

This action was commenced by Chase at the joint request of Indianapolis Gas and its bondholders and was brought and maintained collusively by Chase and Indianapolis Gas in order that the suit might be brought in a Federal Court; that there is no collision of interest between Chase and Indianapolis Gas; that Chase and Indianapolis Gas have actively cooperated in the maintenance of this litigation.

Upon the foregoing Findings of Fact, the Court makes and states the following

This action was commenced by Chase at the joint request of Indianapolis Gas and its bondholders and was brought by Chase in order that the suit might be brought in a Federal Court.

CONCLUSIONS OF LAW:

1. This suit was collusively brought and has been collusively maintained by Chase and Indianapolis Gas; there was not at the commencement of this action and never has been collision of interest between Chase and

Indianapolis Gas; the interest of Chase and Indianapolis Gas in this case is joint and that interest is to secure a declaration of the validity and binding effect upon the City of the lease; the prayer for temporary relief in the complaint was not inserted for the purpose of obtaining such relief, but merely for the purpose of showing an apparent collision of interest; this action was commenced at the joint request of Indianapolis Gas and its bondholders and there has been active cooperation between Chase and Indianapolis Gas in the commencement and prosecution of this suit.

2. Because of the collusive nature of the action the City is entitled to a judgment against Chase for its reasonable costs, expenses and attorneys' fees in defending this collusive suit.

3. This cause is hereby referred to ..... as Special Master for the purpose of ascertaining and reporting to this court the amount of the City's reasonable costs, expenses and attorneys' fees in defending this action.

4. Upon such report of the Special Master being made and being approved or modified by the court the City is entitled to have judgment against Chase for the amount of its reasonable costs, expenses and attorneys' fees and to have this case dismissed for want of jurisdiction.

OR ALTERNATIVELY.

1. The order of the Public Service Commission approving the lease; and the judgments and decrees in the Fishback, Todd and Williams cases are not res adjudicata of the validity and binding effect of the lease upon the City.

2. The City is not estopped by any of its conduct from denying the validity and enforceability against it of the lease.

3. The lease is invalid and unenforceable against the City for each of the following reasons:

(a) Citizen's Gas as initial trustee of a public charitable trust with a fixed date of expiration of its trusteeship had no power or authority to execute a lease for 82 years beyond the expiration of its term of trusteeship which would be binding upon or enforceable against its successor trustee, the City, a municipal corporation.

(b) The trust instruments conferred no specific power

upon the initial trustee to execute such a lease as Lessee and properly construed precluded the initial trustee from executing such a lease.

(c) Said lease was executed in violation of the terms of an Indiana statute which prohibited the execution of such a lease without the approval of the Board of Public Works and the Common Council of the City which approval was never obtained. Said statute precluded the execution of any lease for a term of longer than 25 years. A lease executed in violation of this Statute is void and cannot be ratified.

4. The agreement of March 2, 1936, between City and Indianapolis Gas was not inimical to the interests of Chase or the bondholders which it represents.

5. Neither the City nor Indianapolis Gas has violated the terms of the agreement of March 2, 1936, nor is there any valid subsisting controversy as to the proper interpretation of that agreement. Inasmuch as this court has concluded that said lease is invalid and unenforceable against the City it has no power or jurisdiction to determine and fix the rights of Indianapolis Gas and the City under the terms of such agreement.

6. Plaintiff's complaint should be dismissed for want of equity.

Respectfully submitted,

Edward H. Knight,
Corporation Counsel,

Michael B. Reddington,
City Attorney,

William H. Thompson,
Albert L. Rabb,
Patrick J. Smith,
Solicitors for City of Indianapolis and individual defendants who are members of the Board of Trustees and Directors of the Department of Utilities of said City.

July 5, 1939.

Submitted July 6, 1939.

382 The following is the request of defendant, Citizens Gas Company of Indianapolis, for findings of fact and conclusions of law submitted July 6, 1939:

383 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Consolidated Caption—1844 and 1950) * *

REQUEST OF DEFENDANT, CITIZENS GAS COMPANY OF INDIANAPOLIS, FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Citizens Gas Company of Indianapolis, a defendant in the above-entitled consolidated cause, respectfully submits and requests the adoption of the following proposed findings of fact and conclusions of law:

Findings of Fact.

(1) Citizens Gas Company of Indianapolis (hereinafter referred to as "Citizens") was organized on the 23rd day of May, 1906, under the general laws of the
384 State of Indiana, providing for the incorporation of manufacturing and mining companies, its purposes and obligations being fixed and controlled entirely by its Articles of Incorporation, as amended, its By-Laws, and the certain franchise ordinance and contract granted and entered into on the 25th day of August, 1905, by and between the City of Indianapolis, acting by and through its Common Council, and Afred F. Potts, Frank D. Stallnaker and Lorenz Schmidt. Copies of said instruments and enactment as contained in the stipulation of the parties offered in evidence as Plaintiffs' Exhibit One, are adopted by the Court as part of these findings of fact.

(2) That by virtue of such instruments and enactment Citizens became the initial trustee of a public charitable trust for the benefit of the present and prospective gas consumers of the City of Indianapolis, and all of the rights, property and assets then or thereafter acquired by Citizens were held by it as such initial trustee, and for the purposes and upon the terms and conditions set forth in said instruments and enactment, and no others. Said instruments and enactment provide, among other things, than when the outstanding preferred stock of Citizens shall have been retired and when the holders of the cer-

tificates representing the common stock of Citizens shall have received, by dividends or otherwise, upon such certificates an amount equal to the face value thereof together with interest thereon at the rate provided for, the said certificates shall all be deemed fully paid and cancelled, and it shall thereupon be the duty of the Voting Trustees and Board of Directors of Citizens to convey to the City of Indianapolis all the right, title and interest of
385 Citizens in all of its said property, subject to all of the legal obligations of Citizens, to be owned and operated by the said City of Indianapolis, and that thereafter Citizens shall be wound up.

(3) The sole purpose and object of the creation, organization and existence of Citizens was to act and perform the duties of initial trustee of the said public charitable trust, as specifically set forth in the said instruments and enactment, and Citizens had no power or authority, as a corporation, to act otherwise.

(4) Prior to September 30, 1913, and at all times subsequent thereto, all persons, including the plaintiffs herein, the defendant Indianapolis Gas Company, and all of the holders of the bonds of the said defendant, either had actual knowledge of, or were bound in law by knowledge of, all of the terms and provisions of the said instruments and enactment and of the purposes, objects, power and authority of Citizens, as aforesaid, including the duty, power and authority of Citizens, at the end of the period of said franchise ordinance, to wit, on August 30, 1930, when the conditions fixed therein precedent to the conveyance and transfer had been fully complied with, to convey and transfer all of the said property to the City of Indianapolis, and thereafter to be wound up.

(5) Prior to September 9, 1935, all of the conditions fixed in the said instruments and enactment as precedent to the duty and authority of Citizens to convey and transfer the said property had been fully and completely performed so that on said date nothing further remained to be performed or done by the City of Indianapolis to entitle it in law to have all of said property con-
386 veyed and transferred to it as aforesaid. On said date, Citizens, by its proper corporate officers, executed and delivered instruments of conveyance and transfer of all of the said property to the City of Indianapolis, in the manner and form, and in strict compliance with its duty and authority so to do, as aforesaid.

(6) Citizens had fully and completely complied with all the terms, provisions and obligations of the written lease entered into by and between Citizens and Indianapolis Gas Company under date of September 30, 1913, which written lease was offered in evidence as Plaintiffs' Exhibit One and is made a part of these findings of fact, when, on September 9, 1935, Citizens conveyed, transferred and assigned all of the said property, including the interest in and to the said written lease, to the City of Indianapolis, subject to all the legal obligations of Citizens, including the legal obligation under the said written lease, if any there be, all as aforesaid. As a result of the performance of its duties, power and authority as initial trustee of the said public charitable trust, Citizens divested itself of all of its property of every nature, and ceased doing business of any kind.

(7) Citizens, its Board of Directors, Voting Trustees and Officers, in making the conveyance, transfer and assignment of all of the said property to the City of Indianapolis, as aforesaid, fully and completely performed and exhausted all of the duties, powers and authority of Citizens as initial trustee of the said public charitable trust. Neither Citizens, nor its Board of Directors, Voting Trustees or any of its officers, from and after
387 September 9, 1935, has any further duties, powers or authority as initial trustee of the said public charitable trust, or to hold, own, lease, manage or operate any property or business of any nature whatsoever.

(8) Citizens, its Board of Directors, Voting Trustees and Officers were entirely and completely released and discharged from any and all obligations and duties, of every nature whatsoever, by virtue of the conveyance, transfer and assignment of all of the said property to the City of Indianapolis of September 9, 1935, as aforesaid, including any and all obligations under the said written lease. Citizens has fully and lawfully performed all of its duties and obligations as initial trustee of the said public charitable trust, and its Board of Directors, Voting Trustees and Officers have fully and lawfully performed all of their duties as such, respectively, and neither Citizens nor its Board of Directors, Voting Trustees or any of its officers is under any further obligation to any of the plaintiffs or other defendants herein.

Conclusions of Law.

(1) The plaintiffs herein, and the defendant Indianapolis Gas Company, are estopped to deny that Citizens has been entirely and completely released and discharged from any and all obligations under the said written lease, as a result of the said conveyance and transfer to the City of Indianapolis, as aforesaid, and that the said written lease is not a valid obligation of Citizens at this time.

(2) The said written lease, from and after September 9, 1935, is not a valid or legal obligation of Citizens and Citizens was and is entirely and completely released
388 and discharged from any present or future obligation or liability under the said written lease as a result of the conveyance, transfer and assignment of all of the said property to the City of Indianapolis of September 9, 1935.

Davis, Pantzer, Baltzell & Sparks,
By William G. Sparks,
Counsel for Citizens Gas Company of Indianapolis.

389 The following is the request of defendant, The Indianapolis Gas Company, for findings of fact and conclusions of law submitted July 8, 1939: Submitted July 8, 1939.

390 In the District Court of the United States.

* * (Caption—1844) * *

REQUEST OF DEFENDANT, THE INDIANAPOLIS GAS COMPANY, FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Louis B. Ewbank,
William R. Higgins,
Indianapolis, Ind.,
Solicitors for Defendant, The Indianapolis Gas Company.

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Comes now the Indianapolis Gas Company, a defendant in the above entitled cause, and separately submits and respectfully petitions the adoption of the following Findings of Fact and Conclusions of Law:

Findings of Fact.

1. The Chase National Bank of the City of New York, Trustee, plaintiff, hereinafter referred to as "plaintiff" is a corporation existing by virtue of the banking laws of the United States and is a resident and citizen of the State of New York; defendants the Citizens Gas Company of Indianapolis and the Indianapolis Gas Company (hereinafter referred to as "Citizens Gas" and "Indianapolis Gas") are each corporations existing by virtue of the laws of Indiana and are citizens of the State of Indiana; defendant City of Indianapolis is a municipal corporation located in the Southern United States Judicial District of Indiana, Indianapolis Division; the individual members of the Board of Trustees and Board of Directors for Utilities for the City of Indianapolis are all and each of them Citizens of the State of Indiana.

2. The amount in controversy between plaintiff and each of said defendants, exclusive of interest and costs, exceeds the sum of $3,000.00.

3. Indianapolis Gas was incorporated under the general laws of Indiana prior to November 28, 1913, had for many years been engaged in operating a gas manufacturing plant and distributing system in the City of Indianapolis and in selling gas to the inhabitants thereof; that it continued the operation of said gas plant and system until November 28, 1913, when the same was delivered to Citizens Gas in accordance with the provisions of a ninety-nine year lease dated September 30, 1913, hereinafter referred to as "the lease".

4. Citizens Gas was incorporated in 1906 under the general laws of the State of Indiana and was at all times thereafter until September 9, 1935, a public utility operating a gas plant and a gas distributing system in the City of Indianapolis; a true copy of its Articles of Incorporation and amendments thereto, together with its by-laws and franchise are set out in "Exhibit 3" to the complaint and by reference made a part hereof.

5. On October 1, 1902, Indianapolis Gas executed its certain mortgage deed of trust to secure the payment of the principal and interest of its First Consolidated Mortgage Five Per Cent Gold Bonds (hereinafter referred to as "bonds") which were authorized in the principal amount of $7,500,000.00; the interest on said bonds was payable semi-annually on the first days of April and

October of each year. Plaintiff herein is now and has been, since March 1935, the sole trustee under said mortgage indenture; a true copy of said mortgage deed of trust is set out as "Exhibit A" to the complaint and 392 by reference made a part hereof.

6. There are now and were, when this action was instituted, issued and outstanding in the hands of the public bonds of Indianapolis Gas in the total principal amount of $6,881,000.00; said bonds and coupons attached are in the form set out in the mortgage last above referred to.

7. Citizens Gas during its entire existence until the 9th day of September, 1935, held its said gas properties as a trustee of a public charitable trust, the beneficiaries of which were the gas users and residents of the city of Indianapolis.

8. Prior to the 26th day of February, 1913, the Trustees and Directors of Citizens Gas suggested and requested that one Volney T. Malott and a group of Indianapolis businessmen purchase the capital stock of Indianapolis Gas, or an amount in excess of three-fourths thereof, thereby making possible a merger of the systems of the two companies under the unified control and operation of Citizens Gas; and the purchase of the capital stock of the Indianapolis Gas was made by said Indianapolis syndicate in reliance upon the agreement of Citizens Gas that it would execute a lease of the former's property for a period of ninety-nine years during which it would hold and operate the same under the terms and rental provisions as set out in a certain lease.

9. On September 30, 1913, Citizens Gas and Indianapolis Gas entered into a certain contract of lease, hereinafter called "lease"; a correct copy of said lease is attached as "Exhibit B" to the Bill of Complaint and is by reference made a part hereof.

10. All property leased by Indianapolis Gas was covered by and included in its said mortgage.

11. Said lease contains the following provisions, among others.

(a) The entire gas system including its manufacturing plant and distributing system was leased to Citizens Gas for a period of ninety-nine years from the first day of October, 1913.

(b) As part of the rental provided, lessee and its successors and assigns agreed to pay $120,000.00 annually as dividends on the outstanding capital stock of Indianapolis Gas, the par value of which was $2,000,000.00.

(c) As part of the rental provided, lessee and its successors and assigns agreed to pay all interest charges on the bonds of Indianapolis Gas payable during the term of the lease.

(d) The lessor agreed to call upon the trustee for certification and delivery to it of bonds which were in turn to be delivered to lessee in payment of ninety per cent of the cost of any extensions or betterments as might be made by lessee to the leased property.

12. On said 30th day of September, 1913, bonds of Indianapolis Gas had been issued and were outstanding in the principal amount of $4,833,000.00.

13. On May 21, 1913, Indianapolis Gas and Citizens Gas filed a joint petition with the Public Service Commission of Indiana for approval of the proposed lease; this petition is correctly set forth on pages 3 and 4 of the plaintiff's "Exhibit 13" (the complaint in Fishback *vs.* Public
393 Service Commission et al.) and is by reference made a part hereof.

14. Prior to the ruling and order on said petition, one Frank S. Fishback filed with the Public Service Commission an intervening petition opposing the approval of the proposed lease jointly petitioned by Citizens Gas and Indianapolis Gas; a correct copy of said petition is set forth at pages 4 to 7 of plaintiff's "Exhibit 13" and is by reference made a part hereof.

15. On or about October 1, 1913, the Public Service Commission, after a full hearing in the premises, granted the joint petition of Citizens Gas and Indianapolis Gas and approved the execution of said lease; a correct copy of the finding and order of said commission is attached to the Bill of Complaint and marked "Exhibit D", and is by reference made a part hereof.

16. Upon denial by the Public Service Commission of the intervening petition formerly filed by Fishback, a petition for re-hearing was filed and overruled by the commission on November 28, 1913.

17. In all said proceedings before the Public Service Commission, upon the joint petition of Indianapolis Gas and Citizens Gas, as well as upon the intervening petition of said Frank S. Fishback, the defendant City of Indianapolis was served with notice to appear, and through its duly appointed Corporation Counsel was in fact present at all proceedings had therein; said City through its Corporation Counsel urged upon the commission that it order included

in the lease Section 27½ thereof, which provision was inserted and made part of the lease as approved.

18. At said hearing, said counsel for defendant City joined with counsel for Citizens Gas and Indianapolis Gas in urging the granting of their said joint petition and the overruling of intervening petition of said Fishback.

19. On November 28, 1913, or shortly thereafter, Citizens Gas took possession and control of the gas plant and distributing system of Indianapolis Gas as well as all other property described in the lease and operated said plant and system as a unified part of its own plant and system and as an integral part of the corpus of the charitable trust continuously thereafter until September 9, 1935.

20. On September 30, 1913, Indianapolis Gas owned a distributing system consisting of 383.15 miles of mains and was in the process of making substantial improvements in its manufacturing plant and it also had 41,541 meters in use. Citizens Gas at said time owned and operated 184.52 miles of mains and had 11,165 meters in use.

21. In seeking to secure a leasehold estate in the property of Indianapolis Gas and the control and operation of the same for a period of ninety-nine years under the terms of the proposed lease, the trustees and directors of Citizens Gas were acting upon their judgment and honest belief that the creation of said estate would be to the benefit and advantage of the trust which they then held and operated.

22. The execution of said lease by the Directors and Trustees of Citizens Gas upon order of the Public Service Commission was a reasonable exercise by Citizens Gas of its powers as trustee of a public charitable trust and appropriate to the carrying out of the purposes of the
394 trust under all the existing conditions, including the duration of the trust, the nature of the property and uses to which it might advantageously be put and of all other conditions existing at that time.

23. On November 28, 1913, Frank S. Fishback, as a resident freeholder of Indianapolis and a beneficiary of the public charitable trust, commenced an action in the Superior Court of Marion County, Indiana, against the Public Service Commission of Indiana, City of Indianapolis, Citizens Gas and Indianapolis Gas and sought to have vacated and set aside the order of said commission approving and ordering the execution of said lease.

Attack upon the commissions' order and the lease was upon the following grounds, among others:

(a) That the trustees, directors and officers of Citizens

Gas exceeded their authority in entering into a lease for a period of ninety-nine years.

(b) That the lease, as executed, would prevent the fulfillment of the contract between the City and Citizens Gas and would prevent the City from taking over said gas system.

(c) That the lease was improvident and burdensome from the point of view of Citizens Gas.

(d) That the lease constituted a lien upon the property and earnings of Citizens Gas thereby impairing the obligations of the contract between said company and its stockholders and the City.

(e) That the City of Indianapolis had not given its consent to such lease.

(f) That the Public Service Commission was without power or authority to order said contracting parties to enter into the said lease.

24. Demurrers to the complaint were filed by Public Service Commission, Indianapolis Gas and Citizens Gas and an answer in general denial to all paragraphs of complaint was filed by defendant City.

25. Upon the day of judgment, the plaintiff dismissed his action as against defendant City of Indianapolis and the demurrers of defendant Public Service Commission, Citizens Gas and Indianapolis Gas were sustained; and, on failure of plaintiff to plead over, judgment was rendered in favor of said defendants.

26. Appeal from this judgment was made by plaintiff to the Supreme Court of Indiana where it was denied because of plaintiff's failure to properly perfect said appeal.

27. City of Indianapolis, through its Board of Public Works prior to the final judgment in the Fishback case required and made demand that extensions be made in the mains of the leased property as provided in Section 27½, Sub-section 6, of the lease, and such extensions were made pursuant thereto.

28. The contentions of the City and Citizens Gas in the Fishback case were admissions and acceptance of the fact that the lease, properly construed, provided that the lease hold estate thus created became part and parcel of the res of the public charitable trust; and that both the contracting parties had authority to execute it and the Public Service Commission, the right to approve and authorize it.

395 29. On March 12, 1930, one Allan G. Williams and others instituted suit in the Circuit Court of Marion County, Indiana, on behalf of himself and all other tax-

payers and inhabitants of the City as beneficiaries of the public charitable trust. Indianapolis Gas, Citizens Gas, the City of Indianapolis and members of the City's Board of Public Works, Board of Trustees for Utilities and Board of Directors for Utilities were all made parties defendant and appeared.

The complaint alleged:

(a) that the lease was invalid;

(b) that the order of the Public Service Commission approving said lease was unlawful;

(c) that the lease was burdensome upon the public charitable trust and one improvident from the standpoint of the lessee;

(d) that the lease was "ultra vires said Citizens Gas Company".

Citizens Gas, City of Indianapolis and the members of its Board of Public Works, Board of Trustees for Utilities, Board of Trustees and Directors for Utilities, separately and severally moved the Court to strike out certain portions of the plaintiff's complaint. As supporting grounds for said motion, said defendants made, among others, the following allegations:

(a) "The Public Service Commission of Indiana has express authority to approve leases between two operating public utilities and, it appearing from the averments of the complaint that such lease did have the approval of the Public Service Commission, the action of that commission can not be collaterally attacked." (Stip. Ex. 37, p. 4.)

(b) There is no averment in the complaint which shows any ground on which the plaintiff can successfully attack collaterally the order of the Public Service Commission approving said lease; there is no showing in the complaint that the commission was without jurisdiction to approve the lease between the Indianapolis Gas Company and Citizens Gas Company or that it exceeded its jurisdiction or that the approval of the lease was procured by any fraud. (Stip. Ex. 37, p. 4.)

(c) "It appearing that the lease so approved by the Public Service Commission has been in full force and effect for nearly seventeen years, and that many millions of dollars have been expended in reliance upon its validity, all persons including plaintiffs (if they have any standing under any circumstances) are estopped to question the validity of the same." (Stip. Ex. 37, p. 5.)

(d) "If the lease is valid, the leasehold estate created thereby constitutes a part of the public charitable trust

and is subject to be administered in the same way as property owned by the Citizens Gas Company in its own right. If for any reason the lease is invalid, it would fall without the scope of the trust." (Stip. Ex. 37, p. 7.)

30. The judgment of the Marion Superior Court denied the allegations of the complaint and sustained the contentions made by Citizens Gas and the City. On appeal to the Supreme Court of Indiana, the judgment was affirmed in *Williams* v. *Citizens Gas Company, et al.*, 206 Ind. 448.

396 31. The contentions made and positions taken by the City and Citizens Gas in the Williams case were admissions by them that the leasehold estate was part and parcel of the public charitable trust for the full term of ninety-nine years and was a construction by them of the City's resolution of March 20, 1929, that said resolution did in fact express an election on the part of said City to succeed to the trusteeship of said trust and to take over all the property operated by Citizens Gas including its leasehold estate in the property of Indianapolis Gas.

32. Between the years 1914 and 1935, Citizens Gas in the sale of Indianapolis Gas bonds made representations that all interest payments on the same were guaranteed by Citizens Gas, and that it had a lease on all the gas property of Indianapolis Gas for a period of ninety-nine years, and by reason thereof had a monopoly of the gas business of Indianapolis. Said bonds were sold on reliance of said representations.

33. On March 20, 1929, resolution by the City's Board of Public Works was made which declared its election to succeed Citizens Gas as trustee of the public charitable trust and demanded of said Citizens Gas all rights, title, interest and ownership of whatever nature or character which said Citizens Gas held and owned in the plant and property it was operating.

It was also provided that said Citizens Gas secure by mortgage, if possible, sufficient sums to pay off and discharge the amounts due its certificate holders and to redeem its preferred stock and then convey to said City the gas property "subject to such mortgage and other legal obligations against said company". The right of the city to furnish and advance funds to pay and discharge the obligations to the owners of certificates and preferred stock was expressly reserved. (Stip. Ex. 2?.)

34. On May 7, 1935, the Board of Directors for Utilities passed a resolution authorizing the issuance of the City's gas plan revenue bonds in the total principal amount of

$8,000,000.00 for the purpose of obtaining funds for the taking over of the property owned by Citizens Gas "and/or in which it has an interest". The form and text of the bonds so authorized was also set out and described the purposes in the same language as above set out.

Said resolution also provided an agreement by City that "when it has obtained the possession of the property operated by Citizens Gas Company of Indianapolis it will cause the same to be continually operated as a gas system in an efficient manner and at reasonable cost, and maintained in good operating condition; and it will use all reasonable efforts to resist competition and maintain the exclusive right to serve gas in the City of Indianapolis and Marion County of Indiana and the towns therein." (Stip. Ex. 47, p. 16.)

Said resolution also provided: "So long as any of said bonds are outstanding and unpaid the City shall not sell, mortgage or dispose of said gas system or any substantial and useful part thereof;" (Stip. Ex. 47, p. 17). A true copy of said resolution is set out as "Exhibit 47" of the Stipulation and is by reference made a part hereof.

35. Pursuant to the resolution of May 7, 1935, the City did execute its revenue bonds in the principal amount of $8,000,000 and, in connection with the public offering thereof, represented:

397 (a) that the City was taking over "the property operated by Citizens Gas Company";

(b) that said bonds were to be issued to obtain funds to take over "property owned by Citizens Gas Company of Indianapolis and/or in which it has an interest";

(c) that the payment of the bonds would be "secured by a charge upon the revenue from the operation of all the gas system owned and/or operated by the City of Indianapolis";

(d) that the City would secure a system which had enjoyed the exclusive right to supply gas to the inhabitants of Indianapolis;

(e) that the City would use all reasonable efforts to maintain the exclusive right to serve gas in the City of Indianapolis, Marion County;

(f) that the gas system, which would be taken over by the City, included the property leased from Indianapolis Gas for the term of ninety-nine years; under the provisions of which lease the lessee was obligated to pay the interest on the outstanding mortgage bonds of the lessor.

36. A correct copy of the circulars issued by Holsey-

Stewart and Company and Otis and Company, in the public sale of the City's revenue bonds, which circulars contained statements, all of which were known to City, and all of which were approved by the City (except the representations relating to the relative values of the properties of Citizens Gas and Indianapolis Gas) is set out as "Exhibit B" to the answer of defendant City and is by reference made a part hereof.

37. The representations made, approved or authorized by the City in connection with the sale of its revenue bonds were in fact an affirmance by the City of the construction that its resolutions of March 20, 1929, was one demanding succession as trustee to all the property which had been operated by the Citizens Gas, including the leasehold estate.

38. The City's revenue bonds were purchased by Holsey-Stewart and Company and Otis and Company and in turn by the public, all in reliance upon the representations made by the City as set forth in Finding 33, supra.

39. Between July 1, 1935, and September 9, 1935, the City caused the sum of $2,500,000.00 to be paid to the certificate holders of Citizens Gas for the retirement of all said company's common stock. It also caused $1,050,000.00 to be paid for the redemption of all the Citizens Gas preferred stock and by this means all of said common and preferred stock of said company was redeemed; said payments were made by the City with full knowledge:

(a) of the existence of the ninety-nine year lease between Indianapolis Gas and Citizens Gas and of the continuing obligations of Citizens Gas and the trust it was operating thereunder.

(b) of the fact that, after the transfer of its property to the City, Citizens Gas would be without assets of any kind or character with which to meet the known obligations of the lessee under the lease.

40. On September 9, 1935, Citizens Gas delivered to the City and the City accepted:

(a) a deed of conveyance of all real estate owned;

398 (b) an instrument of transfer and assignment of all its personal property;

(c) An assignment of the lease executed September 30, 1913, by Citizens Gas and Indianapolis Gas.

Immediately upon acceptance of said instruments, the City recorded the same in the office of the recorder of Marion County, Indiana.

41. On September 9, 1935, the City, through its Board

of Directors for Utilities, took possession and control as successor trustee of all the property which had been operated by Citizens Gas, including the property of Indianapolis Gas under lease, and it has, since said date, continuously operated said property as a unified system.

42. The City, through its board of directors for utilities, has paid:

(a) all interest coupons on the bonds of Indianapolis Gas falling due subsequent to September 9, 1935, to and including those due April 1, 1936.

(b) all insurance premiums for insurance on the property covered by the lease.

(c) all installments of Indiana Gross Income Tax of Indianapolis falling due after September 9, 1935, to and including the payment made on April 15, 1936.

(d) all the State, County and Municipal taxes on the property covered by the lease payable after September 9, 1935.

(e) all installments of Federal Income Tax of Indianapolis Gas payable between September 9, 1935, and December 31, 1936, on account of sums paid by either Citizens Gas or the City to Indianapolis Gas during the years 1934 and 1935.

43. The City has deposited as of April 1, 1939, with the Indiana National Bank as escrow agent pursuant to the agreement of March 2, 1936, the amount of:

(a) $1,029,450.00, as interest on Indianapolis Gas bonds payable on October 1, 1936, and to and including the semi-annual payment due April 1, 1939. The above payment so deposited equals the interest due on all outstanding bonds, except those held by City in the total principal amount of $18,000.00.

(b) $420,000.00, representing the amount of rental paid by way of dividend on the capital stock of Indianapolis Gas due and payable under the provisions of the lease from June 30, 1936, to June 30, 1939.

44. Indianapolis Gas has not concealed or attempted to conceal from plaintiff or its bondholders any true facts relative to conditions surrounding the use and operation of its property or resulting in the default of interest payments on its bonds.

45. The agreement of March 2, 1936, entered into by City and Indianapolis Gas was not inimical to the interests of plaintiff or the bondholders whom it represents.

46. There was no collusion between Indianapolis Gas and plaintiff or any other party to this cause in the bringing or prosecution of this action.

Conclusions of Law.

1. This Court has jurisdiction of this cause on the ground of diversity of citizenship between the parties thereto.

399 2. The lease is now and has been at all times since its approval by the Public Service Commission, a valid, binding and effective lease for the term of ninety-nine years, between Indianapolis Gas and Citizens Gas and its successors and assigns.

3. The finding and order of the Public Service Commission approving the lease is a conclusive and binding determination upon all the parties to this cause and upon the public charitable trust that the lease was fair and reasonable in its terms, in the public interest, and its execution a proper exercise by Citizens Gas of its powers as trustee of a public charitable trust which has been at all times a public utility.

4. The City and Citizens Gas, each by their duly authorized counsel, appeared in the proceedings before the Public Service Commission and each requested of the commission approval of said lease and, by reason thereof and also because of their failure to subsequently object to either its validity or the validity of the order of the Public Service Commission approving the same, they now are each estopped to deny and precluded by their own laches from denying that the lease is a valid and binding obligation of Citizens Gas, of the City as successor trustee of the public charitable trust and of the property received by the City from Citizens Gas, for its full term of ninety-nine years.

5. The judgment of the Superior Court of Marion County in the case of Fishback v. Public Service Commission et al. is binding in all its provisions in the present case upon Citizens Gas and the City and upon the public charitable trust.

6. By reason of the position and contentions taken and made by Citizens Gas and the City in the Fishback case, both Citizens Gas and City are estopped from denying that the lease is a valid and binding obligation of Citizens Gas, of the City as successor trustee of the public charitable trust, and of the property conveyed to the City by Citizens Gas for its full term of ninety-nine years.

7. By reason of the representations made by Citizens Gas in the sale of Indianapolis Gas bonds and of its own

securities, and by reason of the fact that said Citizens Gas and the public trust it was administering accepted the value and benefits of said ninety-nine year lease for twenty-two years, Citizens Gas, and the City as present trustee, are estopped from denying and are precluded by their own laches from denying that the lease is now a present valid and binding obligation of Citizens Gas, of the City as successor trustee of the public charitable trust, and of the corpus of the trust itself for the full term of ninety-nine years.

8. The City, in demanding and securing through its Board of Public Works certain extensions in the mains of Indianapolis Gas in accordance with the provisions of the lease, formally accepted and recognized the validity of said lease.

9. The City's resolution, adopted by its Board of Public Works on March 20, 1929, was an election by the City to take over all of the property which had been operated by Citizens Gas, including the leasehold estate in the property of Indianapolis Gas, and all those obligations attached to the leasehold estate.

10. The judgment of the Superior Court of Marion County in the Williams case is a conclusive determination upon all parties to this cause and upon the public charitable trust of the following matters:

400 (a) That Williams had the right to sue on behalf of said public charitable trust.

(b) That the interests of the beneficiaries of the public charitable trust were and are subordinate to the obligations of the trust as a public utility and to the control exercised over said trust as a public utility by the laws and regulations relating thereto made and provided by the State of Indiana.

(c) That the Lease is a valid and binding obligation of Citizens Gas, the City as successor trustee and of the said public charitable trust for its full term of ninety-nine years.

(d) That the order of the Public Service Commission approving said lease is conclusive and cannot be collaterally attacked.

(e) That Williams and all other beneficiaries of the said public charitable trust and the trustees of said trust are precluded by laches from attacking the validity of said Lease or its binding effect upon the public charitable trust or upon Citizens Gas or the City as successor trustee, for the full term of ninety-nine years.

11. The execution of said lease by Citizens Gas upon order of the Public Service Commission was a reasonable, lawful and valid exercise of its powers as trustee of a charitable trust and appropriate to the carrying out of the purposes of the trust.

12. By reason of the position taken and representations made by each the City and Citizens Gas in the case of Williams v. Citizens Gas et al., the City and Citizens Gas are precluded by their own laches and estopped from denying that the Lease is a valid and binding present obligation of Citizens Gas, of the City as successor trustee of the public charitable trust and of the property received by City from Citizens Gas for its full term of ninety-nine years.

13. By reason of the provisions of the resolution of the City of May 7, 1935, by its Board of Directors for Utilities, and of the representations made by the City in connection with the sale of its revenue bonds, the City is estopped from denying that the Lease is a valid and binding obligation of the City as successor trustee of the public charitable trust or that the leasehold estate is part and parcel of said trust estate.

14. By accepting the deed of conveyance on September 9, 1935, of all the real estate owned by Citizens Gas, which deed expressly provided that the described property was conveyed subject to all the legal obligations of the grantor, and by accepting and having recorded the assignment of Lease, and by taking possession of all said property covered both in the deed and lease, all of said property so conveyed to the City has at all times remained and is now obligated on all the covenants of the lessee as provided in said lease for its full term of ninety-nine years.

15. By reason of its taking possession of the Indianapolis Gas property on September 9, 1935, and its operation thereof until September 30, 1936, the City is estopped from denying that the lease is a valid and binding obligation of the City as successor trustee of the public charitable trust and of the property received by the City from Citizens Gas for its term of ninety-nine years and also that the leasehold estate was part of the res of the said trust.

401 16. By reason of the fact that the City took over all the assets of Citizens Gas and that the sole consideration therefor was paid by it directly to the stockholders and bondholders of Citizens Gas leaving said

Citizens Gas without assets with which to satisfy its obligations, the City is now obligated to pay all liabilities of Citizens Gas.

17. By the provisions of the Lease, all obligations of Indianapolis Gas to its bondholders for payment of interest have been assumed and expressly undertaken by Citizens Gas and its successors and assigns. Such obligations are valid and enforceable against Citizens Gas, the City and all property conveyed to the City by Citizens Gas.

18. The obligation to satisfy such judgment as may be entered in this cause is that of the City Trustee, and the public charitable trust it is administering, and Citizens Gas, as principals; and of Indianapolis Gas, as surety.

19. No obligation is created by the bonds or mortgage indenture of Indianapolis Gas to pay to the holders of its bonds interest on said unpaid bond interest.

20. The agreement of March 2, 1936, between City and Indianapolis Gas was not inimical to the interests of the Trustee or the bondholders whom it represents.

21. The agreement of March 2, 1936, is a valid and binding agreement and the amount paid to the Indiana National Bank as escrow agent representing dividends on the capital stock of Indianapolis Gas should be ordered paid to Indianapolis Gas without awaiting determination of the issues which, under the order of this court heretofore made, are reserved for later hearing.

22. Such an amount from the fund now on deposit with Indiana National Bank as represents the amounts paid thereto by the City as interest payments on the bonds of Indianapolis Gas may be used by the City to satisfy such judgment as shall be herein entered; but no part of said fund as represents the amount paid thereto for dividends on the capital stock of Indianapolis Gas, may be used for such purpose unless and until there shall be a failure to have the balance of said judgment satisfied from the property and the assets of the City as trustee and the public charitable trust.

23. The defendants herein should be held liable for such judgment, as may be entered in the following order:

First, The City of Indianapolis and the property of the public charitable trust received by said City from Citizens Gas.

Second, The Citizens Gas Company of Indianapolis.

Third, The Indianapolis Gas Company.

24. The counter-claim of defendant City should be dismissed and denied for want of equity.

Respectfully submitted,
Louis B. Ewbank,
William R. Higgins,
Solicitors for Defendant, The Indianapolis Gas Company.

402 And afterwards towit at the May Term of said Court, on the 21st day of September, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit:

This cause coming on to be finally heard by the Court for the determination of the issues submitted for trial at this time, as defined in the order made and entered herein on the 18th day of January, 1939, and the parties appearing by their respective attorneys, and the Court having heard the evidence and argument of counsel and being sufficiently advised in the premises, now files a memorandum herein.

Filed Sept. 21, 1939.

403 In the District Court of the United States.

* * (Caption—1844) * *

Baltzell, *District Judge*:

This is an action in which the plaintiff, The Chase National Bank of the City of New York, as Trustee under a deed of trust executed on October 1, 1902 by the defendant, The Indianapolis Gas Company, to secure the payment of the principal and interest of certain first mortgage bonds, is seeking to recover a judgment against such Gas Company for the amount of the due and unpaid interest upon such bonds. The plaintiff is aiso seeking, among other things, a declaratory judgment in which judgment it asks the court to declare that a certain lease entered into by and between the defendants, The Indianapolis Gas Company and Citizens Gas Company of Indianapolis on September 30, 1913 is a valid and binding obligation in all its terms and conditions upon the parties thereto and upon the defendants, City of Indianapolis, the Trustees and Directors for Utilities of the City of Indianapolis, and upon all the property formerly owned by the de-

fendant, Citizens Gas Company, which is now owned and operated by the defendant City through its Board of Directors for Utilities.

404 While there have been filed in this action, pursuant to Rule 52 of the Rules of Civil Procedure, Special Findings of Fact and Conclusions of Law to which reference is made for a more detailed statement of the facts, yet it is deemed advisable to briefly sketch the facts leading up to the execution of the lease in question, as well as those following its execution, in order that a clear and logical approach may be had to the proper determination of the questions involved.

During the year 1913, and for many years prior thereto, the defendant, The Indianapolis Gas Company, was the owner of considerable property in Indianapolis consisting of coke ovens, machinery, mains, meters, etc., was engaged in operating a gas manufacturing plant and distributing system in the City of Indianapolis, and was selling gas to the inhabitants of such city. It was the owner of much of such property during the year 1902, and on October 1 of that year it executed a deed of trust (hereinafter referred to as a mortgage) to the Trust Company of America, of New York City, and Ferdinand Winter of Indianapolis, as Trustees to secure the payment of bonds in the aggregate principal amount of $7,500,000.00. Such mortgage covered all of its property then owned by it, as well as after acquired property. Because of the death of Trustee Winter and various mergers and consolidations, The Chase National Bank of New York City has become and now is the sole Trustee under such mortgage. While the mortgage provided for the issuance of $7,500,000.00 of bonds yet there were originally issued and authenticated only $4,000,000.00. The mortgage, however, also provided that additional bonds could be issued to acquire additional property or for improvements, extensions, enlargements, etc., and under this provision $833,000.00 in principal of additional bonds were issued prior to September 30, 1913, and $2,048,000.00 in principal

405 issued subsequent to that date, so that there are now outstanding and unpaid of such bonds the principal amount of $6,881,000.00, of which amount the City of Indianapolis is the owner of $18,000.00 principal, and The Indianapolis Gas Company of $120,000.00 principal. The bonds thus issued and authenticated were sold to the public generally. The Indianapolis Gas Company is an Indiana corporation and its common capital stock consists of

forty thousand shares of the total par value of $2,000,000.00.

The defendant, Citizens Gas Company, is an Indiana corporation and was organized in 1906 under the general laws providing for the incorporation of manufacturing and mining companies, and for the express purpose of becoming the initial trustee of a public charitable trust, which trustee was to supply "the City of Indianpolis and its inhabitants with light, heat and power." Prior to its organization on, to-wit: the 25th day of August, 1905, a contract and agreement had been entered into by and between the defendant, City of Indianapolis, by and through its Board of Public Works and three of its citizens, namely, Alfred F. Potts, Frank D. Stalnaker and Lorens Schmidt, wherein such three named citizens were given permission, subject to the ratification and approval of the Common Council of such City, to enter upon the streets, alleys, avenues and other public places and parts of such city for the purpose of excavating and laying, maintaining, operating and repairing a system of mains or pipes for the distribution of gas to the citizens of such City and the users of gas therein. This contract or franchise was approved by the Common Council on August 30, 1905. As a condition precedent, however, to the exercise of any of the rights conferred by such franchise, the said Potts, Stalnaker and Schmidt were to "organize
406 a corporation under and in accordance with the laws of Indiana to carry out the purposes of this grant, to which corporation this franchise and all interests thereunder shall be assigned, which articles of incorporation shall, among other matters, provide * * *" for the amount of the capital stock, for the placing of the entire capital stock under the control of five trustees who shall be stockholders in the company, for *the order in which the earnings of such company shall be used*, for the conveyance of the gas plant and property owned by such company to the City of Indianapolis to be owned and operated or leased by it upon the receipt by the certificate holders of the capital stock of such company, by dividends or otherwise, of an amount equal to the face value thereof together with interest thereon at the rate of ten per cent per annum, etc. The term of the franchise was for a period of twenty-five years from and after the date of its ratification or from August 30, 1905 and "thereafter all the rights of said company to occupy the streets

and alleys of said city shall terminate and cease." Pursuant to the terms of this franchise, the defendant, Citizens Gas Company, was organized, and such franchise was assigned by the said Potts, Stalnaker and Schmidt to such company on May 24, 1906, by virtue of which it began its activities and began laying mains and supplying gas to the citizens of Indianapolis. The defendant, The Indianapolis Gas Company, was also providing gas to the citizens of Indianapolis at that time. This was prior to the enactment of the law providing that the Public Service Commission of Indiana should supervise all public utilities in the state and, therefore, gas was furnished the users of Indianapolis by both the defendants, The Indianapolis Gas Company and Citizens Gas Company for several years thereafter without such supervision.

407 At the time of the issuance and execution of such franchise contract and at the time of the organization of the defendant Citizens Gas Company, "there existed in the City of Indianapolis", as was said by this court in its Memorandum filed in the case of Todd *vs.* Citizens Gas Company, *et al.*, In Equity No. 1191, "a rather peculiar situation. The supply of natural gas, which had been used by the citizens of the city for a number of years, had been practically exhausted. Much litigation had taken place with reference to the rights of the Consumers Gas Trust Company, under a franchise which it held with the city, as to whether or not such franchise gave it the right to supply artificial gas to the citizens of the City of Indianapolis. It had just been determined by the courts that the Consumers Gas Trust Company had no rights under its franchise, and therefore, the Board of Public Works and the City Council were anxious that a plant be erected for the purpose of supplying to the citizens of the City of Indianapolis artificial gas at as low a rate as possible. Profiting by its past experience, the city proceeded to negotiate the terms of a franchise whereby, in its opinion, the rights of its citizens would be protected against exhorbitant rates, and its beneficial interest in the property be fully preserved. That the city had this in mind is emphasized by the fact that under the terms of the franchise, it was mandatory upon the part of Potts, *et al.*, that they form a corporation and incorporate into the Articles thereof certain provisions with reference to the issuance of beneficial certificates, the interest of such certificate holders, the appointment of trustees, the management of its affairs, etc. as a condition precedent

to the issuance of such franchise." It was this situation which confronted the citiezns of Indianapolis and their public officials which gave birth to the franchise issued to Potts, *et al.*, and to the organization of the defendant
408 Citizens Gas Company, which became the initial trustee of the Public Charitable Trust thus created, as adjudicated by the courts almost twenty-five years later. See—*Todd* v. *Citizens Gas Company of Indianapolis, et al.*, 46 F. (2d) 855.

In order that competition be eliminated and gas furnished to the users thereof in Indianapolis by one company only, the defendants, The Indianapolis Gas Company and Citizens Gas Company, began negotiations in the early part of 1913 through Mr. Volney T. Malott, *et al.*, looking to a merger of the systems of the two companies under the unified control and management of the defendant, Citizens Gas Company. These negotiations continued for a considerable length of time and finally consummated in the execution of the lease in question on September 30, 1913, in which all of the property of the defendant, The Indianapolis Gas Company, was leased by it to the defendant, Citizens Gas Company, for a term of ninety-nine years under certain conditions and for a certain consideration as rental therein fully set forth. As a part of such rental, the lessee agreed to pay the sum of $120,000.00 per year, which sum is equal to a six per cent return upon the par value of the entire outstanding common capital stock of the lessor. The lessee further agreed to pay all interest charges upon the outstanding bonded indebtedness of the lessor, which, at that time, amounted to $4,833,000.00, and was later increased to a total principal of $6,881,000.00, the annual interest rate being five per cent. As a further part of the rental, the lessee was to pay all taxes of every kind and description, for which the lessor would become liable. The lease is a very lengthy one, and all the terms and conditions are therein fully set forth, of which the above are only a few.
409 Prior to the execution of the lease, the law creating the Public Service Commission of Indiana and giving it supervision over all public utilities within the state, known as the Shively-Spencer Utility Commission Act, had been enacted and was in force. By virture of the provisions of that law it was necessary to submit a lease of the character of the one in question to such Commission for its inspection and approval before it could become

effective. Consequently such lease was submitted to such Commission upon a joint petition of both lessor and lessee, and approved by it. After its approval, the defendant, Citizens Gas Company, took possession of the leased property and continued to operate it in conjunction with its own property under the franchise theretofore granted by the City of Indianapolis until the 27th day of August, 1921, at which time, pursuant to the provisions of the Shively-Spencer Utility Commission Act, it surrendered its franchise, accepted an indeterminate permit and continued to operate thereunder as it had a legal right to do. On the same day it filed in the office of the Secretary of State a document containing certain amendments to its Articles of Incorporation. These amended articles provided for the manner of payment of the beneficial certificates similar to the original Articles, provided for the mortgaging or bonding of its property for a specific purpose, for the issuance of preferred stock, for the transfer of the property to the City of Indianapolis. The surrender of the franchise transferred to the Public Service Commission authority to regulate the business of the Citizens Gas Company insofar as its relation to the public is concerned and did not in any manner affect the validity of the franchise granted in 1905 by the City.

(*Todd* v. *Citizens Gas Company, et al., supra.*)

410 On March 20, 1929, the defendant, City of Indianapolis, by resolution of its Board of Public Works, among other things, formally declared its intention to take over "all rights, title, interest and ownership of whatever nature and character" which were then held and owned by the defendant, Citizens Gas Company, and to exercise its rights as successor trustee of the Public Charitable Trust theretofore created. A copy of the resolution was served upon the said Gas Company and it, by resolutions of its directors, approved by its Board of Trustees on April 3, 1929, formally accepted the demands of the City and thereby resolved that it would proceed to carry out its obligations to its beneficial certificate holders and preferred stockholders and then convey its property and assets to the City in accordance with the provisions of its franchise, etc. Thereafter on, to-wit: April 30, 1929, Newton Todd, owner of a beneficial certificate of the defendant, Citizens Gas Company, filed an action in this court in which the Citizens Gas Company, the voting trustees of its common stock, the City of In-

dianapolis, the Mayor, Clerk, and members of its Board of Public Works were defendants, in which action he sought, among other things, to enjoin the Citizens Gas Company and individual defendants from carrying into effect the resolutions theretofore adopted by them in which they recognized the existence of a trust and acknowledged the right of the City to take over the property and assets of the Gas Company as Trustee pursuant to the terms of its franchise, etc. In that action there was placed at issue for the first time for determination the question of whether there was, in fact, a Public Charitable Trust created by the franchise, etc. of 1905, and that question was answered in the affirmative by both this court and by the Circuit Court of Appeals, and 411 application for a writ of certiorari was denied by the Supreme Court of the United States on May 18, 1931. (*Todd* v. *Citizens Gas Company, et al., supra.*) Partially, if not entirely because of the delay occasioned by the litigation of the *Todd* v. *Citizens Gas Company, et al. case, supra* and the case of *Williams* v. *Citizens Gas Company, et al.*, 206 Ind. 448, 188 N. E. 212, which was instituted in a Superior Court of Marion County on May12, 1930, the transfer of the property from the Citizens Gas Company to the City was not made until September 9, 1935.

The defendant, Citizens Gas Company, paid, or caused to be paid, dividends to its common stockholders from the date of its organization to June 30, 1935 at the rate of ten per cent per annum upon the par value of such stock. By proper resolution of the Board of Directors for Utilities of the City of Indianapolis, advertisement, etc., Indianapolis Gas Plant Revenue Bonds were issued and sold during the month of May, 1935, and the proceeds thereof were received by the defendant City on June 27 of that year. From the proceeds of the sale of such bonds, the defendant City retired all of the common stock of the defendant, Citizens Gas Company at a cost of $2,500,000.00, which was in full payment of the par value thereof, together with interest thereon at the rate of ten per cent per annum. In addition thereto, the defendant City caused to be paid to the preferred stockholders of the defendant Citizens Gas Company on or about September 1, 1935 the sum of $1,050,000.00 in full satisfaction and redemption of all outstanding preferred stock. There was outstanding on August 12, 1935 bonds of the defendant Citizens Gas Company in the principal

sum of $2,745,000.00, all of which, with the exception of $32,000.00 have been fully paid by the defendant City pursuant to resolution of its Board of Directors for Utilities.

On September 9, 1935, the defendant Citizens Gas Company executed and transmitted to the defendant City
412 as its successor trustee the following four instruments, to-wit: an instrument of Transfer and Assignment of Personal Property, Assignment of Lease assigning the lease in question, a Deed of conveyance of real estate and assignment of a lease to part of the Majestic Building in the City of Indianapolis, which said four instruments thus executed and transmitted purported to transfer to the defendant City, as Trustee, all of the property of the defendant, Citizens Gas Company. There was included in such transfer cash or current funds in the sum of approximately $411,000.00. Prior to the transmittal of such four instruments by the defendant, Citizens Gas Company, there had been adopted by the defendant Board of Directors for Utilities a resolution rejecting the lease in question as a part of the assets of the trust transferred to it, and a copy of such resolution and a formal rejection of the lease was delivered to the attorney for the defendant, Citizens Gas Company, at the same time that he transmitted the four instruments of conveyance, including the assignment of such lease, to a representative of the said Board of Directors. The attorney for such defendant Gas Company, while acting on behalf of such company, had been advised by the defendant City on or about August 27, 1935 as to its attitude as to whether it would accept an assignment of such lease as a part of the assets of such company, and he knew such attitude at the time of the preparation and transmittal of such assignment. Such attorney knew at the time of the preparation of the assignment and at the time he transmitted physically the four instruments of conveyance above set forth that the City would, in turn, deliver physically to him a written rejection of such lease. The four instruments of conveyance were, however, turned over physically by him to a representative of the defendant City and all, including the assignment, were placed of record by such representative in the Recorder's Office of Marion County, Indiana.

413 The defendant City, as Trustee, took possession of all the property of the defendant, Citizens Gas Com-

pany, immediately following its transfer and began its operation and continued to operate such property and supply gas to the citizens of Indianapolis continuously since that date. In such operation it has operated the plant of the defendant, The Indianapolis Gas Company, in the same physical manner as it had been theretofore operated by the defendant, Citizens Gas Company, under an agreement, however, with said The Indianapolis Gas Company that such operation would not prejudice the rights of either the City or the said Gas Company; neither would such operation be a recognition of the validity of such lease on behalf of the City nor an admission of its invalidity on behalf of such Gas Company.

On March 2, 1936, the defendant, City, and The Indianapolis Gas Company, entered into a written agreement with reference to the continued operation of the plant of such Gas Company pending a settlement or judicial determination of the dispute over the validity of the lease in question. By the terms of such agreement, the defendant City was to continue the use of the property of the defendant, The Indianapolis Gas Company, the same as theretofore, and was to deposit with the escrow agent, The Indiana National Bank, of Indianapolis, sums of money equal to the payments required under such lease, such sums to be held by such agent and paid out by it pursuant to any settlement agreement or, upon judicial determination that the lease was valid, the entire amount should be paid to the defendant, The Indianapolis Gas Company. If, however, the lease is held to be invalid as to the defendant City or the property acquired by it, then reasonable compensation for the use of the mortgaged property (fixed by agreement or by the court) shall be paid by the escrow agent to the Indianapolis Gas Company, and the balance paid to the City of Indianapolis. This contract also
414 provides for the payment of the sum of approximately $171,000.00 to The Indianapolis Gas Company on or before March 25, being an amount equal to the interest due upon the bonds of The Indianapolis Gas Company to March 30, 1936. This provision, as well as all other provisions of the contract, has been fully complied with by the defendant City. No interest upon such bonds has been paid to the bondholders since that date, but a sum sufficient to pay such interest is upon deposit with the escrow agent. In addition, all taxes due upon the property of The Indianapolis Gas Company, as well as all income taxes, have been fully paid by the City, and all needed repairs of

its property have been made by the City. This agreement further provides that neither its execution nor the carrying out of its provisions is to prejudice the rights of either the defendant City or the defendant, The Indianapolis Gas Company, or to be construed as an admission of either the validity or invalidity of the lease on the part of either of them. On March 11, 1936, and prior to the payment by the defendant City of the sum of $171,000.00 above referred to, and prior to the payment of any sums by it to the escrow agent under the contract of March 2, the plaintiff was advised of the execution of such contract, and of its terms and conditions.

Under the issues presented at this hearing, there are submitted five questions for determination:

First: As bearing upon the question of jurisdiction—whether there is, in fact, as shown by the evidence, a collision of interest between the plaintiff and the defendant, The Indianapolis Gas Company, or whether the collision as shown by the allegations of the bill of complaint is apparent only and was actually
415 brought about by the collusion of the plaintiff and defendant, The Indianapolis Gas Company, for the purpose of conferring jurisdiction upon this court, as charged in the answer of the defendant, City of Indianapolis.

Second: If the answer to the first question is that there is, in fact, a collision of interest between the plaintiff and the defendant, The Indianapolis Gas Company, as charged in the bill of complaint, that such collision is real, not brought about by the collusion of the plaintiff and said defendant, as charged in the answer of the defendant City, and that this court has jurisdiction to hear and determine the issues presented, then, in logical sequence, the next and primary question to be determined is whether the lease of September 30, 1913, entered into upon that date by and between the defendants, The Indianapolis Gas Company and the Citizens Gas Company, is valid and enforceable as against the defendant City, as successor trustee, and the questions of estoppel presented by plaintiff.

Third: The amount of the judgment to be rendered in favor of plaintiff against the defendant, The Indianapolis Gas Company, because of the default in the payment of the due and unpaid interest upon the bonds of said company.

416 *Fourth:* The liability of the defendant, Citizens Gas Company, and, if liable, the extent of such liability.

Fifth: The liability of the defendant, City of Indianapolis, and, if liable, the extent of such liability under the limited issues here presented.

These questions will be considered and determined in the order presented. If, however, it is determined that this court has no jurisdiction because of collusion, then it will not be necessary to consider any of the questions presented, except the first above enumerated.

The question of whether there was any collision of interest between the plaintiff and the defendant, The Indianapolis Gas Company, *as shown by the averments contained in the bill of complaint* and *averments contained in the answer of the defendant, The Indianapolis Gas Company,* was determined by this court adversely to the contention of plaintiff when originally presented in August, 1937. At that time this court was of the opinion that, *as shown by the pleadings,* the interests of plaintiff and the defendant, The Indianapolis Gas Company, were identical; that the defendant, The Indianapolis Gas Company, was an indispensable party; that said defendant Gas Company should be realigned as a party plaintiff and when thus aligned the bill of complaint should be dismissed because diversity of citizenship, upon which jurisdiction depends would then be destroyed, since both The Indianapolis Gas Company and the defendant, Citizens Gas Company, are Indiana corporations and as such are citizens of that state. Consequently, the bill was dismissed, but, upon appeal by plaintiff to the Circuit Court of Appeals the case was reversed and in the course of its opinion upon the question of realignment that court said: "While it seems apparent
417 that the essential question involved is whether the lease in question is enforceable against the City, and that both appellant and the Indianapolis Company are so contending, yet there are other important questions which give rise to controversies between appellant and the Indianapolis Company. * * * If it be conceded, however, that appellant and the Indianapolis Company occupy a similar position with respect to the validity and enforcement of the lease against the City, yet we think there are sufficient matters in controversy between them to prevent the latter from being aligned with appellant as plaintiff. The rule seems to be that before such realignment may be required, the parties must be in substantial accord upon all issues presented." *Chase National Bank, etc.* v. *Citizens Gas Com-*

pany, et al., 96 F. (2d) 363. Thus it is established as the law of this case that collision of interests between plaintiff and the defendant, The Indianapolis Gas Company, as shown by the pleadings, does exist. Hence this court does have jurisdiction unless it is shown by the evidence that there is no actual collision of interest and that such collision as is shown by the pleadings is apparent only and the result of collusion, as charged in the answer of the defendant City. In that event jurisdiction is destroyed. (28 USCA 80.)

It is the contention of the defendant City that the collision of interest asserted in the pleadings "is apparent only and has been brought about as the result of collusion and concert between" the plaintiff and the defendant, The Indianapolis Gas Company. Thus, the question of collusion as a fact between such parties is open for decision, such issue being presented by subdivision 26 of the answer of the defendant City in which it is alleged "that the plaintiff has no right to maintain this action and that this suit is
418 a collusive one." This subdivision of answer contains certain alleged facts upon which such defendant relies to establish collusion between such parties in the institution and maintenance of this action, among which are "(e) That the Indianapolis Gas Company has cooperated with plaintiff in the preparation of the complaint in this cause". Even though it has been heretofore decided that there is a collision of interests between the plaintiff and defendant, The Indianapolis Gas Company, upon the face of the pleadings, that decision does not preclude the court from making inquiry as to collusion, as a fact, when that issue is presented by the issues as in the instant case. It now becomes a question of fact to be determined from the evidence as to whether or not there was collusion, as charged, and, if so, this court is deprived of jurisdiction. The Supreme Court of the United States, in the case of *Hartog* v. *Memory*, 116 U. S. 588, 29 L. Ed. 725, thus held, wherein in the course of its opinion, it said: "If in the course of a trial it appears by the evidence, which is admissible under the pleadings and pertinent to the issues joined * * * that the parties have been improperly or collusively made or joined for the purpose of creating a cognizable case, the court may stop all further proceedings and dismiss the suit."

See, also:

Wheeler v. *Denver*, 229 U. S. 342, 57 L. Ed. 1219.

United States v. *Butterworth-Judson Corporation*, 269 U. S. 504, 46 S. Ct. 179, 70 L. Ed. 380.

At the outset it may be observed that it is apparent that both the plaintiff and defendant, The Indianapolis Gas Company, preferred the Federal Court in which to institute and maintain this litigation. The plaintiff in its brief says: "There is no secret about the fact that the Trustee *preferred* the jurisdiction of the Federal Court." It also said in its brief that, "It may be—though the evi-
dence does not expressly show the fact—that Indiana-
419 apolis Gas also preferred the jurisdiction of the Fed-
eral Court." That such preferences existed and were actually expressed either verbally or in exchange of letters between such parties prior to and at the time of the institution of this action and since its institution there can be no doubt, but such expressions of preference are insufficient to constitute collusion. Litigants have the right to select the forum of their choice in the institution and maintenance of an action so long as no improper acts which constitute collusion are resorted to for the purpose of conferring jurisdiction upon the court in which such action is instituted and maintained. This principle of law was well stated many years ago by Mr. Justice Pecknam in the case of *In Re Metropolitan Railway Receivership*, 208 U. S. 90; 28 S. Ct. 219; 52 L. Ed. 403, as follows: "That the parties preferred to take the subject matter of the litigation into the Federal Courts, instead of proceeding in one of the courts of the state, is not wrongful. So long as no improper act was done by which the jurisdiction of the Federal Court attached, the motive for bringing the suit there is unimportant." With this principle of law, the defendant City, in its brief, agrees; however, it asserts that the acts and conduct of the plaintiff and defendant, The Indianapolis Gas Company, went far beyond the bounds fixed by this principle in an effort to confer jurisdiction upon this court, and that such acts and conduct, as a fact, amount to collusion.

The charge of collusion greatly exceeds an agreement or understanding between a plaintiff and defendant that an action will be begun by plaintiff against the defendant in a certain court and, in fact, it extends beyond the joint preparation by them of a bill of complaint or of the
assistance of either of them in such preparation. A
420 defendant may agree to be sued in a Federal Court,
may make suggestions as to allegations to be contained in the complaint and may assist in its preparation, but so long as there are no improper or fraudulent acts done in such agreement and no allegations made in the

complaint which are untrue and unprovable, known to be such at the time made, and made fraudulently and intentionally for the purpose of conferring jurisdiction upon the court, no collusion exists. As was said by Judge Sparks in the case of *Lincoln Printing Company* v. *Middle West Utilities Company*, 74 F. (2d) 779, "The mere fact that a debtor or his attorneys have previously arranged with a creditor for the filing of the bill does not render the action fraudaulent."

The provisions of the statute upon which defendant City relies which give this court authority to dismiss this action upon the ground of collusion is found in Section 37 of the Judicial Code, as follows. "If in any suit commenced in a district court * * * it shall appear to the satisfaction of the said district court, at any time after such suit has been brought * * * that the parties to said suit have been improperly or collusively made or joined, either as plaintiff or defendant, for the purpose of creating a case cognizable * * * the said district court shall proceed no further therein, but shall dismiss the suit * * *." (28 U. S. C. A. 80.) As defined by Bouvier's Dictionary, and as accepted by the courts, the term "collusion", as used in this section of the statute, means "an agreement between two or more persons to defraud a person of his rights by the forms of law or to obtain an object forbidden by law." When collusion exists, fraud must be present and is implied from the very acts which constitute the collusion. Mr. Justice McKenna, speaking in the case of *Wheeler, et al.* v. *Denver, supra*, said: "The sole question is whether there was collusion to give the court jurisdiction of the cause; and, of course, the existence of collusion implies the existence of fraud." See—*Cashman* v. *Amador & Sacramento Canal Company, et al.*, 118 U. S. 58; 30 L. Ed. 72. It was also said, in the case of *Lincoln Printing Co.* 421 v. *Middle West Utilities Co., supra*, "It is clear that there must be fraud before there can be collusion and it has been so held in construing Section 37 of the Judicial Code (28 U. S. C. A. 80) which authorizes the dismissal of suits in federal courts for collusion." *In re Metropolitan Receivership, supra.*

There can be no doubt but that both plaintiff and the defendant, The Indianapolis Gas Company, have at all times asserted that the lease in question is valid and is binding upon the City, as Trustee. Neither is there any

doubt as to their interest in sustaining the validity of such lease at the time of the institution of this action, prior hereto, and at all times subsequent thereto, and that many conferences have been held by and between them, through their attorneys, and many letters have passed between them relating to this subject. Many such meetings were held and much corespondence had before the commencement of this action, and many have been held and much correspondence had since that time. Some of these conferences and exchange of correspondence related to the preparation and filing of the complaint. The subject matter under discussion related to the drafting of and allegations to be contained in such complaint, as well as to the court in which it was to be filed. Later conferences were held and correspondence exchanged relating to the preparation and filing of briefs upon law questions presented in this court, as well as in the Circuit Court of Appeals. Each of the parties charged with collusion contending at all times that this court had jurisdiction, that the lease in question is valid and is a binding obligation upon the defendant City, as successor trustee.

Many months prior to the commencement of this action, and at a time when there was a difference of opinion between attorneys for the defendants City and The Indianapolis Gas Company as to the validity of such lease, the defendant, The Indianapolis Gas Company, tendered employment to Newton D. Baker, Esq., an eminent lawyer of Cleveland, Ohio, as special counsel to make an investigation as to its validity and render a legal opinion thereon.

He accepted such employment and rendered an opin-
422 ion, as requested. Later, when the parties were unable to adjust their differences and arrive at an agreement, it was decided by The Indianapolis Gas Company and the plaintiff that a suit should be instituted. The common stockholders of that company, of course, had a vital interest in the question of the validity of the lease because, if the lease is valid, they are assured of a six per cent return upon their stock for many years. If, however, a foreclosure suit should have been begun, or if the lease is invalid, no such return is assured. It was natural, therefore, that the Gas Company should take an active interest in the litigation and attempt to guide it along the course that would be most advantageous to it and to its stockholders. This interest gave rise to the many conferences and to the correspondence between such company and plaintiff. Since Mr. Baker had already in-

vestigated the question of the validity of the lease it would seem natural and logical that he be employed to institute and maintain the suit, if his employment could be effected. Consistent with his life, his high idea of ethics and his duty as a lawyer, when employment was tendered by plaintiff, he refused to accept such employment until released by The Indianapolis Gas Company. It is not disclosed from the evidence that he obtained any information during his employment by such Gas Company which would be inimical to its interests and, therefore, he would be at liberty to accept employment by the plaintiff if released by it. This was regularly done on May 12, 1936, and this suit begun by his firm on June 8, 1936.

In the case of *Dickerman* v. *Northern Trust Co.*, 176
423 U. S. 181, 20 S. Ct. 311, 44 L. Ed. 423, it was said that collusion "implies the existence of fraud of some kind, the employment of fraudulent means or of lawful means for the accomplishment of an unlawful purpose; but if the action be founded upon a just judgment and be conducted according to the forms of law and with a due regard to the rights of parties, it is no defense that the plaintiff may have had some ulterior object in view beyond the recovery of a judgment, so long as such object was not an unlawful one."

Before collusion can be said to exist, the evidence must establish some improper or fraudulent acts upon the part of the plaintiff and defendant, The Indianapolis Gas Company, knowingly and intentionally done for the purpose of conferring jurisdiction upon and maintaining this action in this court. No allegations of the complaint have been shown by the evidence to have been falsely or fraudulently made for jurisdictional purposes, and no acts or conduct of such parties, either before or since the institution of this action, can be so construed as to constitute collusion. The prior decision of the Circuit Court of Appeals holding that this court has jurisdiction is, therefore, the law of the case and is binding upon the court. *Chase National Bank, Trustee, etc.* v. *Citizens Gas Company, supra.*

In considering the question of the validity of the lease, it must be kept in mind at all times that such lease was entered into by and between a corporation on the one hand as lessor with broad general powers to contract and a quasi-public corporation on the other hand as lessee with limited powers, organized for a specific purpose, that
424 of administering a public charitable trust, as its initial trustee, and for a limited and fixed term. The

plaintiff, as trustee for the bondholders, has such an interest in the lease as to give it authority to maintain this action and seek to uphold its validity. It is its position that the lease is valid and, as stated in oral argument, is enforceable against the City as successor trustee as against all of the property which it acquired from its predecessor trustee and the income to be derived from its operation.

It is the contention of plaintiff, in seeking a declaratory judgment that the lease is a binding obligation upon the defendant City and upon the property transferred to it by the Citizens Gas Company, first, that the defendant City exercised its option to take all the property of such Gas Company and discharge the obligations of such company to its stockholders and bondholders and that it had the right only to take all of such property, including the lease, or none, or, in the alternative if it had the right to take only a part of such property, which plaintiff denies, it affirmatively decided to take *all* of it and cannot afterwards change its mind; second, that the right of the defendant City to become trustee and administer the trust carried with it the obligation of accepting the property subject to all outstanding legal obligations created by its predecessor trustee and that the lease was one of such obligations; third, that there was an actual acceptance of the four instruments of conveyance by the defendant City which expressly provided that the transfer was made
425 subject to all outstanding obligations and that by the acceptance of the assignment of the lease, as one of such four instruments and taking possession of the leased property, it became liable, by privity of estate, for the obligations under the lease; fourth, that the City is estopped by judgment (a) the order of the Public Service Commission in which the lease was approved is binding upon it, (b) the decree in the case of *Fishback* v. *Public Service Commission, et al.*, 193 Ind. 282, is an adjudication of the validity of the lease and is therefore binding upon the City, (c) the judgment in the case of *Williams* v. *Citizens Gas Company, et al., supra*, is an adjudication of the validity of the lease and is binding upon the City; fifth, that the defendant City is estopped by its own conduct and precluded by its own laches from denying the validity of the lease; and, sixth, that the defendant City is liable under the indemnity agreement for all liabilities and obligations of the defendant, Citizens Gas Company. It is the contention of the defendant, The Indianapolis Gas

Company, that the lease is valid and is a binding obligation upon the defendant City as successor trustee and upon all the property transferred to it by the Citizens Gas Company, predecessor trustee, and now operated by the City. In general, the argument advanced by it to sustain its position is similar to that advanced by plaintiff. With reference to the right of the defendant City to take over the lease as a part of the trust estate, it asserts that the Act of the General Assembly, approved March 11, 1929, is ample authority. The defendant, Citizens Gas Com-
426 pany, in its answer and in its brief, "takes no position upon the issues between the City of Indianapolis and the plaintiff." That is to say, it takes no position with reference to the validity or invalidity of the lease but contents itself by asserting that it has fully performed its obligations and duties as original trustee, including all obligations and duties imposed under the lease, and that it is therefore, released from any further obligations or liability under the trust, including the lease, both as to the plaintiff and as to the defendant, The Indianapolis Gas Company.

On the other hand, it is the contention of the defendant City that, contrary to the contentions of plaintiff and defendant, The Indianapolis Gas Company, it did not assume the obligations of the lease in taking over the property of its trust, but that it specifically refused to assume such obligations and gave notice of such refusal both before and at the time of the transfer of the property by the Citizens Gas Company; that the right to administer the trust, as trustee, carried with it no obligation to accept a 99 year lease entered into by its predecessor trustee; that there was no legal acceptance by it of the assignment of the lease, but that on the contrary it was simply given the physical possession of such assignment along with the other three instruments, and that it delivered to the defendant, Citizens Gas Company, a written refusal to accept such lease at the same time as the transmittal of such assignment; that the defendant City is not estopped either by judgment or in equity from denying the validity of the lease, and that there is no
427 liability under the indemnity agreement as to the obligations and liabilities, if any, created by the lease.

At the time of the execution of the first instrument looking to the creation of the trust in 1905, that is, the franchise, the Citizens Gas Company was not yet in existence. It came into being the following year, and its

very existence was brought about by the necessity of providing a corporation to administer the trust for a period not longer than twenty-five years, pursuant to the mandate contained in the franchise granted by the City through its public officials the preceding year. In order that funds might be available for the carrying out of the plan contained in the franchise, it became necessary to sell stock in the corporation. This was done, stock was sold and funds were subscribed and paid by the public, which funds were used to purchase the property and plant of the Consumers Gas Trust Company which was winding up its business and, thus, this property became the original trust res. Pursuant to authority vested in it by its franchise, Articles of Incorporation, By-Laws, etc., the Citizens Gas Company began operation and began supplying the citizens of Indianapolis with gas through its system of mains, etc. As its customers increased, it became necessary that it extend its mains, and this necessarily meant that it was compelled to acquire additional pipes, connections, machinery, etc. It was the intent and purpose of the citizens who originated the idea of the formation of the trust and of the City through its Board of Public Works which granted the franchise that competition be had for The Indianapolis Gas Company which was operating and supplying gas to the citizens of Indianapolis at that time and thus be enabled to supply gas to such citizens at a cheaper rate. After the
428 two companies had operated for several years it was deemed advisable by the Citizens Gas Company and thought by it to be to the best interests of the gas users of Indianapolis that one company only be permitted to supply their needs in that direction. Consequently, negotiations were begun which consummated in the execution of the lease in question, and from that time on the Citizens Gas Company operated the property of The Indianapolis Gas Company in conjunction with its own until transferred to the City. At the time the property of the Citizens Gas Company, as trustee, was thus transferred, it was the contention of the City that the lease was not a part and parcel of such property, and it therefore declined to accept it as such. This it had a legal right to do, pending the adjudication of that question. The fact that it and plaintiff do not agree as to such lease being a part of the trust res and therefore binding upon the City, does not mean that, because it exercised its right to take over the trust, the City must take over the lease as a part

thereof before the question of its validity is adjudicated. It simply means that the question of whether or not such lease is a part of the res is yet to be determined and that the City was acting within its rights in asserting its position and declining to thus accept it at the time of its attempted assignment. The authorities cited by plaintiff to the effect that a trustee cannot take over a part of the assets of a trust and refuse others have no application
429 because it had not yet been determined that the lease is a part of such assets at the time the City exercised its rights to take over the property and hence at that time could not be said legally to be a part of such assets. If it is finally determined that the lease is valid it then, of course, becomes a part of the trust res and the City, as trustee, must accept it and be bound by its terms in the administration of its trust. If, on the other hand, the lease is held to be invalid, it is no part of the trust res and the City is not obligated by its terms. Until the time of the final determination of the validity of the lease, the City, as trustee, is acting within its rights in carrying out the contract entered into by and between defendant, The Indianapolis Gas Company, and itself and by depositing the money provided by that contract with the escrow agent, and no inference as to the validity or invalidity of the lease can be drawn therefrom. There is no evidence that the City did intend to take over such lease at the time it exercised its right to take over the property, but on the contrary all of the evidence is to the effect that it did not so intend, and that it had so notified the Citizens Gas Company a considerable length of time in advance of the transfer of the property and served a written rejection on it at the time of the transmittal of the instruments of conveyance. As a matter of fact, the defendant, The Indianapolis Gas Company, knew of the attitude of the City with reference to the validity of the lease and of its intention to reject it several weeks in advance of the transfer of the property and, by agreement with it, operation was continued as theretofore pending an adjustment or adjudication. While no legal obligation de-
430 volved upon the City to notify plaintiff in advance of its taking over the trust of its attitude with respect to the validity of the lease, yet it would seem that no effort was made by either it or the defendant, The Indianapolis Gas Company, to conceal its attitude in that respect. Within ten days following the transfer of the property to the City, an inquiry went forward from

plaintiff addressed to defendant, The Indianapolis Gas Company, concerning this matter, in which it was stated that it was "receiving numerous inquiries from holders of bonds of the above described issue with respect to newspaper reports that the City Utilities District is attempting to abrogate the lease made by your company with the Citizens Gas Company in 1913."

There were prepared and executed by the Citizens Gas Company four instruments which covered all of the property owned and operated by it, as trustee. One of these instruments of conveyance was the assignment of the lease. All of these instruments were physically transmitted by a representative of such Gas Company to a representative of the defendant City. However, at the same time and as a part of the same transaction, there was delivered by the defendant City to such representative of the Gas Company a written rejection of the lease. In fact, the Citizens Gas Company knew at the time of the execution and transmittal of such assignment that it would be rejected by the City. It was, no doubt, attempting to protect itself insofar as it could against any liability being asserted against it as lessee in such lease because of any failure upon its part to discharge its duty. It cannot be said as a matter of law under the evidence
431 that because there was physically delivered to the City the written assignment of the lease and that it was actually recorded in the Recorder's Office, it was in legal effect an acceptance of the lease on the part of the defendant City. In reality the transaction constituted simply a tender on the part of the Citizens Gas Company of an assignment of the lease and a rejection of such assignment on the part of the City. No legal conclusions or inferences tending to bind the City by such transaction can be drawn therefrom.

As a part of the transaction when the property of the Citizens Gas Company was transferred to the defendant City, as trustee, on September 9, 1935, there was executed by the City and delivered to such Gas Company an Indemnity Agreement wherein, "in consideration of the * * * * conveyance, transfer and assignment as aforesaid, it is agreed by the City * * * * that it will hereafter well and sufficiently save, defend, keep harmless and indemnify the said Citizens Gas Company * * * * from any and all loss, damage, costs, charges, liabilities or expense on account of any pending actions or suits which have heretofore been instituted against said Company and on account

of any actions or suits which may hereafter be brought against said Company, arising from any and all acts or actions or omissions to act on the part of said Company of any nature whatsoever." A careful reading and study of this agreement will disclose the fact that it was given solely for the purpose of indemnifying the Gas Company against any loss or liability which it might sustain be-
cause of any actions then pending or thereafter be-
432 gun against it. It executed and transmitted to the defendant City an assignment of the lease along with all other instruments of conveyance and therefore performed its duty in that regard insofar as it was possible for it to do so. No judgment has yet been rendered against the Gas Company as to any liability under the lease, therefore no liability as yet arises against the City under such agreement, and such Company has not yet sustained any loss as contemplated by such agreement unless it be the cost and expenses incurred in the defense of this action, which are doubtless covered by such agreement. The acts of the City in the execution of this agreement cannot be construed so as to require it to carry out the terms of the lease In construing this instrument, effect must be given to the acts and intentions of the parties at the time of its execution, as well as to the language of the agreement. Such acts and intentions, as well as the language of the agreement, are all contrary to the contention of plaintiff as to the effect of its execution.

The Shively-Spencer Public Utility Act was in effect at the time of the execution of the lease in question on September 30, 1913. It therefore became necessary to have such lease approved by the Public Service Commission before it could become effective. This approval was given upon a joint petition of the defendants, The Indianapolis Gas Company, as lessor, and the Citizens Gas Company, as lessee. One of the stockholders of the Citizens Gas Company and a citizen of Indianapolis, Frank S. Fishback, intervened in the proceeding before the Public Serv-
ice Commission and sought to prevent the approval
433 of the lease by that body. In this he failed, and a petition for a rehearing was denied. Having thus failed in his attempts before the Public Service Commission to prevent the approval of the lease, Fishback instituted an action in the Superior Court of Marion County wherein he sought to have vacated and set aside the order of the Commission in thus approving it. Defendants to this action were the Public Service Commission of Indi-

ana, The Indianapolis Gas Company, Citizens Gas Company, and The City of Indianapolis. It was his contention among others in that suit that the rentals fixed under the lease were excessive and their payment would result in the Citizens Gas Company's being unable to pay its stockholders dividends as required; that such Gas Company was without power to execute the lease without the consent of the owners of three-fourths in amount of its capital stock; that the City of Indianapolis had not given its consent to its execution; that the order of the Commission was contrary to the law and the evidence; that the provisions in the lease requiring the Citizens Gas Company to pay interest upon the bonds and dividends upon the stock of The Indianapolis Gas Company constituted an impairment of the contract between the Citizens Gas Company and himself and other stockholders for the payment of a fixed dividend to them, etc. Many other contentions were contained in the complaint, but the aforementioned are the essential ones. The defendant City filed an answer in general denial, but all other de-
434 fendants filed demurrers. The separate and several demurrers of defendants were sustained and, plaintiff refusing to plead further, judgment was rendered against him. Prior to the entry of final judgment, however, the suit was dismissed as to the City on motion of plaintiff, and it was not a party to the final judgment. An appeal to the Supreme Court of Indiana was attempted, but not having been perfected within time, it was dismissed by the Supreme Court. *Hoback* v. *Public Service Commission, et al., supra.*

On May 12, 1930, one Allen G. Williams, a resident and citizen of Indianapolis, commenced an action in a Superior Court of Marion County against the Citizens Gas Company, The Indianapolis Gas Company, the City of Indianapolis, the Trustees under the Mortgage of The Indianapolis Gas Company, the Mayor, City Clerk, Board of Public Works, Board of Trustees and Directors for the Department of Utilities of Indianapolis, and the Public Service Commission. This was intended as a class suit by plaintiff, as it was alleged by him to be on behalf of himself and all other persons similarly situated. The nature of the suit, as stated in the opinion of the Supreme Court, was: "Suit by appellant (Williams) to establish a trust; to quiet title to property of the trust estate; to recover diverted assets of the trust estate; to recapture the trust and its propery from delinquent

and insolvent trustees and sequester the same with receiverships; to administer the trust during an emergency and at the end of the emergency turn over the trust and its property to its lawful beneficiaries." To the
435 complaint in the Superior Court certain defendants filed a motion to strike out certain parts of the complaint, which motion was sustained in part and overruled in part. Afterwards, all defendants filed separate demurrers to the complaint, which were sustained, judgment rendered against the plaintiff, and he appealed to the Supreme Court of Indiana. The errors relied upon were (1) the action of the trial court in sustaining a motion to strike out certain allegations of the complaint, and (2) the sustaining of a demurrer to the complaint. The case was affirmed. *Williams* v. *Citizens Gas Company, et al., supra.*

It is the contention of plaintiff that the decision of the Public Service Commission in approving the lease is conclusive upon the parties before it, and that it cannot be collaterally attacked; that the City was a party to such proceeding and is, therefore, bound by its decision. It is its further contention that the question of the validity of the lease was adjudicated in both the case of *Fishback* v. *Public Service Commission, et al., supra,* and the case of *Williams* v. *Citizens Gas Company, et al., supra;* that these cases are *res adjudicata* of that subject and that, therefore, there is in this case an estoppel by judgment. On the other hand, it is the contention of the defendant City that "the judgments in the Fishback * * * * and Williams cases are not *res adjudicata* of the enforceability against the City of the lease" and that it is not precluded by the action of the Public Service Commission in litigating the validity of the lease in this action.

In the case of *Todd* v. *Citizens Gas Company, et al., supra,* the question of the validity of the lease was not in issue and was not adjudicated. Neither were the parties the same. Neither the plaintiff in this action nor The Indianapolis Gas Company was a party in that case. In that case, for the first time, the question of whether or not there was created, in 1905 and 1906, by the
436 franchise and other instruments then executed, a public charitable trust of which the Citizens Gas Company was the original trustee was presented and adjudicated.

In the proceeding before the Public Service Commission in 1913 in which the lease was approved, the defendant

City was not a party as trustee of a public charitable trust. It was not a party to the lease in any capacity and was simply representing the public interest in its appearance before the Commission. The Acts of the Public Service Commission were administrative in character, and not judicial. *Fishback* v. *Public Service Commission, et al., supra.* It is the law, however, that an order of the Commission based upon facts and while acting within its jurisdiction cannot be collaterally attacked in a court proceeding. *Public Service Commission, et al.* v. *City of Indianapolis, et al.,* 193 Ind. 37. The instant case is not, however, a collateral attack, because that order cannot, upon the facts before the Commission, be said to have determined the rights of the defendant City, as trustee of a public charitable trust. It did not assume the duties of its trust for almost twenty-two years thereafter, and the term of the lease extends for a period of more than seventy-seven years beyond the time when it did assume such duties. The legal questions as to the validity of the lease presented in this case were foreign to the proceedings before the Commission and, in fact, as a matter of law, such legal questions could not have been determined by it. In its administrative acts it looks to the public interest and cannot adjudicate private rights of persons not parties to a proceeding. Neither the plaintiff in this action nor any person representing the bondholders nor any of the bondholders was a party to such proceed-
437 ing, and since it is admitted by plaintiff that the consideration contained in the lease must be paid by the defendant City, as trustee, from the proceeds of the trust or from income derived therefrom, the City, as trustee of such trust, was not a party. See—*In re Northwestern Indiana Telephone Company, et al.,* 201 Ind. 667. It will, therefore, be seen that the order of the Public Service Commission does not constitute an adjudication of the validity of the lease so as to bind the defendant City, as trustee, in this action.

In the case of *Fishback* v. *Public Service Commission, et al., supra,* the judgment was rendered upon demurrer being sustained to the complaint. In that action, it is true, that the City of Indianapolis was a party defendant in the Superior Court. It was a party, however, in its individual capacity, and not as trustee of a public charitable trust. In considering the question of *res adjudicata* or estoppel by judgment as pertains to that case, it must also be kept in mind that, even though the City filed an

answer in general denial, no issue of fact as between Fishback and the City was ever determined, the case having been dismissed by him as to the City before the rendition of a final judgment. Furthermore, neither the plaintiff in this action nor any trustee for the bondholders, nor any individual bondholder was a party to that action and, hence, was not a party to the final judgment. Even though a public charitable trust did, in law, exist at the time of entry of the judgment in the Fishback case, no such contention was made by him or any other party to that action, that subject never having been presented, until six years later, when it was asserted in the Todd case.

438 In the case of *Williams* v. *Citizens Gas Company, et al., supra,* the judgment was, also, rendered upon demurrer being sustained to the complaint. At the time of the commencement of that action, at the time of the final judgment in the Superior Court, and at the time of the decision of the Supreme Court of Indiana affirming the trial court, the defendant City was not the trustee and it did not assume such duties until many months thereafter. The question of the enforceability of the lease as against the City, as trustee, was not in issue in that suit. The question of whether or not the length of the term of the lease was such as to make it unenforceable as against the City, as successor trustee, was not adjudicated in that action and could not have been adjudicated therein because the City had not yet succeeded the Citizens Gas Company, as trustee. It is a fact that the question as to there being in existence a public charitable trust had been previously adjudicated but the provision in the lease with respect to the length of the term thereby created, hereinafter referred to, was not construed in that case, the court saying that * * * * "The complaint does not make out a case for any relief on the basis of invalidity of the lease or of the action of the Commission in approving the same." The questions presented in that case and which were pertinent under the issues were entirely different and were surrounded with an entirely different set of facts from those presented in this case. Only the facts well pleaded in the complaint were before the court in that case.

439 It seems that a final judgment rendered sustaining a demurrer to a complaint may be relied upon as res adjudicata or estoppel by judgment upon the facts therein well pleaded, the same as though there had been

a final judgment rendered upon the merits sustaining the same facts. By the filing of a demurrer, all facts well pleaded are admitted. As was said by the Supreme Court of the United States in the case of *Gould* v. *Evansville, et al.*, 91 U. S. 526; 23 L. Ed. 416: "Decided cases may be found in which it is questioned whether a former judgment can be a bar to a subsequent action, even for the same cause, if it appears that the first judgment was rendered on demurrer; but it is settled law, that it makes no difference in principle whether the facts upon which the court proceeded were proved by competent evidence, or whether they were admitted by the parties; and that the admission, even by way of a demurrer to a pleading in which the facts are alleged, is just as available to the opposite party as if the admission was made *ore tenus* before a jury. * * * * *Aurora City* v. *West*, 7 Wall. 99." See, *Bissel* v. *Spring Valley Township*, 124 U. S. 225, 8 S. Ct. 495, 31 L. Ed. 411. *Northern Pacific Railway Company* v. *Slaght*, 27 S. Ct. 442. Gould on Pleading, Sec. 42. *Stuck* v. *Town of Beech Grove*, 201 Ind. 66, 163 N. E. 483. In considering the doctrine of *res adjudicata* or estoppel by judgment, it is said in the case of *Burrell* v. *Jean*, 196 Ind. 187, 146 N. E. 754, at page 759, that "In these considerations, it is important to remember that 'The party who invokes the doctrine of former adjudication must be one who tendered to the other an issue to 440 which the latter could have demurred or pleaded.' In other words, 'Ordinarily, four things must occur before the principles of *res adjudicata* can be invoked; (1) A suit. (2) A Final Judgment. (3) Identity of Subject Matter. (4) Identity of Parties. *Jones* v. *Vert*, 121 Ind. 140, 22 N. E. 882, 16 Am. St. Rep. 379. Another rule, and one which is said to be the best test for determining whether a former judgment is a bar to a present action, is; Will the same identical evidence support the issue tendered in both actions. Freeman on Judgments (4th Ed.) 259." In the case of *Whitsell, et al.* v. *Strickler, et al.*, 167 Ind. 602, 78 N. E. 845, the court said, "* * * * stated more generally, when two or more defendants make issues with the plaintiff, a judgment determining those issues in favor of the defendants settles between them no fact that might have been, but was not, put in issue by a proper pleading." Again, in the case of *Wiltrout* v. *Showers*, 118 N. W. 1080, the Supreme Court of the State of Nebraska said: "The rule of law is well settled that parties to a judgment are not bound by it in a subsequent

action, unless they were adverse parties in the original action. The bar of former adjudication can only be raised between those who were adverse parties in the former suit, and the judgment in the former suit settles nothing as to the relative rights or liability of co-defendants
441 as between themselves unless their conflicting claims were put in issue by cross petition or adverse answers and were actually litigated and adjudicated." Furthermore, the defendant City was not a party to any of the proceedings which plaintiff contends constitute an estoppel in its capacity as trustee of a public charitable trust, and, therefore, any judgment rendered in either of such proceedings is not binding upon it in such capacity. As was said by the Supreme Court of Indiana, in the case of *Lord, et al* v. *Wilcox,* 99 Ind. 491, "As a general rule, judgments conclude the parties only in the character in which they sue or are sued." See, also, *Craighead* v. *Dalton,* 105 Ind. 72; *Erwin* v. *Garner,* 108 Ind. 488; *Bumb* v. *Gard,* 107 Ind. 575; *McBurnie* v. *Seaton,* 111 Ind. 56; *Jones* v. *Vest, supra.* The Indiana Appellate Court, in the case of *Copeland* v. *Brunning,* 44 Ind. App. 405, said, "It is the settled law that parties to a judicial proceeding are bound by the decision and judgment in such proceeding, in the capacity and right in which they appear, and not otherwise." Bigelow on Estoppel, 65. Applying these principles to the cases of *Fishback* v. *Public Service Commission, et al., supra,* and *Williams* v. *Citizens Gas Company, et al., supra,* neither is *res adjudicata* in this action, nor do the judgments in those cases constitute an estoppel. There was a suit and a final judgment in each case, but the identity of the parties was not the same, and neither was the identity of the subject matter the same, nor was the City a party to either in its fiduciary capacity. The facts were essentially different and were
442 only those pleaded in the complaints. In the Fishback case, the defendant City was not even a party to the final judgment, and in the Williams case neither was the subject-matter the same as between plaintiff and defendant City, nor was any issue tendered by the plaintiff in this action, the party seeking to invoke the doctrine of former adjudication, to the defendant City in this action in any capacity, the party against whom the doctrine is sought to be invoked, as pertaining to the validity of the lease or any other subject. Neither did the defendant, The Indianapolis Gas Company, tender any issue as to the validity of the lease to the defendant City.

Neither is the position taken by the City in the proceedings before the Public Service Commission, *supra*, the case of *Fishback* v. *Public Service Commission, et al., supra*, the case of *Todd* v. *Citizens Gas Company, et al., supra*, nor the case of *Williams* v. *Citizens Gas Company, et al., supra*, as shown by the records and briefs, sufficient to constitute an estoppel.

It is the further contention of plaintiff that the defendant City, because of its acts and conduct extending over a period of years following the execution of the lease, is estopped from denying its validity, and that it is guilty of laches. Under the law, before the doctrine of estoppel can be invoked, the person seeking to invoke it must have been influenced by the acts and representations made by the party against whom such doctrine is sought to be invoked, and must have actually relied upon such acts and representations. These are questions of factual proof
of which plaintiff in this action has the burden of
443 establishing. It was, also, said by the Supreme Court
of Indiana in the case of *Horford* v. *Johnson, et al.*, 74 Ind. 480, that the following elements are necessarily present to support a decree of estoppel, (1) a representation or concealment of a material fact, (2) the representation must have been made with knowledge of the facts upon the part of the one making such representation, (3) the party to whom the representation was made must have been ignorant or uninformed as to its truthfulness, (4) the representation must have been made with the intent and purpose of influencing the other party to act upon it, and (5) the other party must have acted upon such representation so made. See—*Simpson, et al.* v. *Pearson, Admr.*, 31 Ind. 1. *McCabe, et al.* v. *Raney*, 32 Ind. 309. *Ross, et al.* v. *Banta*, 140 Ind. 120. In considering the question of estoppel, consideration must be given to the capacity in which the defendant City was acting at the time of the commission of the acts which are asserted by the plaintiff to have constituted estoppel. It must be kept in mind that the defendant City did not become trustee and take over the administration of its trust until September 9, 1935. Any of its acts prior to that time were done by it in its individual capacity and not in its fiduciary capacity. At the time of the approval of the lease by the Public Service Commission, the City was acting only in the public interest and not in any sense in its capacity as trustee of a public charitable trust. In fact, as heretofore stated, it was not adjudicated that such a

trust did exist for approximately seventeen years thereafter. At least two of the stockholders of the Citizens Gas Company at that time denied the existence of such a trust—Todd and Cotter. By the very term of the franchise, the City had twenty-five years from its grant
444 to exercise its rights and take over the property of the Citizens Gas Company. It proceeded to exercise such right within that period. Prior to the time of its actual taking over of the property, it exercised no control and could not exercise any control over it, and had no means of controlling the actions of the Citizens Gas Company. It is true that more than $2,000,000.00 of principal amount of bonds were issued by the defendant, The Indianapolis Gas Company and sold to the public subsequent to the execution of the lease. It may also be observed that these bonds were authenticated by the trustee for the bondholders, and there is no evidence which justifies the conclusion that such trustee relied upon the lease as security for the payment of such bonds at that time. The money represented by these bonds was used for the benefit of The Indianapolis Gas Company and naturally increased the value of its property and the value of the security of the bondholders. Specific provision for the issuance of these bonds was made in the Trust Indenture. As a matter of fact, at the time of their authentication the lease itself was in the possession of The Indianapolis Gas Company. It is true that certain representations as to the lease were made by brokers who purchased this bond issue and by those who purchased the Indianapolis Gas Plant Revenue Bonds issued by the City just prior to the taking over of the property by it as trustee, but these representations were made by the purchasers of the bonds and not by the City, and the evidence fails to disclose that
445 such representations were authorized by it. In fact, under the evidence, such representations were not so authorized. Furthermore, the evidence fails to disclose that any present owner of any of the bonds issued by the Gas Company after the execution of the lease even knew of such representations at the time of his or its purchase and, therefore, it necessarily follows that no reliance could have been had thereon. Such purchaser was not in any manner induced to purchase such bonds because of any representation made even by the broker. Even though considerable length of time elapsed between the date of the execution of the lease and the taking over of the property by the City as trustee, and during all of

such time the City knew of its existence and terms, it cannot be said that any of its acts during that time, as a municipal corporation, were such as to estop it, as trustee, from denying the validity of the lease. See—*Texas and Pacific Railway Company* v. *Pattorff*, 291 U. S. 245; 54 S. Ct. 416; 78 L. Ed. 777; *California National Bank* v. *Kennedy*, 167 U. S. 362; 17 S. Ct. 831; 42 L. Ed. 198. It exercised its rights within the time prescribed by the franchise and prior to the exercise of such right and at the time of taking over of the property it gave notice and took every step possible within its power to inform all interested parties, and the world in general, as to its attitude upon the question of the validity of the lease. Notice was given and public record made of such attitude. The evidence is insufficient to justify the conclusion that the defendant City is estopped by its acts and conduct from denying the invalidity of the lease.

446 It is the contention of the defendant City that the lease was executed in violation of Sections 48-1507 and 48-7302, Burns' Revised Statutes of Indiana (1933) and that it is, therefore, invalid. Section 48-1507 provides in substance that "No executive department, officer or employee thereof shall have power to bind such City to any contract or agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purposes of such department * * * *; and all contracts and agreements, express or implied, and all obligations of any kind and every sort, beyond such existing appropriations are declared to be absolutely void; Provided, that the Board of Public Works shall have power to contract with any individual or corporation for * * * * supplying the City with gas * * * *, on such terms and for such times not exceeding the term fixed by Sec. 254 (Sec. 48-7302) of this Act as may be agreed upon; but any such contract shall be submitted to the common council of such City and approved by ordinance before the same shall take effect * * * *." Section 48-7302 referred to above limits the time to a "term not longer than twenty-five (25) years." The lease was not an agreement by The Indianapolis Gas Company to furnish gas to the citizens of Indianapolis but, on the contrary, it ceased furnishing gas to them upon its execution. It was simply a contract by it with another corporation to permit such other corporation to use its property for a definite time upon payment to it of a definite

and fixed consideration. Furthermore, no appropria-
447 tion under this statute is necessary, because it was admitted by plaintiff, on oral argument, that it does not contend the payment of the rental, or any part thereof, can be enforced from the general fund of the City or from any other fund than the income derived from the operation of the trust and from such trust property. It is, therefore, apparent that neither of these sections of the statute has any application to the facts in this case.

At the time of the execution of the lease there seemed to be a doubt in the minds of the parties thereto as to their power to enter into it for such a long period of time. The express term being for a period of ninety-nine years. That there was such a doubt may be inferred from the provisions of subsection 32 of the lease, as follows: "* * * * In the event it should be determined by a court of final jurisdiction that the contract is ultra vires or void because of the length of the term created, and that such term is in excess of the authority of either party hereto to contract, then this lease shall nevertheless be binding upon the parties hereto for the longest term for which the parties hereto might lawfully contract." The parties to the lease were the defendants, The Indianapolis Gas Company and the Citizens Gas Company. The defendant, Citizens Gas Company, complied with its term so long as it operated the property and by its transfer of all its property, as provided in the franchise and its Articles of Incorporation, and its attempted assignment of the lease, it is released from any further obligations.

In order that a logical conclusion may be reached as to the validity of the lease, an examination of the franchise, Articles of Incorporation, Amended Articles and By-Laws of the Citizens Gas Company is necessary to ascertain whether or not such instruments contain any provisions granting such authority. These are the instruments which created the trust, and, if no authority for the execution of the lease or a lease of that character can be found
448 within them, then, no such authority exists. Before the franchise became effective it was necessary that it have the approval of the Common Council of the City. The granting and approval of the franchise were the initial steps in the creation of the trust. One of the most important powers with which a corporation can be clothed is the authority to enter into a lease whereby it assumes obligations for the payment of vast sums of money annually as rental over a long period of years. It

is natural to conclude, therefore, that where the defendant City deemed it advisable to grant a franchise to three of its citizens expressly providing therein for the assignment of such franchise to a corporation to be thereafter organized for the express purpose of serving as the initial trustee of a public charitable trust, if it had intended to confer such an important power upon such corporation Trustee, it would have done so in language which could not have been misunderstood. It must be remembered that where a franchise is granted by a municipal corporation to an individual or a corporation and the extent of the grant contained in such franchise becomes the subject of construction, the universal rule is that in doubtful points the construction shall be against the grantee and in favor of the municipality. In all grants by the public, the principle is well recognized that nothing passes by implication. As was said by the Supreme Court of the United States, in the case of *Piedmont Power & Light Company* v. *Town of Graham, et al.*, 253 U. S. 193; 40 S. Ct. 453; 64 L. Ed. 855: "Grants of rights and privileges by a state or municipality are strictly construed and whatever is not unequivocally granted is withheld,—nothing passes by implication." See—*Knoxville Water Co.* v. *Knoxville*, 200 U. S. 22; 26 S. Ct. 224; 50 L. Ed. 355; *Blair* v. *Chicago*, 201 U. S. 400; 26 S. Ct. 427; 50 L. Ed. 801; *Mitchell* v. *Dakota Central Telephone Co.*, 246 U. S. 396; 38 S. Ct. 362; 62 L. Ed. 793.

Obviously, it was the intent and purpose of the defendant City, in granting the franchise, and of the incorporators of the defendant, Citizens Gas Company, to create a quasi public corporation for the express purpose of administering a Public Charitable Trust. The de-
449 fendant, Citizens Gas Company, obtained all its rights and powers through the franchise. Its Articles of Incorporation, Amended Articles and By-Laws were all so framed as to carry out the duties and responsibilities imposed upon it by such franchise. The franchise provided a method by which the object of the corporation was to be obtained. It safeguarded the interests of the stockholders of the corporation to be thereafter organized, who were the settlers of the trust, by providing for the return to them of the money invested by them, together with interest thereon at the rate of ten per cent per annum. It also imposed upon the Directors of the Citizens Gas Company the absolute duty of conveying to the City all its property when it had discharged its obligations to its stockholders,

which, according to its express terms, was to be within twenty-five years from its date. The franchise further provided that no obligation could be created by the Citizens Gas Company for the purpose of reimbursing its own stockholders which would extend for a longer period than ten years beyond the termination of such franchise. (*Todd v. Citizens Gas Company, et al., supra.*) Furthermore, the instruments creating the trust contained detailed instructions upon such subjects as the retirement of the stock of the Citizens Gas Company, *the order in which its earnings should be used,* the payment of the bonds, the time within which the City was to exercise its right to take over the property, etc., yet, not one word is to be found with reference to the execution of a lease which, by its terms, would bind the trust far beyond the time within which the lessee, Citizens Gas Company, was to surrender title and possession of such trust; far beyond the corporate life of both the Citizens Gas Company and The Indianapolis Gas Company and would anticipate for a period of ninety-nine years a supposed profit on behalf of the Citizens Gas Company sufficient to pay five per cent interest on $4,833,000 of the mortgage bonds of The Indianapolis Gas Company issued and outstanding at the time of the execution of the lease and upon all bonds thereafter issued by it, and on all its refunding bonds, on all its escrow bonds,

450 and in addition thereto, the sum of $120,000 per annum as dividends on the capital stock of The Indianapolis Gas Company, and taxes of all description for which The Indianapolis Gas Company is liable. It is inconceivable that the settlors of the trust, the City, the grantees of the franchise, and the incorporators of the Citizens Gas Company intended to provide for the protection of stockholders of another corporation, in this instance, The Indianapolis Gas Company, through the medium of a long term lease whereby such stockholders would be assured of a return of six per cent per annum upon the par value of the common stock held by them for a period of ninety-nine years, while the stockholders of the corporation organized to administer the trust (Citizens Gas Company) would receive nothing upon their investment unless and until such The Indianapolis Gas Company stockholders had been paid their six per cent dividends and interest on the bonds and taxes paid, even though the instruments creating the trust specifically provided for the payment of ten per cent per annum to the stockholders of the Citizens Gas Company. Rather, it was

their intention to protect the stockholders of the Citizens Gas Company who made possible the creation of the trust and assure them a return of their money, together with interest thereon at the rate of ten per cent per annum, and ample provision is made therefor in the franchise, etc. No provisions are to be found in the trust indentures which would authorize or empower the trustee of the Public Charitable Trust, created by such trust indenture, to enter into a contract which would, of necessity, anticipate sufficient profits on the part of the trustee over a period of ninety-nine years necessary to pay the rental provided in the lease in question, which amounts to more than $500,000.00 per year. (*Oregon Railway & Navigation Company* v. *Oregonian Railway Company, Limited*, 130 U. S. 1; 9 S. Ct. 409; 32 L. Ed. 837.) No authority can be found in the instruments creating the trust for the execution of the lease in question. Therefore, such lease, executed as it was without such authority, is ultra vires and void, and is not binding upon the defendant City. It is no part of the trust res. To hold otherwise would be to read into the trust instruments authority not therein contained.

451 At the time of the commencement of this action, no interest was due upon the bonds of The Indianapolis Gas Company secured by the mortgage of which plaintiff is the sole trustee. Attached to each of these bonds were coupons evidencing the amount of interest due each six months. The coupons last paid were those which fell due on April 1, 1936, and none has been paid since that date. It is apparent that, at the time of the commencement of this action, plaintiff was not entitled to judgment against any of the defendants for any sum of money because of default in the payment of interest, because none was then due. However, default was afterwards made in the payment of coupons due on October 1, 1936 and thereafter, and plaintiff is, therefore, entitled to a judgment against the defendant, The Indianapolis Gas Company, for the amount of such interest now in default. The defendant, The Indianapolis Gas Company, admits that in-

452 terest in the total aggregate amount of $1,032,150.00 was due and unpaid on April 1 of this year.

It is the contention of plaintiff that, since the various coupons evidencing the amount of interest due were not paid when due, it is entitled to interest upon the unpaid coupons at the rate of six per cent per annum from and after the date when such coupons became due. In other words, it is seeking to recover a judgment for interest

upon the past due and unpaid interest at the Indiana statutory rate in the absence of a contract, in addition to the aggregate amount of the interest due. (Burns' R. S. 1933, Sec. 19-2001). On the other hand, the defendant, The Indianapolis Gas Company, contends that there is a provision contained within the mortgage indenture and within the bonds themselves, wherein it is provided that no interest upon interest shall be paid, and that such provision controls.

It is provided in the mortgage that in case of default in the payment of interest when due, and in case of action being taken because of such default by the Trustee upon request of the bondholders, possession of the mortgaged property taken by the Trustee and sold by it pursuant to the provisions of such mortgage the proceeds shall be applied "* * * to the payment of interest on said bonds hereby secured in the order in which the installments of such interest shall have become due, but *without interest upon such interest* * * *." (Our italics.) It is clear, therefore, that if possession of the mortgaged property is taken by the Trustee and sold by it, and past due and unpaid interest, represented by coupons, upon the bonds is paid from the proceeds of such sale no inter-
453 est can be allowed or paid upon such interest coupons.

Upon examination of the bond to ascertain whether or not the aforementioned provisions of the mortgage apply in an action wherein a personal judgment is sought and not a sale of the property for the purpose of paying the past due interest coupons, we find the following provision, "In case of default in the payment of any half yearly installment of interest which shall become payable and which shall have been demanded by presentation at the office of said The Trust Company of America, and a continuance of such default for a period of six months after such demand, the principal of this bond shall become due, in the manner and with the effect and *subject to the conditions provided in the Indenture of Mortgage securing the payment of the same* * * *." (Our italics.) In substance, the language thus found in the bond is the same as the first part of the paragraph of the Mortgage Indenture from which the above quotation is taken. While this is an acceleration clause, yet, in the institution of an action to collect the due interest and in acquiring a judgment in such action, it must be "subject to the conditions provided in the Indenture of Mortgage securing the payment of same" and one of such conditions is "without in-

terest upon such interest." There can be no valid reason for holding that such provision applies if the property of mortgagor is possessed and sold by the Trustee and the bondholder paid from the proceeds of such sale and that it does not apply where a personal judgment only is sought for the amount of the defaulted interest. In either event, the bondholder receives the amount of the interest due, 454 which is all to which he is entitled under the bond.

Plaintiff is not entitled to a judgment which includes interest upon the interest, but is entitled to a judgment against the defendant, The Indianapolis Gas Company, for the aggregate amount of the past due and unpaid interest. In the cases cited by the plaintiff, and upon which it relies, there are to be found no such provisions and conditions as those found in the bonds and mortgage in this case, and such cases are, therefore, clearly distinguishable.

By virtue of the provisions of the franchise granted to Potts, *et al.*, by the defendant City in 1905, afterwards assigned to the defendant, Citizens Gas Company, and the Articles of Incorporation and By-Laws of such company, it became a quasi-public corporation and, as such, was the original trustee of the Public Charitable Trust created by such franchise, Articles of Incorporation and By-Laws. At the time of the execution of the lease in question, the defendant, The Indianapolis Gas Company, as a matter of law, was chargeable with knowledge of its status, as such. It was also chargeable with knowledge of the contents and provisions of such franchise, Articles of Incorporation and By-Laws, which fixed the duties and responsibilities of the Citizens Gas Company, as well as defined its powers and limited its authority. Acting upon the authority and mandate of the franchise, the defendant, Citizens Gas Company, was organized and began the execution of its trust. It performed its duties through its Board of Directors, Officers, and Voting Trustees, with fidelity, and carried out the original intent and purpose of the citizens of Indianapolis, as expressed in the franchise, its Articles of Incorporation and By-Laws. Under authority granted it by such franchise and its Articles of Incorporation and Amended Articles, the defendant, Citizens Gas Company, proceeded to wind up its affairs and, on September 9, 1935, transferred and conveyed all its property to the defendant City, as successor trustee. Having discharged its duties to its stockholders and bondholders, it became its duty to thus convey all its property

to the City. As a corporation, it profited nothing by
455 such conveyance, but was simply performing its duty under its contract and was, in effect, carrying out the mandate of the Circuit Court of Appeals wherein it said, in speaking of the duty of the Board of Directors of the Citizens Gas Company, in the case of *Todd* v. *Citizens Gas Company, et al., supra,* "The limitations on the rights of stockholders and the duty of the directors to convey to the City were embodied in the charter of the corporation." It did everything within its power to perform the duties of its trust honestly and legitimately, and, having complied with all the terms and conditions of the franchise, its Articles of Incorporation and By-Laws, and having discharged, or caused to be discharged, its duties and obligations to its stockholders and bondholders, as required by its contract, it is under no further obligation or liability to any one in this action, and no judgment should be rendered against it.

Insofar as any liability of the defendant City, under the lease is concerned, that question was determined by the court when it held such lease to be invalid. Under the issues presented at this time for determination, the plaintiff is entitled to no money judgment against the City.

A judgment will be entered in accordance with the views herein expressed.

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456 (Entry for September 21, 1939, continued.)

and the Court pursuant to Rule 52 of the Rules of Civil Procedure, signs and files herein its special findings of fact and states its conclusions of law thereon, which said special findings of fact and conclusions of law are ordered by the Court filed and made a part of the record in this cause, all of which is now done.

Filed Sept. 21, 1939. 457 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—1844) * *

SPECIAL FINDINGS OF FACT.

458 * * * * *

Pursuant to Rule 52 of the Rules of Federal Procedure, the court now states its Special Findings of Fact upon the issues presented for determination, as follows:

1.

That The Chase National Bank is a corporation established and existing under and by virtue of the banking laws of the United States with its principal place of business located in the City of New York in the State of New York and is engaged in and authorized to engage in a general banking and trust business. It is a resident and citizen of the State of New York, and is the sole trustee under a mortgage executed by the defendant, The Indianapolis Gas Company, on October 1, 1902 and, as such trustee, is the plaintiff in this action.

2.

That each of the defendants, The Indianapolis Gas Company and Citizens Gas Company of Indianapolis, is a corporation duly created and existing under the laws of the State of Indiana with its principal place of business in the City of Indianapolis, State of Indiana, and is a citizen and resident of the State of Indiana.

3.

That the City of Indianapolis is a municipal corporation existing under and by virtue of the laws of the State of Indiana and is located in the Southern United States Judicial District, Indianapolis Division.

4.

That defendants, Thomas D. Sheerin, A. Dailas Hitz, Edward W. Harris and Charles Rauh, are members of the Board of Trustees for Utilities of the City, and each of

them is a citizen and resident of the City and of the State of Indiana.

5.

That defendants, Henry L. Dithmer, Brodehurst Elsey, Roy Sahm, Donald J. Angus, Isaac E. Woodard,
459 LeRoy J. Keach, and John E. Ohleyer are members of the Board of Directors for Utilities of the City, and each of them is a citizen and resident of the City and of the State of Indiana.

6.

That the amount in controversy in this cause, exclusive of interest and costs, exceeds the sum or value of $3,000.00.

7.

That The Indianapolis Gas Company was incorporated under the general laws of Indiana prior to November 28, 1913, had for many years been engaged in operating a gas manufacturing plant and distributing system in the City of Indianapolis and in selling gas to the inhabitants thereof; that it continued the operation of said gas plant and system until November 28, 1913, when the same was delivered to Citizens Gas Company in accordance with the provisions of a ninety-nine year lease dated September 30, 1913, hereinafter referred to as "the lease."

8.

That on October 1, 1902, The Indianapolis Gas Company executed its mortgage deed of trust of which The Chase National Bank is successor and sole trustee; that a correct copy of said mortgage marked Exhibit A is attached to the bill of complaint in this cause and is by reference made a part of these findings; that said mortgage was given to secure the payment of principal and interest on bonds which were authorized to be issued in the total principal amount of $7,500,000; that said mortgage was duly recorded; that the bonds issued under such mortgage were in the denomination of $1,000 each, payable on October 1, 1952; that the mortgage covers the entire operating property of The Indianapolis Gas Company and contains provisions to secure the payment of such bonds and the ordinary covenants of a large corporate trust deed; and that

the mortgage contains an after-acquired property clause and in addition to covering the physical property covers the rents, issues, income, tolls, and profits arising therefrom.

Subdivision 14 of the mortgage contains the following provisions:

* * * * * *

"(Here follows the fifth grammatical paragraph of subdivision XIV of the Mortgage (Exhibit A to the bill of complaint, I R. 46, lines 13-36))."

(Inserted pursuant to stipulation filed November 22, 1939.)

460 That, pursuant to the provisions of Subdivision 14, supra, this action was begun by the Trustee, at the request of The Massachusetts Mutual Life Insurance Company and the New England Mutual Life Insurance Company, holders and owners of bonds in the principal amount of $265,000.00 and $150,000.00 respectively.

9.

That there are now issued and outstanding in the hands of the public, and were at the time of the commencement of this action, bonds of The Indianapolis Gas Company secured by the mortgage referred to in Findings of Fact No. 8 in the aggregate principal amount of $6,881,000 (which includes $120,000 and $18,000 principal amounts, respectively, of such bonds held by The Indianapolis Gas Company and the City); that each of said bonds and the coupons attached thereto are in the form set forth in the mortgage, a copy of which, marked Exhibit "A," is attached to the bill of complaint in this case and incorporated into these Findings by reference.

10.

That The Massachusetts Mutual Life Insurance Company, New England Mutual Life Insurance Company and Savings Bank of Baltimore are the owners and holders of the following amounts, respectively, of the bonds, referred to in Findings of Fact No. 9, together with all interest coupons due on October 1, 1936, and thereafter attached thereto, viz.: $265,000, $150,000 and $163,000.

11.

That The Massachusetts Mutual Life Insurance Company purchased its bonds between March 13, 1925, and May, 1931 New England Mutual Life Insurance Company purchased its bonds between July 14, 1916, and August, 1931; Savings Bank of Baltimore purchased its bonds during the years 1924, 1925, 1927 and 1928.

12.

That there is no evidence in this case that Massachusetts Mutual Life Insurance Company, New England Mutual Life Insurance Company, Savings Bank of Baltimore, or any other owner or holder of the bonds referred to in Findings of Fact No. 9 other than defendant City purchased any of their bonds at any time subsequent to August, 1931, except those purchased by Citizens Gas Company in 1932;
that there is no evidence in this case that any present
461 owner of such bonds purchased his or its bonds relying
on any acts done or representations made by Citizens Gas Company or the City or any of their authorized officers or agents.

13.

That the last coupons attached to the bonds referred to in Findings of Fact No. 9 which have been paid were those falling due April 1, 1936; that when that interest was paid coupons were presented for payment by and payment was made to more than 940 individual and 210 corporate bondholders.

14.

That Citizens Gas Company of Indianapolis was organized on the 23d day of May, 1906, under the general laws of the State of Indiana, providing for the incorporation of manufacturing and mining companies, its purposes and obligations being fixed and controlled entirely by its Original and Amended Articles of Incorporation, as amended, its By-Laws, and the certain franchise ordinance and contract granted and entered into on the 25th day of August, 1905, by and between the City of Indianapolis, acting by and through its Common Council, and Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt. Copies of said instruments and enactment as contained in the stip-

ulation of the parties offered in evidence as Plaintiffs' Exhibit One, are adopted by the court as part of these Findings of Fact.

15.

That, by virtue of such instruments and enactment, the Citizens Gas Company became the initial trustee of a public charitable trust for the benefit of the present and prospective gas consumers of the City of Indianapolis, and all of the rights, property and assets then or thereafter acquired by it were held by it as such initial trustee, and for the purposes and upon the terms and conditions set forth in said instruments and enactment, and no other.

16.

That the sole purpose and object of the creation, organization and existence of the Citizens Gas Company was to act and perform the duties of initial trustee of the said public charitable trust, as specifically set forth in the said instruments and enactment, and it had no power or authority, as a corporation, to act otherwise.

17.

That, as a result of such franchise, contract and other relevant trust instruments a public charitable trust was created; that the settlors, beneficiaries, trustees and trust res were as follows:

(a) The settlors were the public spirited citizens of Indianapolis who subscribed for stock of Citizens Gas Company;

(b) The beneficiaries of the trust were the then and future gas users of Indianapolis;

462 (c) The initial trustee was Citizens Gas Company with a definitely fixed and limited term of trusteeship, viz.: 25 years and as soon thereafter as the property of the trust could be conveyed to the successor trustee;

(d) The City was the successor and is the present trustee;

(e) The trust res was the property and plant of Citizens Gas Company, being the property formerly owned by the Consumers Gas Trust Company.

18.

That the franchise contract creating the public charitable trust referred to in the last preceding Finding requires the individual grantees to organize an Indiana corporation to which the franchise should be assigned and whose Articles of Incorporation should provide as follows:

(a) The capital stock to be not less than $1,000,000 to be divided into shares of $25 each;

(b) No increase of capital stock shall be made unless the new stock shall be sold at public auction;

(c) The Company shall make and publish a semi-annual public statement of its affairs and the City Controller shall have the right to examine its books and the City Engineer its plant and property;

(d) The entire capital stock shall be placed in the hands of five trustees, one of whom shall be nominated by the Mayor and the capital stock shall be voted as a unit in the selection of directors. Any vacancy occurring on the Board shall be filled by the remaining directors except if a vacancy is created in the case of the member of the Board appointed by the Mayor it shall be filled by him;

(e) The voting trustees shall issue to each subscriber to the capital stock a beneficial certificate which shall entitle him to receive dividends at a rate not exceeding ten per cent per annum;

(f) The earnings of the Company shall be used in the following order:

First. To the payment of maturing debts and operating expenses;

Second. To the payment of dividends at the rate of ten per cent per annum; and

Third. In providing for extensions and betterments ordered by the Board of Public Works.

Fourth. The excess to the payment in whole or part of the amounts subscribed for stock.

(g) The franchise provides

* * * * * *

"(Here follows paragraph 1(g) of the Franchise Contract of August 25, 1905 (part of Exhibit C to the bill of complaint, I R. 84, lines 13-26))."

(Inserted pursuant to stipulation filed November 22, 1939.)

463 (h) The business and prudential affairs are to be managed by a Board of nine Directors elected annually.

(i) Subdivision 2 of the franchise reads as follows:

• • • • • •

"(Here follows paragraph 1(i) of the Franchise Contract (part of Exhibit C to the bill, I R. 84-85))."
(Inserted pursuant to stipulation filed November 22, 1939.)

(j) The company to be organized shall secure, acquire or construct and put in operation a fuel gas plant with not less than 100 miles of mains within eighteen months from the sale of the Consumers Gas Trust Company mains then pending and failing therein shall forfeit all rights hereunder, provided that the Board of Public Works may at any time after the sale of the Consumers Gas Trust Company mains require the individual grantees or their assigns to file a bond in the penalty of $25,000 conditioned for the performance of the contract and the acquisition or construction of such fuel gas plant;

(k) The grantees and their assigns are to hold the city harmless from any damages occasioned by the construction of mains and there are elaborate provisions covering the doing of work in the streets, the supervision of that work, the construction of mains and the quality of gas to be furnished;

464 (l) The grantees agreed never to charge the consumer in excess of sixty cents per 1,000 cubic feet of gas and it is provided that if the price exceeds sixty cents the franchise becomes void and the city shall have the right to acquire said plant as upon the termination of the franchise period;

(m) There are also elaborate provisions for extensions of gas lines upon order of the Board of Public Works, the installation of meters, the testing of meters, etc.;

(n) Subdivisions 21, 22, 23 and 24 of the franchise read as follows:

• • • • • •

"(Here follow subdivisions 21, 22, 23 and 24 of the Franchise Contract (part of Exhibit C to the bill, I R. 93-94))."
(Inserted pursuant to stipulation filed November 22, 1939.)

465 19.

That the Articles of Incorporation adopted by Citizens Gas Company contain the essential provisions required by the Franchise Contract. Subdivision 7 of such Articles reads as follows:

"Any member of the Board of Trustees may be removed

by the Marion Circuit Court upon the showing that said trustee is an employee or holder of any of the securities or capital stock of or delivering gas to consumer residing in, or in the vicinity of the city of Indianapolis, or for any corrupt practice or any misconduct which said court may deem detrimental to the interests of said company. Removal from the city of Indianapolis shall, ipso facto, vacate the office of any trustee."

20.

That there are no provisions in the franchise contract, the Articles of Incorporation of Citizens Gas Company, except as amended in 1921, or its by-laws authorizing the issuance of preferred stock or the execution of any mortgage, except that a mortgage shall be executed at the time of the transfer of the property to the City, if necessary, to pay the obligations and stock of such company. There is no provision in any of the trust instruments authorizing Citizens Gas Company to become the Lessee of a competing gas property.

21.

That, prior to September 30, 1913, and at all times subsequent thereto, all persons, including the plaintiffs herein, the defendant, The Indianapolis Gas Company, and all of the holders of the bonds of the said defendant, either had actual knowledge of, or were bound in law by knowledge of, all of the terms and provisions of the said instruments and enactment and of the purposes, objects, power and authority of Citizens Gas Company, as aforesaid, including the duty, power and authority of Citizens Gas Company, at the end of the period of said franchise ordinance, to-wit, on August 30, 1930, when the conditions fixed therein precedent to the conveyance and transfer had been fully complied with, to convey and transfer all of the said property to the City of Indianapolis, and thereafter to be wound up.

22.

That, on September 30, 1913, The Indianapolis Gas Company executed and delivered to Citizens Gas Company a certain written instrument of lease (hereafter called "Lease"); that a correct copy of said lease marked Exhibit "B" is attached to the bill of complaint in this case

and is by reference made a part of these Findings; that all the property leased by The Indianapolis Gas Company to Citizens Gas Company was covered by and included in the mortgage referred to in Findings of Fact No. 8, and that the trust res did not include any part of the property of The Indianapolis Gas Company or any lease on any part of such property.

23.

That the lease contains, among other things, the following provisions:

466 (a) The entire operating plant of The Indianapolis Gas Company is leased to Citizens Gas Company for a period of 99 years from the 1st day of October, 1913.

Subdivision 32 of the lease contains the following provision affecting the term:

"In event it should be determined by a court of final jurisdiction that the contract is ultra vires or void because of the length of the term created, and that such term is in excess of the authority of either party hereto to contract, then this lease shall nevertheless be binding upon the parties hereto for the longest term for which the parties hereto might lawfully contract."

(b) Subdivision 1 of the lease reads, in part, as follows:

* * * * * *

"(Here follows all of the first paragraph of subdivision 1 of the Lease except the last sentence thereof (Exhibit B to the bill of complaint, I R. 55-56))."

(Inserted pursuant to stipulation filed November 22, 1939.)

(c) The right is given to the Lessee to sell worn or damaged property and to procure a release of such property from the lien of Indianapolis Gas mortgage;

(d) The rent provided for in the lease is the payment of $120,000 a year, which amounts to six per cent dividends on the outstanding stock of Citizens Gas and, in addition, five per cent interest on all outstanding bonds.

When the lease was executed there were outstanding $4,833,000 of bonds and at the present time there are outstanding $6,881,000.

It is further provided that when the maximum price of gas to general consumers shall be fixed at a sum more than forty-five and not more than fifty cents per 1,000 cubic feet the rent shall be increased $10,000 a year, and when such price of gas shall be fixed at a sum not more than forty-

five cents the increased annual rental shall be $15,000 instead of $10,000.

(e) Provision is made for the issuance of addi-
467 tional bonds to reimburse Lessee for expenditures made in betterments and extensions to the leased plant which can be drawn down by the Lessee to the extent of eighty-five (85%) per cent of sums so expended.

(f) The Lessee agrees to refund the mortgage debt during the entire period of the lease and if the bonds are sold at a discount to pay the Lessor the difference in cash and if sold at a premium to retain such premium.

(g) An inventory was made of the personal property and at the termination of the lease Lessee agrees to deliver to the Lessor usable merchandise of life value or to pay the Lessor in money the difference between the value of the property returned and the total value of the inventory.

(h) It is agreed that Lessee will do everything necessary to preserve its right to do business in the city. There then appears the following provision:

"That it will so far as the same may be necessary to that end, secure new franchises from time to time from the city of Indianapolis or other public authorities having power to grant such franchises to do business in the city of Indianapolis. That at or before the termination of the corporate life of the lessee, the lessee will so far as it is legally able so to do, either extend its corporate life or cause a new corporation to be formed to which it will transfer all its then property and assets and cause said new company expressly to assume all the obligations of this lease. And the like duty shall be assumed by all successive companies acquiring said property as such successors in title. All of which agreements however are expressly subject to the rights now held by the city of Indianapolis under the terms of the franchise granted to the lessee by said city."

(i) In addition to the agreed rental Lessee agrees to pay all taxes, general and special, ordinary and extraordinary, of every nature and description, not only upon the property but upon the rent reserved so far as such income constitutes the basis for an income tax.

(j) The provisions in respect of maintenance are as follows:

* * * * * *

"(Here follows the first grammatical paragraph of subdivision 15 of the Lease (Exhibit B to the bill, I R. 64))." (Inserted pursuant to stipulation filed November 22, 1939.)

468 (k) The right of the Lessor to surrender its existing franchise and accept an indeterminate permit is not to be abridged by the execution of the lease.

(l) Lessee also covenants to insure the leased property but may provide protection against loss by fire by the establishment of an insurance fund.

(m) Lessee agrees to operate the plant leased and to perform all grants to Lessor or contracts by it with the state or any municipal subdivision.

(n) Subdivision 22 of the lease reads as follows:

• • • • • •

"(Here follows subdivision 22 of the Lease (Exhibit B to the bill, I R. 72))."

(Inserted pursuant to stipulation filed November 22, 1939.)

(o) Upon approval of the lease by the Public Service Commission, Indianapolis Gas shall file a declaration of a surrender of its franchise and state therein that it desires to receive in lieu thereof by operation of law an indeterminate permit.

(p) That in valuations for rate-making purposes only property actually used and useful shall be included in the rate base and unnecessary duplications of plant shall not be included.

(q) The power to regulate rates remains in the Public Service Commission and while this lease is in force Citizens Gas Company will permit regulation by the Commission.

(r) Lessee binds itself to extend the mains of the
469 combined plants to the extent of at least three miles in any one year. In addition to these minimum requirements Lessee agrees to comply with any orders for extensions made by competent authority.

(s) A schedule of rates is set forth in the lease.

(t) There is a provision for arbitration of disputes.

24.

That on September 30, 1913, the property of The Indianapolis Gas Company included a plant for making and distributing gas to consumers in the City, and approximately 375 miles of mains located in the streets and alleys of the City, which mains were connected with meters of more than 41,000 customers who were served thereby. Citizens Gas Company at that time owned and operated

approximately 184 miles of mains and had 11,165 meters in use.

25.

That the City is not named as a party to such lease.

26.

That no ordinance or resolution was ever at any time adopted by the Common Council or the Board of Public Works of the City authorizing the execution of the lease or ratifying it, or agreeing to be bound by its terms.

27.

That no action has ever been taken at any time by the Boards of Trustees or Directors of the Department of Utilities of the City authorizing the acceptance of an assignment of said lease, ratifying the lease or agreeing to be bound by its terms.

28.

That the City took over the property of Citizens Gas Company on September 9, 1935, as successor trustee; that several days prior to said date the City advised Citizens Gas Company that it would decline to accept an assignment of the lease; that the written assignment of the lease was on said date delivered physically by a representative of Citizens Gas Company to a representative of the Defendant City and such assignment was placed of record by such representative of the City in the Recorder's office of Marion County, Indiana, along with the other three instruments of conveyance at that time physically delivered by said representative of Citizens Gas Company to said representative of the City of Indianapolis; that at the same time the City, through the Board of Directors for Utilities, adopted resolutions declining to accept an assignment of the lease, caused these resolutions to be recorded in the Recorder's office of Marion County, Indiana, and a duly certified copy of them to be served on Citizens Gas Company and Indianapolis Gas Company.

29.

That the Citizens Gas Company operated under the terms of the franchise contract referred to in Find-
470 ings of Fact No. 18 and the amendments thereto from the date of the assignment thereof by the individuals to whom the franchise had originally been granted until August 27, 1921, at which time, pursuant to the terms of an Indiana statute authorizing it to do so, it filed with the Public Service Commission of Indiana its declaration of surrender of said franchise and accepted an indeterminate permit with the result that from August 27, 1921, until September 9, 1935, Citizens Gas Company operated as a public utility under such indeterminate permit.

30.

That, prior to September 9, 1935, all of the conditions fixed in the said instruments and enactment as precedent to the duty and authority of Citizens Gas Company to convey and transfer the said property had been fully and completely performed so that on said date nothing further remained to be performed or done by the City of Indianapolis to entitle it in law to have all of said property conveyed and transferred to it as aforesaid. On said date, Citizens Gas Company, by its proper corporate officers, executed and delivered instruments of conveyance and transfer of all of the said property to the City of Indianapolis, in the manner and form, and in strict compliance with its duty and authority so to do, as aforesaid.

31.

(Stricken out by consent of Citizens Gas Company before signing, 9/21/39. R. C. B.)

32.

That, on September 9, 1935, Citizens Gas Company transferred its gas producing and distributing plant and system to the City and since that time the City, as trustee of the Public Charitable Trust created in 1905 and 1906, has operated said gas producing and distributing plant and system. Since September 9, 1935, Citizens Gas

Company has not been engaged in any business of any nature whatsoever, and it has no property at this time.

33.

That Citizens Gas Company, its Board of Directors, Voting Trustees and Officers, in making the conveyance, transfer and assignment of all of its property to the City of Indianapolis, fully and completely performed and exhausted all of the duties, powers and authority of Citizens Gas Company as initial trustee of the said public charitable trust. Neither it, nor its Board of Directors, Voting Trustees or any of its officers, from and after September 9, 1935, has any further duties, powers or authority as initial trustee of the said public charitable trust, or to hold, own, lease, manage or operate any property or business of any nature whatsoever.

34.

That, prior to the 26th day of February, 1913, the Trustees and Directors of Citizens Gas Company suggested that one Volney T. Malott and a group of Indianap-
471 olis businessmen purchase the capital stock of The Indianapolis Gas Company or an amount in excess of three-fourths thereof, thereby making possible a merger of the systems of the two companies under the unified control and operation of Citizens Gas Company; and the purchase of the capital stock of The Indianapolis Gas Company was made by said Indianapolis syndicate pursuant to said suggestion; that prior to such purchase of such stock, it was understood by those promoting the transaction that a lease would be entered into by and between the two gas companies, similar to the one in question.

35.

That, on or about May 21, 1913, The Indianapolis Gas Company, Lessor, and Citizens Gas Company, Lessee, jointly submitted a tentative form of lease to Public Service Commission of the State of Indiana and jointly petitioned said Commission to adopt and approve the terms and conditions set forth in said form of lease and to authorize them to enter into and execute the same. A correct copy of the finding and order of said Commission with re-

spect to said lease is attached to the bill of complaint in this cause marked Exhibit D and is by reference made a part of these Findings.

36.

That it appears in the finding and order of the Public Service Commission last referred to that Joseph B. Kealing, Corporation Counsel of the City, appeared, after being served with notice so to do, for the City in said proceeding, but there is no evidence in this case that the Corporation Counsel for the City had any power or authority to bind the City in respect of said lease or the approval of the lease by said Commission.

37.

That Newton Todd, a beneficial certificate holder of Citizens Gas Company, commenced an action in the United States District Court for the Southern District of Indiana on April 30, 1929, against the Citizens Gas Company, the individuals who were voting trustees of its common stock, the City, the Mayor, Clerk and Members of the Board of Public Works of the City; that neither The Indianapolis Gas Company, The Chase National Bank, as Trustee, etc., nor any predecessor trustee, nor any bondholder of The Indianapolis Gas Company was a party defendant, or an intervenor in said cause; and that no pleading was filed in the Todd case asserting either the validity or invalidity of the lease.

The issues tendered by the bill in the Todd case were:

(a) That the original agreement between the City and Citizens Gas contained in the franchise contract of 1905 was abrogated and annulled when Citizens Gas Company surrendered the franchise and accepted an indeterminate permit.

(b) That the surrender of the franchise and the acceptance of an indeterminate permit created a new contract between the State and Citizens Gas Company, one of the terms of which was that the City should have the
472 right to acquire the property of Citizens Gas Company at a value to be determined by the Public Service Commission.

(c) That an Act of the Indiana General Assembly of 1929 purporting to legalize all of the provisions of the Articles of Incorporation of Citizens Gas Company and

particularly those in respect of the mode of acquiring the plant and property of Citizens Gas Company by the City, resulted in an impairment of the obligations of the contract above referred to in violation of the Constitutions of Indiana and of the United States.

(d) That the franchise contract of 1905 merely gave an option to the City to purchase the property of the Citizens Gas Company and this resulted in a violation of the rule against perpetuities.

The issues involved in the present case are wholly different from those involved in the Todd case. The question of the validity and enforceability against the City of the lease was neither involved nor determined in the Todd case and could not have been determined under the issues presented to this court in that case.

The Todd case was finally disposed of on May 18, 1931, when the Supreme Court of the United States denied Todd's application for a writ of certiorari and no controversy had ever arisen or existed in connection with the validity or invalidity of the lease prior to July, 1935. Until the transfer of the trust res by Citizens Gas Company to the City, all payments provided for by the terms of said lease had been made as required therein and there had been no breach or threatened breach by Citizens Gas Company of its covenants under said lease, under the issues presented at this time for determination.

38.

That The Indianapolis Gas Company and Citizens Gas Company filed with the Public Service Commission of Indiana a joint petition asking for the approval of the lease; that Frank S. Fishback, a citizen of Indianapolis and a stockholder in the Citizens Gas Company, intervened, raised certain objections to the approval of the lease and after the Commission had entered an order approving the same filed a petition for a rehearing which was overruled; that a correct copy of such joint petition, the intervening petition of Fishback and his petition for rehearing are found in Plaintiffs' Exhibit 13.

That neither The Chase National Bank, as Trustee, etc., nor any predecessor trustee of The Indianapolis Gas Company, nor any bondholder of The Indianapolis Gas Company was a party to said proceedings.

That when the Public Service Commission of Indiana

approved the execution of the lease no claim had been asserted that the franchise contract of 1905 and other related papers resulted in the creation of a public charitable trust and at the time the Commission's approval was given to the lease it was 17 years before the date when a transfer of the trust property was required to be made to the City. Fishback did not intervene or resist
the approval of the lease by the Public Service Com-
473 mission as the beneficiary of a public charitable trust.

A complete copy of the order of the Public Service Commission is attached to the complaint as Exhibit D and made a part hereof.

39.

That, on November 28, 1913, Fishback commenced an action in the Superior Court of Marion County, Indiana, against the Public Service Commission of Indiana, Citizens Gas Company, The Indianapolis Gas Company, and the City to vacate and set aside the order approving the execution of the lease.

Fishback sued as a stockholder of Citizens Gas Company and a resident freeholder of the City and not as a beneficiary of a public charitable trust.

Citizens Gas Company and the City were not made parties defendant as the initial and successor trustees of a public charitable trust, but were parties defendant in their individual capacity. There was no averment in the complaint filed by Fishback that a public charitable trust had been created by the franchise contract of 1905.

Fishback sought to set aside the Commission's order partly on the following grounds:

(a) That the rentals fixed in the lease were excessive and that their payment by the Citizens Gas Company would result in a waste and misapplication of its funds and its inability to pay dividends due its stockholders.

(b) That the Citizens Gas Company was without power to enter into the lease without the consent of the owners of three-fourths (¾) in amount of its capital stock, which consents had not been obtained.

(c) That the City had not given its consent to such lease, had not joined in the execution thereof, and had granted to Citizens Gas Company no right to operate the property of Indianapolis Gas Company.

(d) That the findings and order of the Public Service

Commission were not sustained by sufficient evidence and were contrary to law.

(e) That Citizens Gas Company had no power to enter into the agreement contained in the lease permitting the Public Service Commission to fix rates at which it should sell gas.

(f) That the obligation assumed by the Citizens Gas Company under the terms of said lease to pay interest on the bonds and dividends on the stock of The Indianapolis Gas Company impaired the obligation of the contract existing between the Citizens Gas Company and plaintiff and other stockholders of that company in that it prevented it from executing a mortgage at the end of the franchise term in order to pay the stockholders of that company the par value of their stock and accumulated dividends thereon.

(g) That the lease, as executed, would prevent the fulfillment of the contract between the City and Citizens Gas Company and would prevent the City from taking over the gas system.

(h) That the City had not given its consent to such lease.

474 Prior to the entry of final judgment in the Fishback case, Fishback dismissed the City as a party defendant and the following order book entry was made in connection with such dismissal:

"Come now the parties and the plaintiff now dismisses the action, as against the defendant City of Indianapolis, upon which dismissal the court now enters judgment for costs against the plaintiff."

Fishback elected to stand upon his complaint and to abide the ruling of the court upon demurrers which had been sustained to each paragraph of said complaint and judgment was rendered against him.

The City was not a party to the final judgment rendered in the cause.

Neither The Chase National Bank, Trustee, etc., nor any other trustee under The Indianapolis Gas Company mortgage nor any bondholder was a party plaintiff, defendant or intervenor in the Fishback case.

Fishback prayed an appeal from the decree of the Marion Superior Court to the Supreme Court of Indiana, which dismissed the appeal because it was not perfected in time.

The first Indiana Declaratory Judgment Act became effective on May 16, 1927. At the date of the final dispo-

sition of the Fishback case there was neither an existing controversy nor the ripening seeds of such controversy between The Indianapolis Gas Company, the trustees of its mortgage or its bondholders and the City as to the enforceability of the lease against the City or the trust property.

Up to the date when Fishback dismissed his cause against the City no issue had been presented between the City and The Indianapolis Gas Company as to the validity of the lease.

There was neither in issue nor decided by the Court in the Fishback case any question as to the validity or enforceability against the City of the lease.

The Fishback case was tried and decided on the theory that whether the lease was valid for its entire term or not the action of the Public Service Commission of Indiana in approving the same could not be vacated or set aside.

Since the determination of the Fishback case new facts have occurred which alter the legal rights and relations of the parties thereto, viz.: the transfer of the trust res to the City as successor trustee on September 9, 1935.

After the city had been dismissed as a party defendant in said cause it was not again made a party thereto.

That during the pendency of the Fishback case, certain extensions of the mains of The Indianapolis Gas Company property were made in accordance with the provisions contained in Section 27½ of the lease.

475 40.

That, on March 12, 1930, Allen G. Williams as a resident and taxpayer of the City on behalf of himself and all others similarly situated commenced an action in which Citizens Gas Company, its voting trustees and directors, The Indianapolis Gas Company, the City of Indianapolis, the then trustees under The Indianapolis Gas Company mortgage, the Mayor, City Clerk, Board of Public Works, Boards of Trustees and Directors for the Department of Utilities of the City and the Public Service Commission of Indiana were defendants. The complaint alleged, in part, that the lease was invalid, that the order of the Public Service Commission approving the lease was unlawful because the Act creating such Commission was unconstitutional, that the lease was burdensome upon the trust and that it was ultra vires said

Citizens Gas Company, etc. A demurrer to plaintiffs' complaint was filed by the Public Service Commission, another by The Indianapolis Gas Company and its mortgage trustees and a third by the remaining defendants. The demurrers so filed were sustained, judgment was rendered against Williams and the case was appealed to the Supreme Court of Indiana and affirmed.

Neither a controversy nor the ripening seed of such a controversy existed at any time prior to the date of the final disposition of the Williams case between the City and The Indianapolis Gas Company or its mortgage trustees or bondholders as to the enforceability against the City of the lease. The transfer of the trust res from Citizens Gas Company to the City as successor trustee was not made until long after the final disposition of the Williams case.

In the Williams case plaintiff attempted to procure a determination of the invalidity of the lease on the ground that execution of the lease violated the Constitutions of the United States and the State of Indiana and had been obtained as the result of conspiracy. None of the questions involved in this case were actually litigated in the Williams case nor could such questions have been litigated under the issues in that case.

No issue was made between The Indianapolis Gas Company, its mortgage trustees or its bondholders and the City or the Board of Trustees and Directors of the Department of Utilities in connection with the enforceability of said lease against the City, although the City had pointed out in a joint motion filed by it and Citizens Gas Company to strike out parts of plaintiffs' complaint that the validity of the public charitable trust was in no wise affected by the validity of such lease.

It was stated in said motion:

"If the lease is valid the leasehold interest created thereby constitutes a part of the public charitable trust and is subject to be administered in the same way as the property owned by the Citizens Gas Company in its own right. If for any reason the lease is invalid it will fall outside the scope of the trust."

41.

That, at the date of the execution and delivery of the lease $4,833,000 total face amount of Indianapolis
476 Gas Bonds were outstanding. Between June 22,

1914, and February 11, 1932, upon the request of The Indianapolis Gas Company, the mortgage trustees authenticated and delivered to The Indianapolis Gas Company additional bonds in the total principal amount of $2,048,000. Pursuant to the provisions of the lease, The Indianapolis Gas Company, in turn, delivered $1,971,000 principal amount of said additional bonds to Citizens Gas Company for the purpose of reimbursing Citizens Gas Company for eighty-five per cent (85%) of its capital expenditures on account of extensions and betterments to the plant and system of The Indianapolis Gas Company made and paid for by Citizens Gas Company. As a result of such expenditures for extensions and betterments and the reimbursement by issuance of bonds, Citizens Gas Company has expended for additions and betterments to the plant of The Indianapolis Gas Company approximately $200,000 for which it has received no reimbursement. All additions and betterments to the plant of The Indianapolis Gas Company for which bonds were issued were made with its consent and under the terms of said lease said additions and betterments became and are the property of The Indianapolis Gas Company. All of said bonds in the principal amount of $1,971,000 were sold by Citizens Gas Company except bonds in the principal amount of $18,000 which were retained by it. The proceeds of the bonds sold by Citizens Gas Company were received and used by it. It was many years after the execution of the lease before plaintiff in this action received a copy of the same.

There is no proof that any predecessor trustee of The Chase National Bank which certified bonds either knew of the existence of the lease or relied upon it as a basis for a certification of any The Indianapolis Gas Company bonds.

42.

That the Citizens Gas Company operated the plant and property of The Indianapolis Gas Company under said lease from November [illegible].3, until September 9, 1935. From October 2, 1913, until September 9, 1935, Citizens Gas Company from time to time duly paid the interest on the outstanding Indianapolis Gas Company bonds by making payment thereof to the holders of the bonds either at the office of the trustee or directly to such holders. During that period Citizens Gas Company paid all the rentals payable in cash under the terms of the

lease and also paid all the taxes required to be paid by the Lessee under the terms of the lease; that the total payments so made by Citizens Gas Company are shown in Exhibit 20 attached to the Stipulation in this case, which exhibit, by reference, is made a part of and incorporated into these Findings.

That for the five (5) year period immediately preceding September 9, 1935, the aggregate payments made by Citizens Gas Company on account of the lease were approximately $600,000 annually.

43.

That from the period of its organization in 1906 to June 30, 1935, Citizens Gas Company paid dividends
477 to the holders of its common stock at the rate of ten per cent per annum; and that on September 9, 1935, when Citizens Gas Company conveyed, transferred and assigned its property to the City it turned over a sum of approximately $411,000 in cash or current funds to the City.

44.

That between the years 1914 and 1935, in the sale of bonds of The Indianapolis Gas Company, certain representations with reference to the lease were made by the brokers having such bonds for sale, but the evidence fails to show that any present owner of any such bonds knew of, relied upon, or was in any manner influenced by such representations.

45.

That, on March 20, 1929, the City, through its Board of Public Works, adopted a resolution, a correct copy of which marked Exhibit 22 is attached to the Stipulation in this case and is by reference made a part of these Findings; that on April 3, 1929, the Directors of Citizens Gas Company unanimously adopted two resolutions, copies of which, marked Exhibits 23 and 24, are attached to the Stipulation in this case and by reference made a part of this Finding; that on April 5, 1929, the Board of Trustees of the Citizens Gas Company unanimously adopted a resolution approving resolutions adopted by the Board of Directors of Citizens Gas Company; and that the resolutions referred to above in this subdivision of this stipu-

lation contain demands by the City upon Citizens Gas Company that in accordance with the provisions of the franchise contract "the plants, property and assets of said Company be conveyed to said City of Indianapolis" and a recognition by Citizens Gas Company that it was obligated to make such conveyance.

46.

That, in pursuance of a resolution adopted on May 7, 1935, by the Board of Directors for Utilities of the City, a public offering of $8,000,000 of Indianapolis Gas Plant Revenue Bonds was made on May 28, 1935; that a copy of said Resolution, adopted May 7, 1935, is identified as Exhibit 47 to the Stipulation in this case and is by reference incorporated into these Findings; that a correct copy of the notice by the City Controller of the City pursuant to said resolution marked Exhibit A is attached to the answer and counterclaim of the City in this case and is by reference made a part of this Finding; that Resolutions similar to that of May 7th, 1935, were adopted by the Board of Directors for Utilities for the City on April 5th, April 10th and April 12th, 1935, and advertisements were published in pursuance of said resolutions on April 8th, April 12th, and April 18th, 1935, respectively; that said resolutions were substantially identical with Exhibit 47 to said Stipulation; that said advertisements were substantially identical with Exhibit A to the answer and counterclaim of the City; and that no bid resulting from said advertisements of April 8th, April 12th and April 18th, 1935, was acceptable to the City.

478 Later, viz. on May 29, 1935, a joint bid of Halsey Stuart & Company, of Chicago, Illinois, and Otis & Company, of Cleveland, Ohio, for said revenue bonds was accepted by the City. The proceeds of the sale of said Revenue Bonds were received by the City June 27, 1935.

47.

That the purchasers of said revenue bonds issued an advertising circular, a correct copy of which marked Exhibit B is attached to the answer and counter-claim of the City and is by reference made a part of this Finding.

Before the issuance of said advertising circular Halsey, Stuart & Company and Otis & Company asked the City to

approve the circular which was to be issued by them and were advised by the City and its representatives that the only authority which the City had in connection with the sale of revenue bonds was to make a public offering and that the City had no authority to approve or become responsible for any representations made in connection with the resale of said revenue bonds by the purchasers thereof.

That the circular and newspaper advertising issued by the purchasers of said revenue bonds were issued solely on their own authority and without authorization by the City and that there is no evidence to show that any persons who purchased said Gas Plant Revenue Bonds of the City did so on the faith of any representation made by the City or its authorized agents.

Any representations made by the purchasers of such bonds were never ratified or approved by the City or any of its authorized representatives.

48.

That the City caused the sum of $2,500,000 to be paid on or about July 1, 1935, for the retirement of all of the Citizen Gas Company's common stock; that said $2,500,000 included $2,000,000 as the par value of said common stock and $500,000 as dividends thereon at the rate of ten per cent per annum from January 1, 1933, to June 30, 1935. The City also caused the sum of $1,050,000 to be paid on or about September 1, 1935, for the redemption of all of the Citizens Gas Company's preferred stock in full satisfaction of the preferred stockholders' interest in the property and assets of Citizens Gas Company; that said $1,050,000 included $1,000,000 as the par value of said preferred stock and $50,000 as the premium of five per cent on the redemption thereof required by the terms of said preferred stock. Citizens Gas Company paid all the dividends on said preferred stock up to the time of said redemption. All of said common stock was retired and all of said preferred stock was redeemed.

49.

That, on August 9, 1935, the Board of Directors for Utilities of the City adopted a resolution with respect to the payment of the mortgage bonds of the Citizens Gas Company dated July 1, 1912, a copy of which resolution

is attached to the Stipulation in this cause, marked 479 Exhibit 48 and by reference made a part of this Finding. In pursuance of said resolution the City on August 10, 1935, published a notice, a copy of which, marked Exhibit 49, is attached to the Stipulation in this cause and in September, 1935, published a notice, a copy of which, marked Exhibit 50, is attached to the Stipulation in this cause, both of which exhibits marked 49 and 50 are by reference made a part of this Finding. The principal amount of Citizens Gas Company bonds outstanding on August 12, 1935, was $2,745,000. All of said bonds have been paid and surrendered excepting bonds aggregating the principal amount of $32,000.

Before payment of said bonds had been made by the City it was advised by its counsel that said Citizens Gas Company mortgage had been executed in violation of the terms of said public charitable trust, but that the moneys which Citizens Gas Company had received from the sale of the mortgage bonds had been used in additions to and betterments of the trust res and that the holders of the bonds had an equitable lien on the property for their debt; that it was in pursuance of this advice that the City paid said mortgage bonds.

That in the payment of the common and preferred stock of Citizens Gas Company and the dividends thereon and the premiums on the retirement of the preferred stock the City proceeded in accordance with the decree of this court and the Circuit Court of Appeals in the Todd and Cotter cases, above referred to, and that it was required to make said payments before taking over the res of the public charitable trust hereinbefore described and that in so doing it did not recognize directly or by implication the validity or enforceability against the City of the lease.

50.

That prior to the transfer to the City of the plant and property of Citizens Gas on September 9, 1935, neither the City nor its Department of Utilities gave any notice to The Chase National Bank, Trustee, etc., or any formal notice to any holder of The Indianapolis Gas Company bonds that said transfer and conveyance was to be made, but The Indianapolis Gas Company was fully advised of said transfer and as early as July 23, 1935, was advised that the City would not accept an assignment of the lease; that wide publicity of the fact that said transfer was to

be made appeared in the newspapers, including the publicity incident to the sale of the revenue bonds.

51.

That in pursuance of agreements made between the City and The Indianapolis Gas Company, which agreements have been continuously in effect since September 9, 1935, the City has operated the gas producing and distributing plant and system of The Indianapolis Gas Company. Such agreements provided, among other things, in substance that such operation by the City should not prejudice the rights of either the City or The Indianapolis Gas Company, and further provided that the City by operating such plant did not recognize the validity of the lease and The Indianapolis Gas Company by consenting to such operation did not admit that the lease was invalid.

480 52.

That on March 2, 1936, the City and The Indianapolis Gas Company entered into a written agreement, a correct copy of which is attached to the complaint in this case, marked Exhibit H and is by reference made a part of these Findings; that said agreement has never been modified or supplemented in any respect.

That no settlement agreement as provided for in said contract of March 2, 1936, has ever been agreed upon between the City and The Indianapolis Gas Company.

53.

That The Indianapolis Gas Company did not pay any of the interest coupons due on October 1, 1936, April 1, 1937, October 1, 1937, April 1, 1938, October 1, 1938, and on April 1, 1939 on any of The Indianapolis Gas Company bonds and all of said interest coupons remain unpaid.

54.

That the City, pursuant to the terms of the agreement of March 2, 1936, has from time to time made deposits with the escrow agent, The Indiana National Bank of Indianapolis, which deposits on December 31, 1938, aggregated the sum of $1,217,875 which sum is now held by

said Bank, and said Bank has never at any time paid out any of the sums so deposited with it. All of the sums so deposited with said Bank have been derived from and are part of the proceeds of the City's operation of the property transferred, conveyed and assigned to it by Citizens Gas Company and the property of The Indianapolis Gas Company covered by the lease.

55

That the City also has paid pursuant to the terms of the agreement of March 2, 1936, the sum of approximately $171,000, being an amount equal to the interest due on The Indianapolis Gas Company bonds on March 30, 1936.

56.

That all payments made by the City of sums of money equal to the interest on the Indianapolis Gas Company bonds, dividends payable under the terms of the lease of September 30, 1913, or any of the moneys now in escrow at The Indiana National Bank of Indianapolis, would not have been made in the absence of the agreement of March 2, 1936, for the temporary use of the property of The Indianapolis Gas Company, and certain correspondence exchanged between The Indianapolis Gas Company and attorneys for the City in connection with the payments so made, in which contract of March 2, 1936, and correspondence it was agreed that neither the temporary operation of the property nor the payment of such monies by the City should in any way prejudice the City's rights or without such operation and payments or the execution of the agreements constituting an admission on the part of the City of the validity or binding effect upon the City of the lease.

481 The agreement of March 2, 1936, did not result in the default of interest payments due on the bonds because in the absence of such agreement the City would not have made payments of sums equal to the interest, and such agreement was not inimical to the interest of plaintiff or any of the bondholders whom it represents.

57.

That on March 11, 1936, and prior to the date when the City paid the money equal to the interest referred to in subdivision of this finding and before it had deposited any sums in escrow with The Indiana National Bank as escrow agent, the trustee and two of the principal bondholders of The Indianapolis Gas Company were advised of the making of such agreement and the terms thereof and they made no objection thereto but received and accepted the sum of $171,000 with full knowledge of the terms of said agreement.

58.

That on September 9, 1935, the Directors of Citizens Gas Company adopted a resolution, a copy of which, marked Exhibit 86, is attached to the Stipulation and is by reference made a part of this finding. On the same day, the Board of Trustees of Citizens Gas Company adopted a resolution, a copy of which, marked Exhibit 87, is attached to the stipulation in this case and by reference made a part of this finding.

Pursuant to the requirements contained in each of said resolutions, the City on September 9, 1935, executed and delivered to Citizens Gas Company an indemnifying agreement, a correct copy of which marked Exhibit J, is attached to the second amendment to the complaint in this cause and by reference made a part hereof.

59.

That prior to the commencement of this action neither plaintiff nor any of the bondholders of The Indianapolis Gas Company made any request or demand upon The Indianapolis Gas Company that it commence or prosecute an action in a court of competent jurisdiction to obtain a determination or declaration of the validity or invalidity of the lease.

60.

That the City has been a first class city within the meaning of the Indiana Statutes continuously since January 1, 1910. No other city of Indiana has been a first class city during any of said period. The City has had a population

exceeding 300,000 continuously since January 1, 1920, and no other city of Indiana has had such a population of 300,000 during any of such period.

61.

That as early as September 19, 1935, plaintiff was advised by its bondholders who had seen newspaper reports that the City was attempting to abrogate the lease, as shown by a letter of that date addressed to the President of The Indianapolis Gas Company by plaintiff.

482 62.

That neither the bondholders who requested the Trustee to bring this suit nor The Indianapolis Gas Company, nor any other person, firm or corporation, agreed to indemnify the Trustee for its costs, attorneys' fees or expenses in bringing this suit.

63.

That on September 28, 1935, the firm of which Newton D. Baker was the senior member, was employed by The Indianapolis Gas Company as special counsel in the controversy respecting the validity and enforceability against the City of the lease. That firm gave an opinion on the question of the validity and enforceability against the City of the lease in November, 1935. Mr. Baker's firm continued to represent The Indianapolis Gas Company until May 13, 1936.

64.

That on March 11th and April 10th, 1936, meetings were held at the office of The Chase National Bank in New York attended by representatives of that Bank, The Indianapolis Gas Company, and two of the principal bondholders of The Indianapolis Gas Company, The Massachusetts Mutual Life Insurance Company, and New England Mutual Life Insurance Company; that at these meetings it was arranged that the two insurance companies there represented would request the Trustee for the Bondholders to obtain an opinion from the law firm of Newton D. Baker, Esq., of Cleveland, Ohio, as to the validity of the lease and as to its enforceability against the City of

Indianapolis, and as to whether certain costs and expenses of litigation necessary to determine those questions would be a prior lien against the property of The Indianapolis Gas Company; that such a letter would be written, and if favorable reply received, employment would be tendered to that firm to institute the proceeding; that no member of Mr. Baker's firm attended either of these meetings, and there is no evidence to indicate that either Mr. Baker or any member of his firm had any prior knowledge of these conferences. The letters written by the two insurance companies above referred to are in evidence as Plaintiffs' Exhibits 125 and 126.

65.

That request was made by plaintiff of Mr. Baker's firm in accordance with the plan devised as set forth in Findings of Fact No. 64, but it was advised by his firm that it was then employed by The Indianapolis Gas Company, and that it could not accept employment for the Trustee unless released by such company. It was afterwards released, accepted employment by Trustee and began this action.

66.

That after Mr. Baker's firm had been released from its employment by The Indianapolis Gas Company, it consulted and advised with The Indianapolis Gas Company's attorneys residing in Indianapolis as to the preparation and form of the complaint, accepted suggestions made
483 by such attorneys in respect thereof and cooperated with them in the preparation and filing of the complaint.

67.

That after the complaint was filed Mr. Baker's firm representing plaintiff, and local attorneys for The Indianapolis Gas Company consulted and advised with each other both as to the facts and the law in the presentation and prosecution of the case, both plaintiff and defendant being interested in upholding the validity of the lease.

68.

That there was no collusion between The Indianapolis Gas Company and plaintiff or any other party to this cause in the bringing or prosecution of this action.

(Signed) Robert C. Baltzell,
Judge, United States District Court.

September 21, 1939.

Conclusions of Law.

Upon the above and foregoing Special Findings of Fact, the court now states its Conclusions of Law, as follows, towit:

1.

That plaintiff has such an interest in the lease as to give it authority to maintain this action; that there was no collusion between plaintiff and defendant, The Indianapolis Gas Company, prior to, at the time of, or since the commencement of this action; that there is a collision of interest between plaintiff and all defendants, including The Indianapolis Gas Company, and that this court has jurisdiction to try and determine this cause.

2.

That the order of the Public Service Commission approving the lease, and the judgments and decrees in the Fishback, Todd and Williams cases are not res adjudicata of the validity and binding effect of the lease upon either the Citizens Gas Company or the City of Indianapolis.

3.

That the City is not estopped by any of its conduct from denying the validity and enforceability against it of the lease.

4.

That the Citizens Gas Company is not estopped by any of its conduct from denying the validity and enforceability against it of the lease.

5.

That the lease is invalid and unenforceable against the City for each of the following reasons, among others:

(a) Citizens Gas Company, as initial trustee of a public charitable trust with a fixed date of expiration of its trusteeship had no power or authority to execute a lease for 82 years beyond the expiration of its term of trusteeship which would be binding upon or enforceable against its successor trustee, the City, a municipal corporation.

(b) The trust instruments conferred no specific power upon the initial trustee to execute such a lease as Lessee and properly construed precluded the initial trustee from executing such a lease.

6.

That the lease is not a valid or enforceable obligation against Citizens Gas Company, and said Company was entirely and completely released and discharged from all present and future obligation and liability under said lease, by the conveyance, transfer and assignment of all of its property and assets to the City on September 9, 1935.

7.

That the agreement of March 2, 1936, between the City and Indianapolis Gas Company was not inimical to the interests of plaintiff or the bondholders which it represents.

8.

That the plaintiff is entitled to judgment against the defendant, The Indianapolis Gas Company, in the sum of One Million Thirty-two Thousand One Hundred and Fifty Dollars ($1,032,150.00) with interest thereon at the rate of six per cent (6%) from and after the date of judgment.

9.

That the plaintiff should take nothing in this action as against the defendant, Citizens Gas Company, under the issues presented at this time for determination.

10.

That the plaintiff should take nothing in this action as against the defendant, City of Indianapolis, under the issues presented at this time for determination.

to each of which findings and conclusions, the plaintiff and the defendant, The Indianapolis Gas Company, each excepts.

(Signed) Robert C. Baltzell,
Judge, United States District Court.

September 21, 1939.

Entered Sept. 21, 1939.

485 (Entry for September 21, 1939, continued)

It Is Therefore Declared, Adjudged and Decreed by the Court:

1. That plaintiff has such interest in the lease dated September 30, 1913, from The Indianapolis Gas Company of Indianapolis, Indiana, to the Citizens Gas Company of Indianapolis, Indiana, as to give it authority to maintain this action; that there was no collusion between plaintiff and defendant, The Indianapolis Gas Company, prior to, at the time of, or since the commencement of this action; that there is a collision of interest between plaintiff and all defendants, including The Indianapolis Gas Company, and that the Court has jurisdiction to try and determine this cause.

2. That neither the order of the Public Service Commission of the State of Indiana approving the above described lease, nor the judgment in the cases of *Frank S. Fishback* v. *Public Service Commission of Indiana, et al.*, *Newton Todd* v. *Citizens Gas Company, et al.*, and *Allen G. Williams* v. *Citizens Gas Company, et al.*, nor either of them, are res adjudicata of the validity and binding effect of the above described lease upon the City of Indianapolis, Indiana, and the individual defendants, who are members of the Board of Trustees and Directors of the Department of Public Utilities of said City nor upon the defendant, Citizens Gas Company.

3. That the lease dated September 30, 1913, from The Indianapolis Gas Company, of Indianapolis, Indiana, to the Citizens Gas Company of Indianapolis, Indiana, is invalid and unenforceable against either (1) the defendant, City of Indianapolis; (2) the individual defendants, who
486 are members of the Board of Trustees or of the Board of Directors for Utilities of said City; (3) the prop-

erty formerly owned by the Citizens Gas Company of Indianapolis and now owned and operated by said City through its Department of Utilities; (4) The Indianapolis Gas Company; or (5) the Citizens Gas Company of Indianapolis.

4. That the agreement of March 2, 1936, between the City of Indianapolis and The Indianapolis Gas Company was not inimical to the interests of the plaintiff or the bondholders which it represents.

5. That the plaintiff recover of and from the defendant, The Indianapolis Gas Company, the sum of $1,032,150.00, together with interest thereon at the rate of 6% per annum from and after the date of this judgment.

6. That the plaintiff take nothing in this action as against the defendant, Citizens Gas Company, under the issues presented at this time for determination.

7. That the plaintiff take nothing in this action as against the City of Indianapolis and the individual defendants who are members of the Board of Trustees and Directors of the Department of Utilities of said City or against the property conveyed to said City by the Citizens Gas Company on September 9, 1935, under the issues presented at this time for determination.

To which judgment, the plaintiff and the defendant The Indianapolis Gas Company each excepts.

487 And afterwards towit at the May Term of said Court, on the 20th day of October, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit:

Comes now the plaintiff in the above entitled cause by its attorneys, and files notice of appeal to the Circuit Court of Appeals for the Seventh Circuit, which notice of appeal is as follows:

Filed Oct. 20, 1939.

488 IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Indiana,

Indianapolis Division.

The Chase National Bank of the City of New York, Trustee, *Plaintiff*,
vs.
Citizens Gas Company of Indianapolis, *et al.*, *Defendants*.
} In Equity Cause No. 1844.

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Notice is hereby given that The Chase National Bank of the City of New York, Trustee under the Mortgage Deed of Trust of The Indianapolis Gas Company dated October 1, 1902, plaintiff in the above entitled cause, hereby appeals to the Circuit Court of Appeals for the Seventh Circuit from the final judgment and decree entered in this action on September 21, 1939.

(signed) William L. Taylor,
(signed) Howard F. Burns,
(signed) John Adams,
Solicitors for Plaintiff-Appellant, The Chase National Bank of the City of New York, Trustee.

489 (Further Entry for October 20, 1939)

And said plaintiff also files bond on appeal in the sum of $250.00 with American Surety Company as surety, which bond is as follows:

490 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—1844) * *

BOND ON APPEAL.

Know All Men By These Presents that we, The Chase National Bank of the City of New York, Trustee, as principal, and American Surety Company of New York, as

surety, are held and firmly bound unto Citizens Gas Company of Indianapolis, a corporation, The Indianapolis Gas Company, a corporation, the City of Indianapolis, a municipal corporation, Thomas D. Sheerin, A. Dallas Hitz, Edward W. Harris, and Charles S. Rauh, as members of the Board of Trustees for Utilities of the City of Indianapolis, and Henry L. Dithmer, Brodehurst Elsey, Roy Sahm, Donald J. Angus, Isaac E. Woodard, LeRoy J. Keach, and John E. Ohleyer as members of the Board of Directors for Utilities of the City of Indianapolis (hereinafter referred to as the "obligees") in the full and just sum of Two Hundred Fifty Dollars ($250.00), to be paid to the said obligees, their heirs, executors, administrators, successors, or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Executed this 20 day of October, 1939.

The condition of this obligation is such that:

Whereas, on the 21st day of September, 1939, in the above entitled action between the above named The Chase National Bank of the City of New York, Trustee, plaintiff, and the above named obligees, as defendants, a judgment was rendered against the said plaintiff and the said plaintiff has appealed to the United States Circuit Court of Appeals for the Seventh Circuit;

Now, Therefore, if said The Chase National Bank of the City of New York, Trustee, shall pay the costs if said appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award, if the judgment is modified, then the above obligation to be void; otherwise in full force and effect.

The Chase National Bank of the
City of New York, Trustee
By (signed) Howard F. Burns
Attorney in fact.

American Surety Company of New York
By (signed) Thos. W. King (Thos. W. King)
Resident Vice-President

(Seal) Attest (signed) India Miller (India Miller)
Resident Asst. Secretary

Sealed and Delivered
in the presence of:
(signed) Orville T. Fox
(signed) Leon B. Slack

Filed Oct. 28, 1939. 491 And afterwards to-wit at the May Term of said Court, on the 28th day of October, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to-wit:

Comes now the plaintiff by its attorneys, and files Statement of Points, which is as follows:

492 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—1844) * *

STATEMENT OF THE POINTS ON WHICH PLAINTIFF-APPELLANT INTENDS TO RELY ON APPEAL.

Now comes The Chase National Bank of the City of New York, Trustee, the plaintiff in the above entitled cause and the appellant in the Circuit Court of Appeals, and in connection with its appeal files the following Statement of Points on which it intends to rely on its appeal to the Circuit Court of Appeals for the Seventh Circuit from the final decision of the District Court entered on the 21st day of September, 1939.

The said District Court erred in the following respects:

1) In failing to grant plaintiff's motion filed January 14, 1939, to strike immaterial matter from the answer of defendants the City of Indianapolis, et al.

2) In failing to grant plaintiff's motion filed January 14, 1939, to strike immaterial matter from the counterclaim of defendants the City of Indianapolis, et al.

3) In holding that the lease dated September 30, 1913, from The Indianapolis Gas Company to the Citizens Gas Company (hereinafter referred to as the "Lease") is invalid and unenforceable against either

a) The defendant City of Indianapolis,

493 b) The individual defendants who are members of the Board of Trustees or of the Board of Directors for Utilities of said City,

c) The property formerly owned by the Citizens Gas Company of Indianapolis and now owned and operated by the said City through its Department of Utilities,

d) The Indianapolis Gas Company,

e) The Citizens Gas Company of Indianapolis, or

f) The defendant City of Indianapolis as successor to

Citizens Gas Company as trustee of the public charitable trust,
making this a separate and distinct point as to each of said holdings separately.

4) In failing and refusing to hold that the Lease is binding and enforceable against

a) The defendant City of Indianapolis,

b) The individual defendants who are members of the Board of Trustees or of the Board of Directors for Utilities of said City,

c) The property formerly owned by the Citizens Gas Company of Indianapolis and now owned and operated by said City through its Department of Utilities,

d) The Indianapolis Gas Company,

e) The Citizens Gas Company of Indianapolis, and

f) The defendant City of Indianapolis as successor to Citizens Gas Company as trustee of the public charitable trust,
making this a separate and distinct point as to the Court's failure to make each of said holdings.

5) In holding that neither

a) The order of the Public Service Commission of the State of Indiana approving the Lease,

494 b) The judgment in the case of *Frank S. Fishback* v. *Public Service Commission of Indiana, et al.*

c) The judgment in the case of *Newton Todd* v. *Citizens Gas Company, et al.*

d) The judgment in the case of *Allen G. Williams* v. *Citizens Gas Company, et al.*
nor any or all of said orders or judgments, are res judicata of the validity and binding effect of the Lease as against

i) The City of Indianapolis,

ii) The individual defendants who are members of the Board of Trustees or of the Board of Directors for Utilities of said City,

iii) The City of Indianapolis as successor to Citizens Gas Company as trustee of the public charitable trust,

iv) The public charitable trust,

v) The Citizens Gas Company of Indianapolis,

vi) The property of said public charitable trust,
or any one or more of them, making this a separate and distinct point as to each of said orders or judgments separately with respect to the public charitable trust, the property of said public charitable trust, and each of the defendants to this cause, separately.

6) In failing and refusing to hold that the order of the Public Service Commission of the State of Indiana approving the Lease is binding upon the public charitable trust, the property of said public charitable trust, and each of the defendants to this cause, as to the validity and binding effect of said Lease, making this a separate and distinct point as to the public charitable trust, the property of said public charitable trust, and each of the defendants to this cause, separately.

495 7) In failing and refusing to hold that the judgment in the case of *Frank S. Fishback* v. *Public Service Commission of Indiana, et al.*, is res judicata of the validity and binding effect of the Lease as against the public charitable trust, the property of said public charitable trust, and each of the defendants to this cause, making this a separate and distinct point as to the public charitable trust, the property of said public charitable trust, and each of the defendants to this cause, separately.

8) In failing and refusing to hold that the judgment in the case of *Allen G. Williams* v. *Citizens Gas Company, et al.*, is res judicata of the validity and binding effect of the Lease as against the public charitable trust, the property of said public charitable trust, and each of the defendants to this cause, making this a separate and distinct point as to the public charitable trust, the property of said public charitable trust, and each of the defendants to this cause, separately.

9) In holding that the agreement of March 2, 1936, between the City of Indianapolis and The Indianapolis Gas Company was not inimical to the interests of the plaintiff or the bondholders which it represents.

10) In holding that the plaintiff was not entitled to judgment against The Indianapolis Gas Company for interest on the overdue coupons on the bonds of The Indianapolis Gas Company from the various dates when such coupons matured.

11) In failing and refusing to give judgment for the plaintiff against The Indianapolis Gas Company for
496 the sum of $106,655.55 (in addition to the sum of $1,032,150), being interest at the rate of 6% per annum on the overdue coupons on bonds of The Indianapolis Gas Company from the dates when such coupons became due to the date of judgment.

12) In failing and refusing to give judgment for the plaintiff against the Citizens Gas Company of Indianapolis for the sum of $1,032,150, being the amount of the

overdue and unpaid coupons on the bonds of The Indianapolis Gas Company, which coupons the Citizens Gas Company had agreed to pay.

13) In failing and refusing to give judgment for the plaintiff against Citizens Gas Company of Indianapolis for the sum of $106,655.55 (in addition to the sum of $1,032,150), being interest at the rate of 6% per annum on the overdue coupons on bonds of The Indianapolis Gas Company from the dates when such coupons became due to the date of judgment.

14) In failing and refusing to give judgment for the plaintiff against the City of Indianapolis for the sum of $1,032,150, being the amount of the overdue and unpaid coupons on the bonds of The Indianapolis Gas Company, for which coupons the City of Indianapolis had become liable.

15) In failing and refusing to give judgment for the plaintiff against the City of Indianapolis for the sum of $106,655.55 (in addition to the sum of $1,032,150), being interest at the rate of 6% per annum on the overdue coupons on bonds of The Indianapolis Gas Company from the dates when such coupons became due to the date of judgment.

16) In failing and refusing to give judgment for the plaintiff against the City of Indianapolis, as trustee of the public charitable trust, for the sum of $1,032,150, being the amount of the overdue and unpaid coupons on the bonds of The Indianapolis Gas Company, for which coupons
497 the City of Indianapolis, as trustee of the public charitable trust, had become liable.

17) In failing and refusing to give judgment for the plaintiff against the City of Indianapolis, as trustee of the public charitable trust, for the sum of $106,655.55 (in addition to the sum of $1,032,150), being interest at the rate of 6% per annum on the overdue coupons on bonds of The Indianapolis Gas Company from the dates when such coupons became due to the date of judgment.

18) In failing and refusing to hold that under the issues presented for determination any amounts due the plaintiff from The Indianapolis Gas Company or Citizens Gas Company or the City of Indianapolis or the City of Indianapolis as successor trustee, including said sum of $1,032,150, being the amount of the overdue and unpaid coupons on the bonds of The Indianapolis Gas Company, and said sum of $106,655.55, being interest at the rate

of 6% per annum on the overdue coupons on bonds of The Indianapolis Gas Company from the dates when such coupons became due to the date of judgment, are a prior charge and first lien upon the property formerly owned by the Citizens Gas Company of Indianapolis and now owned and operated by the City of Indianapolis through its Department of Utilities.

19) In failing and refusing to hold that under the issues now presented for determination any amounts due the plaintiff from The Indianapolis Gas Company, Citizens Gas Company, the City of Indianapolis or the City of Indianapolis as successor trustee, including said sum of $1,032,150, being the amount of the overdue coupons on the bonds of The Indianapolis Gas Company, and said sum of $106,655.55, being the interest on said overdue
498 coupons, are a prior charge and first lien upon all funds held by The Indiana National Bank under the agreement of March 2, 1936.

20) In holding that under the issues presented for determination the plaintiff take nothing in this action as against

a) The City of Indianapolis,

b) The individual defendants who are members of the Board of Trustees or of the Board of Directors of the Department of Utilities of said City,

c) The defendant City of Indianapolis as successor to Citizens Gas Company as trustee of the public charitable trust,

d) The property of said public charitable trust conveyed to said City by the Citizens Gas Company on September 9, 1935,

e) Citizens Gas Company,

making a separate and distinct point as to each of said holdings separately.

21) In holding that

a) The City of Indianapolis,

b) The individual defendants who are members of the Board of Trustees or of the Board of Directors of the Department of Utilities of said City,

c) The defendant City of Indianapolis as successor to Citizens Gas Company as trustee of the public charitable trust,

d) The public charitable trust, and

e) The property of said public charitable trust or any one or more of them, are not estopped by the conduct of

the City of Indianapolis or by the conduct of Citizens
499 Gas Company as original trustee of the public charitable trust, or both, from denying the validity and enforceability of the Lease against each of them, making this a separate point as to the public charitable trust, the property of said public charitable trust, and each of said defendants, with respect to the conduct of the City of Indianapolis, the Citizens Gas Company, and either of them.

22) In holding that the Citizens Gas Company is not estopped by its conduct from denying the validity and enforceability against it of the Lease.

23) In failing and refusing to hold that

a) The City of Indianapolis,

b) The individual defendants who are members of the Board of Trustees or of the Board of Directors of the Department of Utilities of said City,

c) The defendant City of Indianapolis as successor to Citizens Gas Company as trustee of the public charitable trust,

d) The public charitable trust, and

e) The property of said public charitable trust,

or any one or more of them, are precluded by the laches of the City of Indianapolis or by the laches of Citizens Gas Company as original trustee of the public charitable trust, or both, from denying the validity and enforceability of the Lease against each of them, making this a separate point as to the public charitable trust, the property of said public charitable trust, and each of said defendants, with respect to the laches of the City of Indianapolis, the Citizens Gas Company, and either of them.

500 24) In failing to hold that the Citizens Gas Company is precluded by its laches from denying that the Lease is valid and enforceable against it.

25) In holding that the Citizens Gas Company, as initial trustee of the public charitable trust, had no power or authority to execute the Lease.

26) In holding that the Citizens Gas Company, as initial trustee of the public charitable trust, had no power or authority to execute the Lease and make it effective and binding upon or enforceable against:

a) The City of Indianapolis,

b) The individual defendants who are members of the Board of Trustees or of the Board of Directors of the Department of Utilities of said City,

c) The defendant City of Indianapolis as successor to

Citizens Gas Company as trustee of the public charitable trust,

d) The public charitable trust, and

e) The property of said public charitable trust,

or any one or more of them, making this a separate point as to the public charitable trust, the property of said public charitable trust, and each of said defendants, separately.

27) In holding that the Citizens Gas Company, as initial trustee, had no specific power to execute the Lease.

28) In holding that the Citizens Gas Company, as initial trustee, was precluded by the trust instruments from executing the Lease.

29) In holding that the Citizens Gas Company was entirely and completely released and discharged from all present and future obligations and liability under the Lease by the conveyance, transfer, and assignment of
501 all of its property and assets to the City on September 9, 1935.

30) In making the parts of Findings of Fact Nos. 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 27, 28, 30, 32, 33, 36, 37, 38, 39, 40, 41, 44, 47, 49, 50, 51, 56, 57, and 64 hereinafter specifically referred to, each of which parts of said Findings of Fact is

i) Wholly unsupported by the evidence,

ii) Contrary to the manifest weight of the evidence,

iii) An inference or conclusion which is wholly unsupported by the evidence, and

iv) An inference or conclusion which is wholly unwarranted as a matter of law.

Each of the parts of Findings hereinafter referred to is objected to on each of the four grounds just stated, and each of said grounds is relied upon as a separate and distinct point as to each part of said Findings hereinafter enumerated. The District Court erred in finding:

a) That there was no evidence that any present owners of Indianapolis Gas bonds purchased such bonds relying on any acts done or representations made by

i) Citizens Gas Company or any of its authorized officers or agents, or

ii) The City of Indianapolis, or any of its authorized officers or agents (Finding 12).

b) That the purposes and obligations of Citizens Gas Company were fixed and controlled entirely by its original and amended Articles of Incorporation, its by-laws, and the Franchise Contract (Finding 14).

c) That all of the rights, property, and assets acquired

by Citizens Gas Company were held for the purposes
502 and upon the terms and conditions set forth in its Articles of Incorporation and the Franchise Contract and for no other purpose and upon no other terms and conditions (Finding 15).

d) That the sole purpose and object of the creation and existence of Citizens Gas Company was to act as and perform the duties of the initial trustee of the public charitable trust, as specifically set forth in its Articles of Incorporation and the Franchise Contract (Finding 16).

e) That Citizens Gas Company had no power or authority as a corporation to act otherwise than to perform the duties of initial trustee of said public charitable trust, as specifically set forth in its Articles of Incorporation and the Franchise Contract (Finding 16).

f) That the beneficiaries of the public charitable trust were the then and future gas users of Indianapolis (Finding 17(b)).

g) That Citizens Gas Company was trustee "with a definitely fixed and limited term of trusteeship" (Finding 17(c)).

h) That the trust res under said public charitable trust "was the property and plant of Citizens Gas Company, being the property formerly owned by the Consumers Gas Trust Company" (Finding 17(a)).

i) That the Franchise Contract required the Articles of Incorporation of Citizens Gas Company to contain the provisions set forth in paragraphs (j), (k), (l), (m), and (n) of Finding 18.

j) That the language of Subdivision 7 of the Articles of Incorporation of Citizens Gas Company is that set forth in Finding 19.

503 k) That there was no provision in any of the trust instruments authorizing Citizens Gas Company to become the lessee of a competing gas property (Finding 20).

l) That plaintiff and all the holders of the bonds of The Indianapolis Gas Company either

i) Had actual knowledge of, or

ii) Were bound in law by knowledge of the matters and things set forth in Finding 21.

m) That the trust res, the subject of said public charitable trust, did not include any part of the property of The Indianapolis Gas Company or any lease on any part of said property (Finding 22).

n) That the specific terms of the Lease are those set

forth in Finding 23, particularly those set forth in Subdivisions (d), (e), (h), and (j) of said Finding 23.

o) That no ordinance or resolution was ever adopted by the Common Council or Board of Public Works of the City of Indianapolis

i) Authorizing the execution of the Lease,

ii) Ratifying the Lease, or

iii) Agreeing to be bound by the terms of the Lease (Finding 26).

p) That no action has even been taken by the Board of Trustees or the Board of Directors of the Department of Utilities of the City of Indianapolis

i) Authorizing the acceptance of an assignment of the Lease,

ii) Ratifying the Lease, or

iii) Agreeing to be bound by the terms of the Lease (Finding 27).

504 q) That

i) The adoption of resolutions declining to accept an assignment of the Lease,

ii) The recording of such resolutions in the Recorder's office, and

iii) The service of a copy of said resolutions on Citizens Gas Company and The Indianapolis Gas Company, or any one or more of said events, occurred at the same time as the delivery of the assignment of the Lease by Citizens Gas Company to the City, the acceptance of such assignment by the City, and the recording of such assignment by the City in the Recorder's Office of Marion County, Indiana (Finding 28).

r) That prior to September 9, 1935, all of the conditions fixed in its Articles of Incorporation and the Franchise Contract as precedent to the duty and authority of Citizens Gas Company to convey and transfer its property to the City had been fully and completely performed (Finding 30).

s) That on September 9, 1935, nothing further remained to be performed or done by the City of Indianapolis to entitle it to have all of the Citizens Gas property conveyed and transferred to it (Finding 30).

t) That Citizens Gas Company has no property at this time (Finding 32).

u) That the Citizens Gas Company, in making the conveyance and transfer of its property to the City, "fully and completely performed and exhausted all of the duties,

powers and authority of Citizens Gas Company as initial trustee of the said public charitable trust." (Finding 33.)

505 v) That after September 9, 1935, neither Citizens Gas Company nor its directors, trustees, or officers had "any further duties, powers or authority as initial trustee of the said public charitable trust, or to hold, own, lease, manage or operate any property or business of any nature whatsoever" (Finding 33).

w) That there is no evidence that Joseph B. Keeling, the Corporation Counsel for the City, had any power or authority to bind the City in respect of the Lease or the approval of the Lease by the Public Service Commission (Finding 36).

x) That no controversy had ever arisen or existed in connection with the validity or invalidity of the Lease prior to July, 1935 (Finding 37).

y) That at the time when the Public Service Commission of Indiana approved the execution of the Lease no claim had been asserted that the Franchise Contract of 1905 and other related papers resulted in the creation of a public charitable trust (Finding 38).

z) That Fishback did not intervene or resist the approval of the Lease by the Public Service Commission as a beneficiary of the public charitable trust (Finding 38).

aa) That Fishback, when he sued in the Superior Court of Marion County, Indiana, sued merely as a stockholder of Citizens Gas Company and a resident freeholder of the City of Indianapolis and not as a beneficiary of the public charitable trust (Finding 39).

bb) That Citizens Gas Company and the City were not made parties defendant to the *Fishback* case as the initial and successor trustees of the public charitable

506 trust, "but were parties defendant in their individual capacity" (Finding 39).

cc) That there was no averment in the complaint filed by Fishback that a public charitable trust had been created by the Franchise Contract of 1905 (Finding 39).

dd) That the City was dismissed as a party defendant to the *Fishback* case prior to the entry of a final judgment therein (Finding 39).

ee) That at the date of the final disposition of the *Fishback* case there was neither an existing controversy nor the ripening seeds of a controversy between The Indianapolis Gas Company, the trustees of its mortgage, or its bondholders, and the City as to the enforceability of

the Lease against the City or the trust property (Finding 39).

ff) That up to the date when Fishback dismissed his cause against the City no issue had been presented between the City and The Indianapolis Gas Company as to the validity of the Lease (Finding 39).

gg) That there was neither in issue nor decided by the court in the *Fishback* case any question as to the validity or enforceability of the Lease against the City (Finding 39).

mm) That the *Fishback* case was tried and decided on the theory that whether the Lease was valid for its entire term or not, the action of the Public Service Commission of Indiana in approving the Lease could not be vacated or set aside (Finding 39).

ii) That new facts have occurred since the determination of the *Fishback* case which alter the legal rights and relations of the parties thereto (Finding 39).

507 jj) That the transfer of the trust res to the City as succesosr trustee on September 9, 1935, constituted such a new fact since the determination of the *Fishback* case as to alter the legal rights and relations of the parties to said case (Finding 39).

kk) That neither a controversy as to the enforceability of the Lease against the City nor the ripening seeds of such a controversy existed at any time prior to the date of the final disposition of the *Williams* case, between the City and The Indianapolis Gas Company or its mortgage trustees or bondholders (Finding 40).

ll) That none of the questions involved in the present case were actually litigated in the *Williams* case (Finding 40).

mm) That none of the questions involved in the present case could have been litigated under the issues in the *Williams* case (Finding 40).

nn) That no issue was made in the *Williams* case between The Indianapolis Gas Company, its mortgage trustees, or its bondholders, and the City or the Board of Trustees or the Board of Directors of the Department of Utilities in connection with the enforceability of the Lease against the City (Finding 40).

oo) That The Indianapolis Gas Company delivered certain bonds to the Citizens Gas Company "for the purpose of reimbursing Citizens Gas Company for eighty-five per cent (85%) of its capital expenditures on account of extensions and betterments to the plant and system of

The Indianapolis Gas Company made and paid for by Citizens Gas Company" (Finding 41).

508 That it was many years after the execution of the Lease before plaintiff received a copy of said Lease (Finding 41).

qq) That the evidence fails to show that any present owner of bonds of The Indianapolis Gas Company knew of, relied upon, or was in any manner influenced by the representations with reference to the Lease made between the years 1914 and 1935 in the sale of such bonds (Finding 44).

rr) That Halsey, Stuart & Company and Otis & Company were advised by the City and its representatives that the only authority which the City had in connection with the sale of its Gas Plant Revenue Bonds was to make a public offering and that the City had no authority to approve or become responsible for any representations made in connection with the resale of said Revenue Bonds by the purchasers thereof (Finding 47).

ss ~~ee~~) That the circulars and advertising issued by the purchasers of the City's Gas Plant Revenue Bonds were issued solely on their own authority and without authorization by the City (Finding 47).

tt) That "there is no evidence to show that any persons who purchased said Gas Plant Revenue Bonds of the City did so on the faith of any representation made by the City or its authorized agents" (Finding 47).

uu) That any representations made by the purchasers of the City's Gas Plant Revenue Bonds were never ratified or approved by the City or any of its authorized representatives (Finding 47).

vv) That in making the payment of the common and preferred stock of Citizens Gas Company and the dividends thereon and the premiums on the retirement of
509 the preferred stock the City did not recognize directly or by implication the validity or enforceability against the City of the Lease (Finding 49).

ww) That The Indianapolis Gas Company was fully advised as early as July 23, 1935, that the City would not accept an assignment of the Lease (Finding 50).

xx) That there were agreements between the City and The Indianapolis Gas Company with respect to the operation of the gas producing and distributing plant and system of The Indianapolis Gas Company, "which agreements have been continuously in effect since September 9, 1935" (Finding 51).

yy) That the City has operated the gas producing and distributing plant and system of The Indianapolis Gas Company in pursuance of agreements between the City and The Indianapolis Gas Company (Finding 51).

zz) That there were agreements between the City and The Indianapolis Gas Company which provided in substance that the operation of The Indianapolis Gas Company plant and system by the City should not prejudice the rights of the City (Finding 51).

aaa) That the agreements referred to in Finding 51 as having "been continuously in effect since September 9, 1935," provided that the operation of The Indianapolis Gas Company plant and system by the City should not prejudice the City's rights (Finding 51).

bbb) That the agreements referred to in Finding 51 as having "been continuously in effect since September 9, 1935," provided that the City, by operating The Indianapolis Gas Company plant and system, did not recog-
510 nize the validity of the Lease (Finding 51).

ccc) That "all payments made by the City of sums of money equal to the interest on The Indianapolis Gas Company bonds, dividends payable under the terms of the lease of September 30, 1913, or any of the monies now in escrow at The Indiana National Bank of Indianapolis, would not have been made in the absence of the agreement of March 2, 1936, for the temporary use of the property of The Indianapolis Gas Company, and certain correspondence exchanged between The Indianapolis Gas Company and attorneys for the City in connection with the payment so made" (Finding 56).

ddd) That in the contract of March 2, 1936, and the correspondence referred to in Finding 56 "it was agreed that neither the temporary operation of the property nor the payment of such monies by the City should in any way prejudice the City's rights" (Finding 56).

eee) That in the contract of March 2, 1936, and the correspondence referred to in Finding 56 it was agreed that neither the temporary operation of the property of The Indianapolis Gas Company nor the payment of the aforesaid monies should constitute an admission on the part of the City as to the validity or binding effect upon the City of the Lease (Finding 56).

fff) That the agreement of March 2, 1936, did not result in the default of interest payments due on the bonds of The Indianapolis Gas Company (Finding 56).

ggg) That in the absence of the agreement of March 2,

1936, "the City would not have made payments of sums equal to the interest" (Finding 56).

hhh) That the agreement of March 2, 1936, was
511 not inimical to the interests of plaintiff or any of the bondholders whom it represents (Finding 56).

iii) That the plaintiff and two of the principal bondholders of The Indianapolis Gas Company were advised on March 11, 1936, of the terms of the agreement of March 2, 1936 (Finding 57).

jjj) That the plaintiff and two of the principal bondholders received and accepted the sum of $171,000 with full knowledge of the terms of the agreement of March 2, 1936 (Finding 57).

kkk) That representatives of either

i) two of the principal bondholders of The Indianapolis Gas Company,

ii) The Massachusetts Mutual Life Insurance Company, or

iii) The New England Mutual Life Insurance Company, attended a meeting at the office of the Chase National Bank in New York City on April 10, 1936 (Finding 64).

lll) That an arrangement was made, either at the meeting of March 11, 1936 or at the meeting of April 10, 1936, by which the Chase National Bank would obtain an opinion from the law firm of Newton D. Baker, Esquire, either as to the validity of the Lease or its enforceability against the City of Indianapolis, or both (Finding 64).

31) In sustaining the objection of counsel for the City and refusing to admit in evidence Plaintiffs' Exhibit 135 for Identification, being the appellees' brief in the Supreme Court of Indiana in the case of *Allen G. Wil-*
512 *liams, appellant* v. *Citizens Gas Company of Indianapolis, et al.*, appellees.

32) In admitting in evidence City' Exhibit 12, the minutes of a meeting of the Board of Directors for Utilities of the City of Indianapolis held on September 9, 1935 (being pages 178 to 236, inclusive, of the minute book of said Board of Directors).

33) In admitting in evidence each of the following exhibits offered by the City of Indianapolis, each of which exhibits was wholly irrelevant and immaterial to any issue in the case and constituted merely self-serving declarations on the part of the City of Indianapolis, its counsel, or Halsey, Stuart & Company:

a) City's Exhibits 28-A and 28-B, the letter of Janu-

ary 4, 1937, from Thompson, Rabb & Stevenson to Halsey, Stuart & Company.

b) City's Deposition Exhibit 2, the letter of September 25, 1935, from Thompson, Rabb & Stevenson to Halsey, Stuart & Company.

c) City's Deposition Exhibits 3 and 3-A, the letter of September 23, 1935, from Halsey, Stuart & Company to Mr. A. L. Rabb.

d) City's Deposition Exhibits 4 and 4-A, the letter of September 21, 1935, from Thompson, Rabb & Stevenson to R. E. Simond.

e) City's Deposition Exhibit 5, the letter of September 18, 1935, from R. E. Simond to Mr. Albert Rabb.

34) In sustaining the objection of the City's counsel to the following question asked by plaintiff's counsel of the witness Gavin L. Payne:

"From your experience in the field of investment banking and particularly in the field of public utility se-
513 curities, do you know how those manuals are made up?"

After the Court sustained said objection plaintiff's counsel made an offer of proof as follows:

"We offer to prove by the witness that the practice in making up these manuals is for the publishers of the manuals to send questionnaires to the various companies to receive that information from the companies and that the information, contained in the manuals, as made up from the information received from the various companies upon which the reports are made."

35) In admitting in evidence City's Deposition Exhibit 1, said exhibit being entitled "Memorandum Re: 99 Year Lease from Indianapolis Gas Company to Citizens Gas Company."

Wherefore, for each and all of the errors of the District Court enumerated in the foregoing Statement of Points plaintiff-appellant prays that said final decision of the District Court entered on the 21st day of September, 1939 be reversed; that the Circuit Court of Appeals enter an order granting plaintiff-appellant such relief prayed for in its bill of complaint as amended and supplemented as comes within the issues presented for determination, and denying defendants, the City of Indianapolis, et al., the relief prayed for in their counterclaim; or, in the alternative, that the Circuit Court of Appeals order and direct the District Court to enter a final order reversing its said final decision entered on the 21st day of Septem-

ber, 1939, granting plaintiff-appellant such relief prayed for in its bill of complaint as amended and supplemented as comes within the issues presented for determination, and denying defendants, the City of Indianapolis, et al., the relief prayed for in their counterclaim; and that it be granted such other and further relief as the Court shall deem proper.

Dated October 27, 1939.

William L. Taylor
Howard F. Burns
John Adams
Solicitors for Plaintiff

514 Acknowledgment of Service.

Service of the foregoing "Statement of the Points on Which Plaintiff-Appellant Intends to Rely on Appeal" and receipt of a copy of said Statement of Points is hereby acknowledged this 27 day of October, 1939.

Edward H. Knight,
Corporation Counsel of Indianapolis.
W. H. Thompson,
Patrick J. Smith,
Solicitors for the City of Indianapolis and the individual defendants who are members of the Board of Trustees or of the Board of Directors for Utilities of the City of Indianapolis.
Louis B. Ewbank,
Wm. R. Higgins,
Solicitors for defendant, The Indianapolis Gas Company.
Davis, Pantzer, Baltzell & Sparks,
William G. Sparks,
Solicitors for defendant, Citizens Gas Company of Indianapolis.

Filed Nov. 16, 1939.

1036 And afterwards towit at the November Term of said Court, on the 16th day of November, 1939, bebore the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit:

Comes now the defedant The Indianapolis Gas Company by its attorneys, and files notice of appeal to the United States Circuit Court of Appeals for the Seventh Circuit, which is as follows:

1037 IN THE DISTRICT COURT OF THE UNITED STATES,

For the Southern District of Indiana.

Indianapolis Division.

The Chase National Bank of The City of New York, Trustee, *Plaintiff.* *vs.* Citizens Gas Company of Indianapolis, *et al.*, *Defendants.*	In Equity, Cause No. 1844.

NOTICE OF APPEAL, BY DEFENDANT THE INDIANAPOLIS GAS COMPANY TO CIRCUIT COURT OF APPEALS FOR THE SEVENTH CICUIT.

Notice is hereby given that The Indianapolis Gas Company, a defendant in the above entitled cause, hereby appeals to the Circuit Court of Appeals for the Seventh Circuit from the final judgment and decree entered in this cause on September 21, 1939.

Louis B. Ewbank,
William R. Higgins,
Solicitors for Defendant-Appellant, The Indianapolis Gas Company.

1061 (Further Entry for November 16, 1939.)

And said defendant also files bond on appeal in the sum of $250.00, with the United States Fidelity and Guaranty Company as surety thereon, which bond is as follows:

1062 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Nov. 16, 1939.

* * (Caption—1844) * *

BOND ON APPEAL BY THE INDIANAPOLIS GAS COMPANY.

Filed Nov. 16, 1939.

Know All Men By These Presents that we, the Indianapolis Gas Company, a corporation, as principal, and the United States Fidelity and Guaranty Company, of Baltimore, Maryland, as surety, are held and firmly bound unto the Chase National Bank of the City of New York, Trustee, Citizens Gas Company of Indianapolis, a corporation, the City of Indianapolis, a municipal corporation, Thomas D. Sheerin, A. Dallas Hitz, Edward W. Harris, and Charles S. Rauh, as members of the Board of Trustees for Utilities of the City of Indianapolis, and Henry L. Dithmer, Brodehurst, Elsey, Roy Sahm, Donald J. Angus, Isaac E. Woodard, LeRoy J. Keach, and John E. Ohleyer as members of the Board of Directors for Utilities of the City of Indianapolis (hereinafter referred to as the "obligees") in the full and just sum of Two Hundred Fifty ..... Dollars ($250.00), to be paid to the said obligees, their heirs, executors, administrators, successors, or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Executed this 16th day of November, 1939.

The condition of this obligation is such that:

Whereas, on the 21st day of September, 1939, in the above entitled action between the above named parties a judgment was rendered against the said defendant, The Indianapolis Gas Company, and said defendant has appealed to the United States Circuit Court of Appeals for the Seventh Circuit;

Now, Therefore, if said The Indianapolis Gas Company

shall pay the costs if said appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award if the judgment is modified, then the above obligation to be void; otherwise in full force and effect.

The Indianapolis Gas Company,
By: Arthur V. Brown,
(Seal) *Vice President.*

Attest:
Wm. J. Yule,
Sect.

The United States Fidelity and Guaranty Company of Baltimore, Maryland,
By: Martin B. Hall,
(Seal) *Its Attorney in fact.*

Sealed and Delivered in the presence of:
R. H. O'Hara,
J. Laudament.

1038 (Further Entry for November 16, 1939.)

Filed Nov. 16, 1939. And said defendant also files its statement of points, which is as follows:

1039 In the District Court of the United States.

* * (Caption—1844) * *

STATEMENT OF POINTS ON WHICH THE INDIANAPOLIS GAS COMPANY, DEFENDANT-APPELLANT INTENDS TO RELY ON ITS APPEAL.

Now comes The Indianapolis Gas Company, a defendant in the above entitled cause both to the complaint of plaintiff and to the counterclaim of each defendant, respectively, Citizens Gas Company of Indianapolis, and of City of Indianapolis, and individuals suing, respectively, as members of the Board of Trustees for Utilities and as members of the Board of Directors for Utilities of such City, and an appellant of the Circuit Court of Appeals, and in connection with its appeal files the following Statement of Points on which it intends to rely on its appeal to the Circuit Court of Appeals for the Seventh Circuit of the United States, from the final decision of the above named District Court entered on the 21st day of September, 1939.

The said District Court erred in each of the following respects:

1. The Court erred in decreeing that the lease dated September 30, 1913 from the Indianapolis Gas Com-
1040 pany to the Citizens Gas Company of Indianapolis is invalid and unenforceable against each:

(a) The City of Indianapolis

(b) The individual defendants who are members of the Board of Trustees or of the Board of Directors for Utilities for said City.

(c) The property formerly owned by the Citizens Gas Company of Indianapolis and now owned and operated by said City through its Department of Utilities,

(d) The Citizens Gas Company of Indianapolis,

(e) The Indianapolis Gas Company.

2. The Court erred in decreeing that neither the order of the Public Service Commission of the State of Indiana approving the said lease nor the judgments in the cases of Frank S. Fishback *vs.* Public Service Commission of Indiana; and Allen G. Williams *vs.* Citizens Gas Company, et al., nor either of them are, res adjudicata of the validity and binding effect of said lease upon each of the following defendants:

(a) The City of Indianapolis

(b) The individual defendants-members of the Board of Trustees and Directors of the Department of Utilities of said City,

(c) The Citizens Gas Company of Indianapolis.

3. The Court erred in decreeing that the plaintiff below recover against this defendant-appellant the sum of
$1,032,150.00 together with interest thereon from date
1041 of judgment at the rate of six per cent per annum.

4. The Court erred in its conclusion of law that the City of Indianapolis was not estopped by any of its conduct from denying the validity and enforceability of the lease against it and the property, which had been formerly owned and operated by Citizens Gas Company of Indianapolis, which it had taken over on September 9, 1935.

5. The Court erred in its conclusion of law that the Citizens Gas Company of Indianapolis was not estopped by any of its conduct from denying the validity and enforceability against it of the lease.

6. The Court erred in refusing to decree as a conclusion of law that the City of Indianapolis and the individual

members of the Board of Trustees and Board of Directors for Utilities of said City, were precluded by laches from denying the validity and enforceability of the lease against said City and the individual defendants and the property formerly owned and operated by Citizens Gas Company of Indianapolis which it had taken over on September 9, 1935.

7. The Court erred in refusing to decree as a conclusion of law that the Citizens Gas Company of Indianapolis was precluded by laches from denying the validity and enforceability of the lease against it.

8. The Court erred in its conclusion of law that the Citizens Gas Company of Indianapolis was completely released of all present and future obligations and liabilities under said lease by the conveyance and assignment to the City of Indianapolis on September 9, 1935, of all its property and assets.

9. The Court erred in refusing to decree as a conclusion of law that by reason of the fact that the City
1042 took over all the assets of the Citizens Gas Company and that the sole consideration therefor was paid by it directly to the stockholders and bondholders of said company, leaving it without assets with which to satisfy its obligations, the City and the property taken over by it from the Citizens Gas Company of Indianapolis is now obligated to pay all liabilities of the Citizens Gas Company including those arising under said lease.

10. The Court erred in refusing to decree as a conclusion of law that by the provisions of the lease, all obligations of the Indianapolis Gas Company to its bondholders for payment of interest had been assumed and expressly undertaken by Citizens Gas Company and its successors and assigns.

11. The Court erred in refusing to decree as a conclusion of law that the obligation to satisfy such judgment as might properly be entered in the cause is that of the City of Indianapolis and the public charitable trust it is administering and the Citizens Gas Company as principals, and the sole obligation of the Indianapolis Gas Company, is that of a surety.

12. The Court erred in refusing to decree as a conclusion of law that the defendants below should be held liable for any judgment entered in the cause in the following order:

First: The City of Indianapolis and the property of

the public charitable trust received by said City from Citizens Gas Company,

Second: The Citizens Gas Company of Indianapolis, and

Third: The Indianapolis Gas Company.

1043 (As To erroneous "Special Findings of Facts".)

13. The Court erred in its Findings of Fact Nos. 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 27, 28, 30, 32, 33, 37, 38, 39, 40, 41, 42, 43, 44, 47, 48, 49, 50, 51 and 56, as hereinafter specifically referred to, each of which parts of said Special Findings of Facts is

i) wholly unsupported by the evidence.

ii) contrary to the manifest weight of the evidence.

iii) states an inference or conclusion which is wholly unsupported by the evidence, and

iv) states an inference or conclusion that is contrary to law and is wholly unwarranted as a matter of law.

Each of the parts of findings hereinafter referred to is objected to on each of the four grounds just stated above, and each of said grounds is relied upon as a separate and distinct point as to each port of said findings hereinafter enumerated.

The District Court erred in finding:

(a) That the purposes and obligations of Citizens Gas Company of Indianapolis were and are fixed and controlled entirely by its original and amended Articles of Incorporation, as amended, and its by-laws and the franchise ordinance and contract between the City of Indianapolis and said company's assignors, now in evidence as Plaintiff's Exhibit one (1), as copied in the stipulation of the parties offered in evidence. (Finding 14.)

(b) That all the rights, property and assets owned and acquired by the defendant counterclaimant, Citizens Gas Company, were held by it as the initial trustee of a public charitable trust for the benefit of present and prospective gas consumers of the City of Indianapolis, and for

1044 the purposes and upon the terms and conditions set forth in said instruments as set out in plaintiff's Exhibit one (1) with the stipulation of the parties, and the enactment providing for the incorporation of manufacturing and mining companies, for no other purpose and on no other terms and conditions. (Finding 15.)

(c) That the sole purpose and object of the creation, organization and existence of the Citizens Gas Company was to act and perform the duties of initial trustee of said public charitable trust, as specifically set forth in said

instruments and enactment contained in the stipulation of the parties as plaintiffs, Exhibit one. (Finding 16.)

(d) That said Citizens Gas Company had no power or authority as a corporation to act otherwise than to act and perform the duties of initial trustee of a public charitable trust as specifically set forth in the said instruments and enactment as contained in the stipulation of the parties as Plaintiff's Exhibit one (Finding 16).

(e) That the settlers of the public charitable trust were (only) the public-spirited citizens who subscribed for stock of Citizens Gas Company (Finding 17a).

(f) That the beneficiaries of the said public charitable trust were (only) the then and future gas users of Indianapolis (Finding 17b).

(g) That Citizens Gas Company was a trustee "with a definitely fixed and limited term of trusteeship" (Finding 17c).

1045 (h) That the City of Indianapolis was the successor of Citizens Gas Company as trustee of said public charitable trust, and is the present trustee (Finding 17d).

(i) That "the trust res was the property and plant of Citizens Gas Company, being the property formerly owned by the Consumers Gas Trust Company" (Finding 17e).

(j) That the franchise contract "creating the public charitable trust" required the "articles of Incorporation" of an Indiana Corporation which the individual grantees were to organize to which the franchise should be assigned, to "provide" anything at all other than what the statute (Acts 1905, p. 434, ch. 139, #1) directed to be written therein (Finding 18).

(k) That anything recited in the court's finding as what the Citizens Gas Company's "articles of Incorporation should provide" because of any stipulations in the city "franchise contract" constituted any part of such articles or of that company's charter, or in any way defined or limited its corporate powers, except only the provisions therein that

(a) the capital stock to be not less than $1,000,000; and that

(h) the business and prudential affairs are to be managed by a Board of nine Directors; and that

(j) the company to be organized shall secure, acquire or construct and put in operation a fuel gas plant;

which the statute (Acts 1905, p. 434, ch. 139, #1) commands to be written therein (Finding 18).

(l) That except only as to the provisions as to
1046 capital stock, directors and business of supplying "light, heat and power" * * * "to the City of Indianapolis" and the term of existence of "50 years" for which the statute provided, any other of said provisions written into the Articles of Incorporation of Citizens Gas Company, or stipulated by the franchise contract of its assignors with the City of Indianapolis to be provided therein, operated or could operate in any way to limit the power of such company to make contracts within its statutory powers then possessed or afterward conferred, or that they in any way took away or limited said company's liability under the contracts which it did execute within its statutory powers as a public utility corporation to furnish light, heat and power to a "city". (Finding 18)

(m) That the franchise contract between the City of Indianapolis and those who afterward assigned it to Citizens Gas Company, providing that the company which they should incorporate and to which they should assign the franchise should include provisions in its Articles of Association not commanded by the Statute (Acts 1905, p. 434, supra), could make any such thing written therein to constitute lawful provisions of such articles; more especially could so make what the court has lettered as follows:

(i) that the stockholders should be repaid their investment with 10% per annum, although that amount had not been earned and the company should be left with unperformed obligations;

(j) that the franchise was conditioned on the company acquiring title to an existing gas fuel plant with not less than 100 miles of mains;

1047 (l) limiting the price which should ever be charged the consumer for gas to 60 cents per thousand cubic feet under penalty of the franchise becoming void. (Finding 18)

(n) That any provision which the City of Indianapolis may have written into a franchise contract with individuals as to what should be contained in the Articles of Incorportion of a corporation which such individuals thereby agreed to organize to which they agreed to convey the franchise, other than the six things which the

statute authorized and commanded to be expressed therein (Acts 1905, p. 434, supra), controlled or in any degree limited the corporation, when organized, in the exercise of its statutory powers in making contracts with third persons as authorized by law. (Finding 18)

(o) That anything written into the "Articles of Incorporation adopted by Citizens Gas Company" reciting the "essential provisions required by the Franchise Contract" between that company's assignors and the City of Indianapolis, different from or in excess of the six things commanded by the statute (Acts 1905, p. 434, supra) to be contained in the Articles of a corporation for supplying light, heat and power to the city and its inhabitants; to wit, besides (1) the corporate name, (2) the object of incorporation, (3) the amount of stock, (4) the term of existence, (5) the number and names of directors, and (6) its principal place of business; either did or could constitute any lawful part of such Articles of Incor-
1048 poration, or amount to anything more than a private contract between the stockholders among themselves and by them with the City of Indianapolis (Finding 19).

(p) That either the franchise contract of the City of Indianapolis with individuals who assigned it to Citizens Gas Company (especially the last ten lines of subdivision (d) the court partly quotes) or the Articles of Incorporation of that company, in Article VII or elsewhere, or purported to contain the provision which the court's finding says was "subdivision 7 of such articles" (Finding 19).

(q) That there was no provision in the "franchise" of Citizens Gas Company, until 1921, authorizing the execution of any mortgage, except one to be executed at the time of the transfer of the property to the city, if then necessary (Finding 20).

(r) That there was no provision in the instruments for the incorporation of Citizens Gas Company authorizing it "to become the lessee of a competing gas property" (Finding 20).

(s) That the "objects" of the Citizens Gas Company, or its duty, power and authority, included "to convey all the said property to the City of Indianapolis" "at the end of the period of franchise ordiance; to wit; on August 30, 1930" upon compliance with any "conditions fixed therein"; or that The Indianapolis Gas Company "had actual knowledge of, or were bound by law by knowledge of" such non-existent fact (Finding 21).

1049 (t) That upon "conveyance and transfer" of all of its "property to the City of Indianapolis" under the "terms and provisions of said instruments", the said franchise contract with said city and what was written into its own articles of association as therein provided, as construed with the law providing for the incorporation of manufacturing and mining companies, the Citizens Gas Company (incorporated for 50 years) was "to be wound up"; or that The Indianapolis Gas Company knew or was bound to know this non-existent fact (Finding 21).

(u) (1) That any "trust res" in any property of Citizens Gas Company was created or existed until after and except subject to the performance of all said company's obligations under its lease (Ex. B with complaint) of the gas plant and property of The Indianapolis Gas Company; or that with such lease unperformed Citizens Gas Company's conveyance of all it owned could vest any property in the City of Indianapolis upon any trust for itself or its inhabitants using gas, or for paying the stockholders dividends on their shares or repaying their investments (Finding 22).

(2) That on or after September 30, 1913, the "trust res" did not include any part of the property of The Indianapolis Gas Company or any lease on any part of such property. (Finding 22).

(v) (1) That the lease (Finding 19) contained the provisions as stated even so far as they purport to be quoted, because the "direct quotations" are incorrect except
1050 only (n) subdivision 22 and (a) the last rhetorical paragraph of subdivision 32 of the lease, but especially that such lease contained the specifications (b), (d), (h), (i), (j), (m) and (o). (Finding 23).

(2) And that the matters set out in the finding in the court's own words are a recital of the "provisions" that the lease contains. (Finding 23)

(w) That the City did not by ordinance or resolution of the Common Council or the Board of Public Works agree to be bound by the terms of the lease.

(x) That no action was ever taken by the Trustees or Directors of the Department of Utilities.

(1) authorizing acceptance of an assignment of the lease,

(2) ratifying the lease,

(3) agreeing to be bound by its terms (Finding 27).

(y) (1) That, prior to September 30, 1935, all of the conditions fixed in the said instruments (of agreement,

franchise and articles of association) and enactment (of statutes) as precedent to the duty and authority of Citizens Gas Company to convey and transfer the said property (to the city) had been fully and completely performed;

(2) That on said date nothing further remained to be performed or done by the City of Indianapolis to entitle it in law to have all of said property conveyed and transfered to it;

(3) That on said date Citizens Gas Company by its proper corporate officers, executed and delivered instruments of conveyance and transfer of all of the
1051 said property to the City of Indianapolis, in the manner and form and in strict compliance with its duty and authority so to do. (Finding 30)

(z) (1) That since September 9, 1935, the City has operated the gas producing and distributing plant and system of Citizens Gas Company "as trustee of the Public Charitable Trust created in 1905 and 1906".

(2) That since September 9, 1935, Citizens Gas Company has not been engaged in any business, and has no property at this time: (Finding 32)

(aa) That Citizens Gas Company, its Board of Directors, Voting Trustees and Officers, in making the conveyance, transfer and assignment of all its property to the City of Indianapolis, fully and completely performed and exhausted all of its duties, powers and authorities as initial trustee of said Public Charitable Trust. (Finding 33)

(bb) That neither Citizens Gas Company, nor its Board of Directors, Voting Trustees or any of its officers, from and after September 9, 1935, has any further duties, powers or authority to hold, own, lease, manage or operate any property or business whatsoever, or as initial trustee of said Public Charitable Trust. (Finding 33)

(cc) (1) That the issues tendered by the bill of complaint in the case of Newton Todd against Citizens Gas Company and others in the United States District Court for the Southern District of Indiana on April 30, 1929, were:

(a) That the original agreement between the City and Citizens Gas contained in the franchise contract of 1905 was abrogated and annulled when Citizens Gas Company surrendered the franchise and accepted an indeterminate permit.

1052 (b) That the surrender of the franchise and the acceptance of an indeterminate permit created a new contract between the State and Citizens Gas Company, one of the terms of which was that the City should have the right to acquire the property of Citizens Gas Company at a value to be determined by the Public Service Commission.

(c) That an Act of the Indiana General Assembly of 1929 purporting to legalize all provisions of the Articles of Association of Citizens Gas Company and particularly those in respect to the mode of acquiring the plant and property of Citizens Gas Company by the City, resulted in an impairment of the obligations of the contract above referred to in violation of the Constitutions of the State of Indiana and of the United States.

(d) That the franchise contract of 1905 merely gave an option to the City to purchase the property of Citizens Gas Company, and that this resulted in a violation of the rule against perpetuities. (Finding 37)

(cc) (2) That no controversy had ever arisen or existed in connection with the validity or invalidity of the lease prior to July, 1935.

(dd) That until the transfer of the trust res by Citizens Gas Company to the City, all payments required by the terms of said lease had been made as required therein and there had been no breach or threatened breach by Citizens Gas Company or its covenants under said lease, under the issues presented at this time for determination. (Finding 37)

(ee) That when the Public Service Commission of Indiana approved the execution of the lease, no claim had been asserted that the franchise contract of 1905 and other related papers resulted in the creation of a public charitable trust. (Finding 38)

(ff) (1) That Fishback, in his action in the Superior Court of Marion County, Indiana, against Citizens
1053 Gas Company and The Indianapolis Gas Company of the City of Indianapolis, and others, commenced November 28, 1913, sued as a stockholder of Citizens Gas Company and as a resident freeholder of the City of Indianapolis, and not as a beneficiary of a public charitable trust. (Finding 39)

(2) That Citizens Gas Company and the City were not made parties defendant as the initial and successor trustees of a public charitable trust, but are parties defendant in their individual capacity. (Finding 39.)

(gg) That there was neither in issue nor decided by the court in said Fishback case any question as to the validity or enforceability against the City of the lease. (Finding 39)

(hh) That since the determination of the Fishback case, new facts have occurred which alter the legal rights and relations of the parties, to wit—the transfer of the gas plant and property to the City on September 9, 1935. (Finding 39)

(ii) That none of the questions involved in this case were actually litigated in the case of Allen G. Williams against Citizens Gas Company, commenced on March 12, 1930, in the Superior Court of Marion County, Indiana, nor could such questions have been litigated under the issues in that case. (Finding 40)

(jj) That Citizens Gas Company has expended for additions and betterments to the plant of The Indianapolis Gas Company approximately $200,000 for which it has received no reimbursement. (Finding 41)

1054 (kk) (1) That it was many years after the execution of the lease before the plaintiff in this action received a copy of the same. That there was any "predecessor trustee of the Chase National Bank", (only the same trustee whose name was changed by consolidation), etc. (Finding 41)

(2) That there is no proof that any predecessor trustee of the Chase National Bank which certified bonds either knew of the existence of the lease or relied upon it as a basis for a certification of any Indianapolis Gas Company Bonds.

(ll) That from the period of its organization in 1906 to June 30, 1935, Citizens Gas Company paid dividends to the holders of its common stock at the rate of ten per cent per annum. (Finding 43)

(mm) (1) That it was "in accordance with the provisions of the franchise contract for 'the plants, property and assets of said (Citizens Gas) Company (to) be conveyed to said City of Indianapolis' ", or that Citizens Gas Company on March 20, 1929, or April 3, 1929, or at any time, "was obligated to make such a conveyance." (Finding 45)

(2) That the circular and newspaper advertising issued by the purchasers of said revenue bonds were issued solely on their own authority and without authorization by the City; and that "any representations made by the purchasers of such bonds were never ratified or approved

by the City or any of its authorized representatives." Finding 47)

(nn) That Citizens Gas Company paid all the dividends on said preferred stock (of that company) 1055 up to the time of its redemption (on or about September 1, 1935); that "all of said common stock was retired". (Finding 48)

(oo) That Citizens Gas Company's mortgage on its gas plant and property had been executed in violation of the terms of any Public Charitable Trust. (Finding 49.)

(pp) That payment to holders of the common and preferred stock of Citizens Gas Company of the face value of their stock and dividends thereon out of or in exchange for that company's property without having performed that company's obligations under its contract for the lease of the gas plant and property of The Indianapolis Gas Company, and without making provision for such performance, was "in accordance with the decree of the United States District Court and the Circuit Court of Appeals in the Todd and Cotter cases". (Finding 49)

(qq) That City of Indianapolis was required to make payments to the stockholders of Citizens Gas Company of the face value of their respective shares of stock and unpaid dividends thereon before taking over the gas plant and property of that company as a trust res. (Finding 49)

(rr) That in taking over the gas plant and property of Citizens Gas Company upon payment to its common stockholders of the face value of their respective shares of stock with dividends at 10% per annum for two and one-half years past, so as to make a total reimburse-1056 ment of all the money they had invested with 10% per annum income thereon for the total period of 30 years or less that it was invested, and to its preferred stockholders of the face value of their respective shares with dividends at 5% per annum for one year, so as to reimburse them for their total investment with cumulative dividends at 5% per annum for their total period of their investment, the City of Indianapolis did not "recognize" the enforceability against such City of the lease by that company of The Indianapolis Gas Company's property. (Finding 49)

(ss) That The Indianapolis Gas Company prior to September 9, 1935, was fully advised of the transfer to the City of Indianapolis of the plant and property of Citizens Gas Company, and "as early as July 23d, 1935,

was advised that the City would not accept an assignment of the lease." (Finding 50)

(tt) That agreements between the City and The Indianapolis Gas Company under which the City has operated the Gas producing and distributing plant and system of The Indianapolis Gas Company "have been continuously in effect since September 9, 1935." (Finding 51)

(uu) That any "correspondence" exchanged between The Indianapolis Gas Company and attorneys for the City before September 30, 1935, contained any agreement whatever by The Indianapolis Gas Company, or that the contract of March 22, 1936, stipulated as to the effect upon rights of the parties of anything which had already been done, as against the mere future effect of the circumstance that the City "may continue to operate the
1057 plant and equipment covered by said lease" and make certain payments, without such operation or the agreement or the payments constituting an admission by the City that the lease is valid or binding, and without the company's consent thereto or the execution of the agreement or acceptance of specified payments and consent to other payments by the City on the part of the company constituting any admission or estoppel of The Indianapolis Gas Company to insist that said lease is valid and binding. (Finding 56)

(vv) That in the contract of March 2, 1936, and any correspondence between The Indianapolis Gas Company and the City of Indianapolis "it was agreed that neither the temporary operation of the property (described in the lease) nor the payment of such monies by the City should in any way prejudice the City's rights." Finding 56)

The District Court also erred in the further following respects:

14. In stating as so-called "conclusions of law", the further findings that are not conclusions drawn from any findings of facts in the preceding paragraphs numbered one (1) to sixty-eight (68), inclusive, of the Court's "Special Findings of Facts", but each of which constitutes assertions of facts and of conclusions of facts as therein stated; which are numbered, respectively as "conclusions of law" No. five (5), No. six (6) and No. eight (8), as follows:

(ww) That "Citizens Gas Company, as initial trustee of a public charitable trust with a fixed date of expiration

of its trusteeship had no power or authority to exe-
1058 cute a lease for 82 years beyond the expiration of
its term of trusteeship which would be binding upon and enforceable against its successor trustee, the City." (Conclusion 5a)

(xx) That the trust instruments (written into the city franchise, and articles of incorporation, and by-laws of Citizens Gas Company; Finding 14 and 15) "properly construed precluded the initial trustee from executing such a lease." (Conclusion 5b)

(yy) That "the lease is not a valid and enforceable obligation against Citizens Gas Company." (Conclusion 6)

(zz) That Citizens Gas Company "was entirely and completely released and discharged from all present and future obligation and liability under said lease, by the conveyance, transfer and assignment of all its property and assets to the City on September 9, 1935. (Conclusion 6)

(&&) "That the plaintiff is entitled to judgment against the defendant, The Indianapolis Gas Company, in the sum of $1,032,150.00 with interest thereon at the rate of 6% from the date of judgment" (Conclusion 8).

Wherefore, for each and all of the errors of the District Court enumerated in the foregoing statement of points, this defendant-appellant and counterclaim defendant-appellant prays that the final decision and judgment of the District Court entered on the 21st day of September, 1939, be reversed; that the Circuit Court of Appeals enter an order denying to the plaintiff the reliefs as against this defendant-appellant of the personal judgment for money
prayed for in plaintiff's bill of complaint, as
1059 amended, and denying to each of the counter-claim-
ants, Citizens Gas Company and the City of Indianapolis and individuals suing jointly with it, respectively, as members of the Board of Trustees for Utilities and as members of the Board of Directors for Utilities of said City, the relief prayed for in each of their said counterclaims; or in the alternative, that the Circuit Court of Appeals order and direct the District Court to enter a final order reversing its said final decision and judgment entered on the 21st day of September, 1939, and denying to the plaintiff, The Chase National Bank of New York, any personal judgment for money as against this defendant-appellant as prayed for in its bill of complaint,

as amended, and denying to each of the counter-claimants, Citizens Gas Company and the City of Indianapolis, et al., respectively, any and all relief as against this counterclaim defendant-appellant, prayed for in their respective counterclaims; and that this defendant-appellant also counterclaim defendant-appellant, The Indianapolis Gas Company, be granted such other and further relief as the Court shall deem just and proper.

Dated November ....., 1939.

Louis B. Ewbank,
William R. Higgins,
Solicitors for Defendant-Appellant, The Indianapolis Gas Company.

1060 Acknowledgment of Service.

We hereby acknowledge service of "Statement of Points on which The Indianapolis Gas Company, defendant, appellant as to the Bill of Complaint and also as to each of the Counterclaims herein, intends to Rely on Appeal" and receipt of a copy of the same, this 15th day of November, 1939.

William L. Taylor,
Howard F. Burns,
Solicitors for the Chase National Bank of the City of New York, Trustee.
William H. Thompson,
Patrick J. Smith,
Solicitors for the City of Indianapolis and the individual defendants who are members of the Board of Trustees and the Board of Directors for Utilities of the City of Indianapolis.
Paul Y. Davis,
William G. Sparks,
Solicitors for Citizens Gas Company of Indianapolis.

515 (Further Entry for October 28, 1939.) Entered Oct. 28, 1939.

It appearing to the Court that it is necessary and proper that the original exhibits hereinafter enumerated should be inspected by the United States Circuit Court of Appeals for the Seventh Circuit upon the appeal to said Court and that said original exhibits should be sent to said Circuit Court of Appeals in lieu of copies thereof;

It Is, Therefore, Ordered that the following exhibits be transmitted by the Clerk of this Court to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, at Chicago, Illinois, and that, upon leave of said Circuit Court of Appeals on final determination of the appeal to said Court, said exhibits be returned to the Clerk of this Court:—

(1) Plaintiff's Exhibit 2 for identification;
(2) Plaintiff's Exhibit 3 for identification;
(3) Plaintiff's Exhibits 89 to 94, inclusive, 95A, 96A, 97A, 98A, 99 to 110, inclusive, and 124;
(4) Plaintiff's Exhibit 133, being the deposition of R. E. Simond and all the exhibits attached thereto;
(5) Plaintiff's Exhibit 134, being the depositions of C. M. Clark and J. E. Baker and all the exhibits attached thereto;
(6) Plaintiff's Exhibit 135 for identification, and
(7) City's Exhibits 7A to 7E, inclusive, 7G, 10 and 11.

516 (Further Entry for October 28, 1939.)

And come also the parties by their respective attorneys, and file stipulations as to parts of record, proceedings and evidence to be included in the record on appeal, which stipulation is as follows:

517 In the District Court of the United States.
* * (Caption—1844) * *

STIPULATION AS TO THE PARTS OF THE RECORD, PROCEEDINGS, AND EVIDENCE TO BE INCLUDED IN THE RECORD ON APPEAL.

It is hereby stipulated by all the parties to this cause that the transcript of record on appeal in this cause shall include the papers and exhibits hereinafter enumerated,

and no other papers or exhibits, being the complete record and all the proceedings and evidence in this action, which papers and exhibits are hereby designated to be included in the record on appeal. This stipulation is made and entered into pursuant to the provisions of Rule 75 of the Federal Rules of Civil Procedure. The papers and exhibits hereby designated to be included in the record on appeal are as follows:

1. All the papers and exhibits enumerated in plaintiff's praecipe for transcript of record, filed November 27, 1937. The papers and exhibits so enumerated have been printed in their entirety in the transcript of record filed in the United States Circuit Court of Appeals for the Seventh Circuit in the case of The Chase National Bank of the City of New York, Trustee, plaintiff-appellant, *vs.* Citizens Gas Company of Indianapolis, et al., defendants-appellees, being case No. 6472 on the dockets of said Court, a copy of which transcript of record, marked "Exhibit A", 518 is filed with this stipulation. No other papers or exhibits appear in said transcript of record. The Clerk is, therefore, hereby requested to include a copy of said transcript of record in the transcript of record on appeal in this cause, as being a correct copy of all the papers and exhibits enumerated in plaintiff's said praecipe.

2. The opinion of the United States Circuit Court of Appeals for the Seventh Circuit in the case of The Chase National Bank of the City of New York, Trustee, plaintiff-appellant, *vs.* Citizens Gas Company of Indianapolis, et al., defendants-appellees, being case No. 6472 on the dockets of said Court.

3. The mandate of the United States Circuit Court of Appeals for the Seventh Circuit, filed October 24, 1938. Omit the detailed statement of costs and in lieu thereof insert:

"(Here follows the detailed statement of costs)".

4. The order of this Court entered on October 28, 1938.

5. The order of this Court entered on December 22, 1938.

6. The second amendment and supplement to plaintiff's bill of complaint, filed December 22, 1938.

7. The separate answer of The Indianapolis Gas Company to the second amendment and supplement to plaintiff's bill of complaint, filed January 10, 1939. Omit the acknowledgment of service and in lieu thereof insert:

"(Acknowledgment of service)".

8. The separate answer of Citizens Gas Company of

Indianapolis to the second amendment and supplement to plaintiff's bill of complaint, filed January 10, 1939. Omit the acknowledgment of service and in lieu thereof insert:

"(Acknowledgment of service)".

9. The separate answer of the City of Indianapolis, et al., to the second amendment and supplement to plain-
519 tiff's bill of complaint, filed January 11, 1939.

10. The order of this Court entered on January 14, 1939, permitting the withdrawal of plaintiff's answer to counterclaim of City of Indianapolis, et al.

11. Plaintiff's motion to strike immaterial matter from the answer and counterclaim of defendants, the City of Indianapolis, et al., filed January 14, 1939.

12. The order of this Court entered on January 14, 1939, overruling plaintiff's motion to strike.

13. The amendment and supplement to answering defendants' (City of Indianapolis, et al.) answer and counterclaim, filed January 18, 1939.

14. The order of this Court entered on January 18, 1939, designating certain issues to be tried and deferring the trial of all other issues.

15. The order of this Court entered on March 2, 1939, substituting new parties defendant.

16. The order of this Court entered on April 7, 1939.

17. The stipulation entitled "Approval of Exhibits", filed April 7, 1939. Omit signatures of counsel and in lieu thereof insert:

"(Here follow the signatures of counsel)".

18. The request of The Chase National Bank of the City of New York, Trustee, for findings of fact and conclusions of law, submitted May 4, 1939.

19. The request of the City of Indianapolis for findings of fact and conclusions of law submitted July 5, 1939.

20. The request of defendant, Citizens Gas Company of Indianapolis, for findings of fact and conclusions of law, submitted July 6, 1939.

21. The request of defendant, The Indianapolis Gas
520 Company, for findings of fact and conclusions of law, submitted July 8, 1939.

22. The opinion of this Court, filed September 21, 1939.

23. The special findings of fact and the conclusions of law of this Court, filed September 21, 1939.

24. The order and final decree of this Court entered on September 21, 1939.

25. Plaintiff's notice of appeal.
26. Plaintiff's bond on appeal.
27. This stipulation.
28. Plaintiff's statement of the points on which it intends to rely on the appeal.
28½. Order To Send Up Original Exhibits.
29. The complete stenographic report of the proceedings at the trial on March 2nd, 3rd, and 4th, 1939.
30. The following exhibits offered by the plaintiff and received and read in evidence:

Plaintiffs' Exhibit 1.

Plaintiffs' Stipulation Exhibits 5 to 9, inclusive, 13, 14, 20, 22, 23, 24, 30, 31, 32, 35 to 40, inclusive, 47 to 50, inclusive, 55, 56, 58, 59, 66, 67, 75, 76, 86, and 87.

Plaintiffs' Exhibits 8 to 94, inclusive, 95A, 96A, 97A, 98A, 99 to 132, inclusive, and 136 to 139, inclusive.

31. Plaintiffs' Exhibit 133, being the deposition of R. E. Simond and all the exhibits attached thereto.
32. Plaintiffs' Exhibit 134, being the deposition of C. M. Clark and J. E. Baker, and all the exhibits attached thereto.
33. Plaintiffs' Exhibit 135, which was excluded by the Court.
34. The following exhibits offered by the defendants, the City of Indianapolis, et al., and received and read in evidence:

521 City's Stipulation Exhibits 60 to 65, inclusive, 68, 69, 70, and 77 to 85, inclusive.

City's Exhibits C, 1 to 4, inclusive, 5A, 6A, 6B, 7A to 7E, inclusive, 7G, 8 to 11, inclusive, and 13 to 30, inclusive.

35. City's Exhibit B, being pages 358 to 362, inclusive, of the minute book of the Board of Directors for Utilities of the City of Indianapolis. Omit pages 358 to 361, inclusive, and in lieu thereof insert:

"(Here appear (pp. 358-361) the contract of March 2, 1936 between the Department of Utilities of the City of Indianapolis and The Indianapolis Gas Company and a certified copy of a resolution adopted by the Board of Directors of The Indianapolis Gas Company ratifying said contract. A copy of said contract and of said resolution appears as Exhibit E to the answer and counterclaim of the City of Indianapolis, et al. (I R. 205-208))".

36. City's Exhibit 5B, being the answers of The Indianapolis Gas Company to the interrogatories propounded

to it by the City of Indianapolis, et al, including all the exhibits attached thereto, with the following exceptions:

(a) Omit the proof of service and in lieu thereof insert:

"(Here follows proof of service)".

(b) Omit Exhibit 1 to the answers and in lien thereof insert:

"(Here follows Exhibit 1, letter dated July 23, 1935 from Thompson, Rabb and Stevenson to The Indianapolis Gas Company, a copy of which is in evidence as Plaintiffs' Stipulation Exhibit 58)".

(c) Omit Exhibits 6 to 34, inclusive, to the answers and in lieu thereof insert:

"(Exhibits 6 to 34, inclusive, to the answers of The Indianapolis Gas Company appear elsewhere in the record as follows:

522

Exhibit to Indianapolis Gas answers No	Appears in the Record as
6	Plaintiff's Exhibit 121.
7	Exhibit 4 to plaintiff's answers to interrogatories.
8	Exhibit 6 to plaintiff's answers to interrogatories.
9	Exhibit 7 to plaintiff's answers to interrogatories.
10	Exhibit 12 to plaintiff's answers to interrogatories.
11	Plaintiffs' Exhibit 111A.
11	Plaintiffs' Exhibit 111B.
12	Plaintiffs' Exhibit 112.
12	Plaintiffs' Exhibit 112A.
13	Plaintiffs' Exhibit 113.
14	Plaintiffs' Exhibit 114.
15	Plaintiffs' Exhibit 115.
16	Plaintiffs' Exhibit 116.
17	Plaintiffs' Exhibit 117.
18	Plaintiffs' Exhibit 118.
19	Plaintiffs' Exhibit 119.
20	Exhibit 29 to plaintiff's answers to interrogatories.
21	Exhibit 30 to plaintiff's answers to interrogatories.
22	City's Exhibit C.
23	Exhibit 32 to plaintiff's answers to interrogatories.
24	Exhibit 34 to plaintiff's answers to interrogatories.
25	Exhibit 35 to plaintiff's answers to interrogatories.
26	Exhibit 36 to plaintiff's answers to interrogatories.
27-34, inclusive	Exhibits 38-45, inclusive, to plaintiff's answers to interrogatories.

(Plaintiff's answers to the interrogatories propounded to it, and the exhibits thereto, are in evidence as City's Exhibit 6B.))"

523 37. City's Exhibit 12, being the minutes of a meeting of the Board of Directors for Utilities of the City of Indianapolis held on September 9, 1935 (pp. 178 to 236, inclusive, of the minute book), with the following exceptions:

(a) Omit pages 179 to 181, inclusive, and in lieu thereof insert:

"(Here follows (pp. 179-181) a certified copy of a resolution of the Board of Trustees of Citizens Gas Company adopted on September 9, 1935, a copy of which resolution is in evidence as Plaintiffs' Stipulation Exhibit 87)".

(b) Omit pages 185 to 187, inclusive, and in lieu thereof insert:

"(Here follows (pp. 185-7) a certified copy of a resolution of the Board of Directors of Citizens Gas Company adopted on September 9, 1935, a copy of which resolution is in evidence as Plaintiffs' Stipulation Exhibit 86)".

(c) Omit pages 188 and 189 and in lieu thereof insert:

"(Here follows (pp. 188-9) a form of indemnity agreement which is identical with the form of indemnity agreement actually executed, a copy of which appears as Exhibit J to the second amendment and supplement to plaintiff's bill of complaint)".

(d) Omit pages 191 and 192 and in lieu thereof insert:

"(Here follows (pp. 191-2) an executed copy of the Indemnity Agreement, a copy of which appears as Exhibit J to the second amendment and supplement to plaintiff's bill of complaint)".

(e) Omit pages 194 to 212, inclusive, and in lieu thereof insert:

"(Here follow copies of:

I. 'Deed of Conveyance of Real Estate' (pp. 194-7), a copy of which is in evidence as Plaintiffs' Stipulation Exhibit 55.

II. 'Instrument of Transfer and Assignment of Personal Property' (pp. 198-204), a copy of which appears as Exhibit E to the bill of complaint (I R. 122-127).

III. 'Assignment of Lease' (pp. 205-8), a copy of which is in evidence as Plaintiffs' Stipulation Exhibit 56.

524 IV. 'Assignment of Lease' (pp. 209-212), assigning the lease dated September 30, 1913 from The Indianapolis Gas Company to the Citizens Gas Company, a copy of which appears as Exhibit F to the bill of complaint (I R. 127-129))".

(f) Omit page 214 and in lieu thereof insert:

"(Here follows (p. 214) a copy of a letter, a copy of which is in evidence as Plaintiffs' Stipulation Exhibit 59)".

(g) Omit pages 216 to 218, inclusive, and the first 9 lines of page 219 and in lieu thereof insert:

"(Here follows (pp. 216-18, part of 219) 'Resolution for Rejection of Assignment of Lease', a copy of which appears as part of Exhibit C to the answer and counterclaim of the City of Indianapolis, et al. (I R. 202-204))".

(h) Omit page 220 and in lieu thereof insert:

"(Here follows (p. 220) an executed copy of a document entitled 'Rejection of Assignment of Lease and Refusal to Assume, Take Over, or Be Bound Thereby', a copy of which appears as part of Exhibit C to the answer and counterclaim of the City of Indianapolis, et al. (I R. 203-4))".

(i) Omit pages 223 to 225, inclusive, and in lieu thereof insert:

"(Here follows (pp. 223-5) 'Resolution for Temporary Use of Property of The Indianapolis Gas Company', a copy of which appears as part of Exhibit C to the answer and counterclaim of the City of Indianapolis, et al. (I R. 200-202))".

38. The Indianapolis Gas Company's notice of appeal.

39. The Indianapolis Gas Company's bond on appeal.

40. The Indianapolis Gas Company's statement of the points on which it intends to rely on appeal.

41. The Clerk's certificate authenticating the transcript of record on appeal.

The Clerk is hereby requested to prepare said transcript of record for the appeal in this cause in ac-
525 cordance with the applicable statutes and rules of court and to file the same in the office of the Clerk of the United States Circuit Court of Appeals for the

Seventh Circuit, at Chicago, Illinois, on or before the 20 day of November 1939.

Dated October 27, 1939.

William L. Taylor,
Howard F. Burns,
John Adams,
Solicitors for plaintiff.

Edward H. Knight,
Corporation Counsel of Indianapolis.

W. H. Thompson,
Patrick J. Smith,
Solicitors for the City of Indianapolis and the individual defendants who are members of the Board of Trustees or of the Board of Directors for Utilities of the City of Indianapolis.

Louis B. Ewbank,
Wm. R. Higgins,
Solicitors for defendant, The Indianapolis Gas Company.

Davis, Pantzer, Baltzell & Sparks,
William G. Sparks,
Solicitors for defendant, Citizens Gas Company of Indianapolis.

1482 United States of America, Southern District of Indiana, Indianapolis Division. } ss:

I, Albert C. Sogemeier, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that the above and foregoing is a true and full transcript of the record and proceedings in the cause of The Chase National Bank of the City of New York, Trustee *vs.* Citizens Gas Company of Indianapolis, et al., No. 1844 In Equity, according to the Stipulation filed on October 28, 1939, now remaining among the records of said Court in my office.

I further certify that the original Official Reporter's Transcript of Proceedings upon the Trial filed on October 30, 1939, has been incorporated into said transcript.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Indianapolis, this 20th day of November, 1939.

Albert C. Sogemeier,
Clerk, United States District Court,
Southern District of Indiana.

(Seal)

United States of America,
Southern District of Indiana, } ss:
Indianapolis Division.

I, Albert C. Sogemeier, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that the following are original exhibits in the case of The Chase National Bank of the City of New York, Trustee *vs.* Citizens Gas Company of Indiana, et al., No. 1844 Equity, to be transmitted to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, in accordance with an order entered on October 28, 1939:

Plaintiff's Exhibit 2 for identification.

Plaintiff's Exhibit 3 for identification.

Plaintiff's Exhibits 89 to 94, inclusive, 95A, 96A, 97A, 98A, 99 to 110, inclusive, and 124.

Plaintiff's Exhibit 133, being the deposition of R. E. Simond and all the exhibits attached thereto.

Plaintiff's Exhibit 134, being the deposition of C. M. Clark and J. E. Baker and all the exhibits attached thereto.

Plaintiff's Exhibit 135 for identifiction.

City's Exhibits 7A to 7E, inclusive, 7G, 10 and 11.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Indianapolis, this 20th day of November, 1939.

Albert C. Sogemeier,
Clerk, United States District Court,
(Seal) *Southern District of Indiana.*

"In the United States Circuit Court of Appeals,

For the Seventh Circuit,

No. 7143 and 7144.

The Chase National Bank of the City of New York, Trustee,
Plaintiff-Appellant,

vs.

Citizens Gas Company of Indianapolis, *et al.*,
Defendants-Appellees.

"Stipulation as to Printing of Record.

"It is hereby stipulated by all of the parties to this proceeding, in pursuance of the provision of Rule 21 (now

Rule 14) of this Court, that only parts of the transcript of record shall be printed and that the parts hereinafter stipulated to be printed are the only parts of the record material to the determination of the questions presented on this appeal.

"It is hereby stipulated that the Clerk shall print the entire transcript of record as received from the Clerk of the District Court, with the exception of the particular matters hereinafter specifically enumerated, to wit:

"(Here follows a detailed statement covering twenty-five pages indicating material to be omitted in the printing of the record.)

"Dated November 10th, 1939.

William L. Taylor,
Howard F. Burns,
John Adams,
Solicitors for Plaintiff.
Edward H. Knight,
Corporation Counsel of Indianapolis.
Michael B. Readington,
City Attorney of Indianapolis.
W. H. Thompson,
Patrick J. Smith,
Solicitors for the City of Indianapolis and the individual defendants who are members of the Board of Trustees or of the Board of Directors for Utilities of the City of Indianapolis.
Wm. R. Higgins,
Louis B. Ewbank,
Solicitors for defendant, The Indianapolis Gas Company.
Davis, Pantzer, Baltzell & Sparks,
by William G. Sparks,
Solicitors for defendant, Citizens Gas Company of Indianapolis."

CLERK'S COPY.

Vol. IV

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940 /941/

No. 420 10

CITY OF INDIANAPOLIS, ET AL., PETITIONERS,

vs.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., ET AL.

No. 422 11

CITY OF INDIANAPOLIS, ET AL., PETITIONERS,

vs.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., ET AL.

No. 423 12

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., PETITIONER,

vs.

CITIZENS GAS COMPANY OF INDIANAPOLIS, ET AL.

No. 424 13

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., PETITIONER,

vs.

THE INDIANAPOLIS GAS COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONS FOR CERTIORARI FILED SEPTEMBER 12, 1940.

CERTIORARI GRANTED OCTOBER 28, 1940.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. _____

THE CITY OF INDIANAPOLIS, ET AL.,
Petitioners,

vs.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., ET AL.,
Respondents.

Two Causes—C. C. A. Nos. 7143-7144.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 813 to 1238, inclusive, contain a true copy of Volume III of the printed record, printed under my supervision and filed on the twentieth day of December, 1939, which together with Volumes I and II of the printed record, constitutes the record, upon which the following entitled causes were heard and determined:

The Chase National Bank of the City of New York, Trustee, etc.,
Plaintiff-appellant,

7143 *vs.*

Citizens Gas Company of Indianapolis, et al.,
Defendants-appellees.

The Chase National Bank of the City of New York, Trustee, etc.,
Plaintiff-appellee,

7144 *vs.*

The Indianapolis Gas Company,
Defendant-appellant.

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 28th day of August, A. D. 1940.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit held in the City of Chicago and begun on the third day of October, in the year of our Lord one thousand nine hundred and thirty-nine, and of our Independence the one hundred and sixty-fourth.

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellant,*
7143 *vs.*
Citizens Gas Company of Indianapolis, *et al.*, *Defendants-appellees.*

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellee,*
7144 *vs.*
The Indianapolis Gas Company, *Defendant-appellant.*

Appeals from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

And, to-wit: On the twenty-second day of November, 1939, there was filed in the office of the Clerk of this Court, a certificate to exhibits, which said certificate to exhibits is in the words and figures following, to-wit:

United States of America
Southern District of Indiana } ss.
Indianapolis Division

I, Albert C. Sogemeier, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that the following are original exhibits in the case of The Chase National Bank of the City of New York, Trustee *vs.* Citizens Gas Company of Indiana, et al., No. 1844 Equity, to be transmitted to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, in accordance with an order entered on October 28, 1939:

Plaintiff's Exhibit 2 for identification.
Plaintiff's Exhibit 3 for identification.

Plaintiff's Exhibits 89 to 94, inclusive, 95A, 96A, 97A, 98A, 99 to 110, inclusive, and 124.

Plaintiff's Exhibit 133, being the deposition of R. E. Simond and all the exhibits attached thereto.

Plaintiff's Exhibit 134, being the depositions of C. M. Clark and J. E. Baker and all the exhibits attached thereto.

Plaintiff's Exhibit 135 for identification.

City's Exhibits 7A to 7E, inclusive, 7G, 10 and 11.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Indianapolis, this 20th day of November, 1939.

Albert C. Sogemeier,
(Seal) *Clerk, United States District Court, Southern District of Indiana.*

Endorsed: Filed November 22, 1939. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-second day of November, 1939, there was filed in the office of the Clerk of this Court, a stipulation as to printing of record, which said stipulation is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

The Chase National Bank of the City of New York, Trustee, *Plaintiff-Appellant,* *vs.* Citizens Gas Company of Indianapolis, The City of Indianapolis, a Municipal Corporation, The Indianapolis Gas Company, *et al.*, *Defendants-Appellees.*	Nos. 7143, 7144.

STIPULATION AS TO PRINTING OF RECORD.

It is hereby stipulated by all of the parties to this proceeding, in pursuance of the provision of Rule 21 (now Rule 14) of this Court, that only parts of the transcript of record shall be printed and that the parts hereinafter

stipulated to be printed are the only parts of the record material to the determination of the questions presented on this appeal.

It is hereby stipulated that the Clerk shall print the entire transcript of record as received from the Clerk of the District Court, with the exception of the particular matters hereinafter specifically enumerated, to wit:

1. As to "Findings of Fact and Conclusions of Law Submitted by City of Indianapolis":

(a) In place of the last 26 lines on page 5 and the first 6 lines on page 6, insert:

"(Here follows the 5th grammatical paragraph of Subdivision XIV of the Mortgage (Exhibit A to the bill of complaint, I R. 46, lines 13-26))."

(b) In place of the last 15 lines on page 8 and the first 4 lines on page 9 insert:

"(Here follows paragraph 1(g) of the Franchise Contract of August 25, 1905 (part of Exhibit C to the bill of complaint, I R. 84, lines 13-26))."

(c) In place of the last 28 lines on page 9 insert:

"(Here follows paragraph 1(i) of the Franchise Contract (part of Exhibit C to the bill, I R. 84-85))."

(d) In place of all but the first 2 lines on page 11, and the first 22 lines on page 12 insert:

"(Here follow subdivisions 21, 22, 23 and 24 of the Franchise Contract (part of Exhibit C to the bill, I R. 93-94))."

(e) In place of the last 30 lines on page 14 insert:

"(Here follows all of the first paragraph of subdivision 1 of the Lease except the last sentence thereof (Exhibit B to the bill of complaint, I R. 55-56))."

(f) In place of the last 30 lines on page 17 and the first 9 lines on page 18 insert:

"(Here follows the first grammatical paragraph of subdivision 15 of the Lease (Exhibit B to the bill, I R. 64))."

(g) In place of the last 11 lines on page 18 and the first 15 lines on page 19 insert:

"(Here follows subdivision 22 of the Lease (Exhibit B to the bill, I R. 72))."

2. As to the "Special Findings of Fact" of the Court:

(a) In place of the last 20 lines on page 4 and the first 13 lines on page 5 insert:

"(Here follows the fifth grammatical paragraph of

subdivision XIV of the Mortgage (Exhibit A to the bill of complaint, I R. 46, lines 13-36))."

(b) In place of the last 2 lines on page 10 and the first 17 lines on page 11 insert:

"(Here follows paragraph 1(g) of the Franchise Contract of August 25, 1905 (part of Exhibit C to the bill of complaint, I R. 84, lines 13-26))."

(c) In place of the last 15 lines on page 11 and the first 13 lines on page 12 insert:

"(Here follows paragraph 1(i) of the Franchise Contract (part of Exhibit C to the bill, I R. 84-85))."

(d) In place of the last 22 lines on page 13 and all of page 14 insert:

"(Here follow subdivisions 21, 22, 23 and 24 of the Franchise Contract (part of Exhibit C to the bill, I R. 93-94))."

(e) In place of the last 20 lines on page 17 and the first 11 lines on page 18 insert:

"(Here follows all of the first paragraph of subdivision 1 of the Lease except the last sentence thereof (Exhibit B to the bill of complaint, I R. 55-56))."

(f) In place of the last 25 lines on page 20 and the first 15 lines on page 21 insert:

"(Here follows the first grammatical paragraph of subdivision 15 of the Lease (Exhibit B to the bill, I R. 64))."

(g) In place of the last 7 lines on page 21 and the first 19 lines on page 22 insert:

"(Here follows subdivision 22 of the Lease (Exhibit B to the bill, I R. 72))."

3. As to the complete stenographic report of the proceedings at the trial, omit:

(a) Page 112, last 8 lines; all of pages 113 and 114, and all of page 115 except the last line.

(b) Last 4 lines of page 189; pages 190 and 194, inclusive, and all but last 7 lines of page 195.

(c) All but first 2 lines of page 196, pages 197 and 198, and first line of page 199.

(d) Last 11 lines of page 199, pages 200 and 201, and first 10 lines of page 202.

(e) All of page 206, except first 7 lines; all of pages 207 to 211, inclusive; and all of page 212 except the last 8 lines.

(f) All of page 219, except the first 5 lines; all of pages 220 to 231, inclusive; and the first 3 lines of page 232.

(g) The last 9 lines of page 243 and pages 244 to 251, inclusive.

(h) The last 8 lines of page 259, pages 260, 261, and the first 6 lines of page 262.

(i) Page 289, the last 15 lines; pages 290 to 295, inclusive.

(j) Page 307, all but first 4 lines; page 308; and page 309 all but last 3 lines.

(k) Page 316, all but first 3 lines; pages 317 to 319, inclusive; and first 3 lines of page 320.

(l) Page 360, all but first 8 lines; pages 361 to 367, inclusive; page 368 all but last 6 lines.

(m) All of pages 371 to 383, inclusive; page 384, all except last 3 lines.

(n) Page 385, all but first 5 lines; pages 386 to 438, inclusive.

(o) Page 467, all but first 4 lines; page 468; all of page 469 except last line; page 470 except first 8 lines; page 471; and first 2 lines of page 472.

(p) Page 487, all except first 5 lines; pages 488 to 505, inclusive; page 506, except last line.

4. As to Plaintiffs' Exhibit 2 (the record in *Todd* v. *Citizens Gas*), this exhibit was merely marked for identification and should not be printed, except to the extent that other exhibits hereinafter enumerated were taken therefrom.

5. As to Plaintiffs' Exhibit 3 (Appellants' Brief in *Williams* v. *Citizens Gas Company*), this exhibit was merely marked for identification and should not be printed, except to the extent that other exhibits hereinafter enumerated were taken therefrom.

6. There are no Stipulation Exhibits bearing numbers 1 to 4, inclusive, 10, 11, 12, 15 to 19, inclusive, 21, 25 to 29, inclusive, 33, 34, 41 to 46, inclusive, 51 to 54, inclusive, 57, or 71 to 74, inclusive.

7. As to Plaintiffs' Stipulation Exhibit 5, the Agreement of Lease set forth therein beginning in the middle of page 3 and continuing through the first 31 lines on page 20 should be omitted and the following inserted in lieu thereof:

"Here is inserted the proposed 'Agreement of Lease'. Said Agreement of Lease is substantially identical with the Lease finally executed between the parties, a copy of which is attached to the bill of complaint as Exhibit B thereto (I R. 51-80), with the following exceptions:

"(a) The proposed 'Agreement of Lease' did not contain:

"(I) The metes and bounds description of the Indianapolis Gas property as it appears in the 4th to 9th grammatical paragraphs, inclusive, of the executed Lease (I R. 52-4).

"(II) The 13th grammatical paragraph of the executed Lease (I R. 55).

"(III) The 3rd grammatical paragraph of Subdivision 6 of the executed Lease (I R. 58).

"(IV) The last grammatical paragraph of Subdivision 7 of the executed Lease (I R. 60).

"(V) The next to the last grammatical paragraph of Subdivision 15 of the executed Lease (I R. 66).

"(VI) All of Subdivision 16 of the executed Lease, except the first sentence thereof (I R. 66-7).

"(VII) Subdivisions 26, 27 and 27½ (containing 19 grammatical paragraphs) of the executed Lease (I R. 73-77).

"(VIII) Subdivision 31 of the executed Lease (I R. 79).

"(b) In place of the 3rd, 4th, and 5th grammatical paragraphs of Subdivision 21 of the Lease as executed (I R. 70, lines 8-43), the proposed Agreement of Lease contained the following provisions:

"'2. The Lessee will pay to the Lessor as additional rental for the demised property:

"'On the 31st day of December, 1913, the sum of ..... thousand Dollars, being at the rate of One Hundred and Twenty Thousand Dollars per year for the period from the beginning of this lease to the 1st day of January, 1914.

"'On the 30th day of June and the 31st day of December, 1914, and thereafter semi-annually on the last days of June and December of each year, the sum of Seventy Thousand Dollars, provided however when the dividends paid on the capital stock of the Lessee Company shall in any calendar year equal eight per cent of the par value thereof, thereupon in the calendar year following the semi-annual rental to be paid the Lessor shall be Eighty Thousand Dollars and being thus once fixed shall, except as hereafter provided, remain at such sum during the remainder of the term created by this lease; provided if in any calendar year during the running of this lease after the rental hereunder has reached the sum of $160,000 a

year, the earnings of the Lessee available for dividends to its stockholders shall not be sufficient to enable a dividend of eight per cent to be paid to the Lessee's stockholders (whether or not in fact such dividend be actually declared and paid), then the rental to be paid to the Lessor under this paragraph of the lease for the succeeding calendar year shall be only One Hundred and forty thousand dollars ($140,000), payable in two equal semi-annual payments, as hereinbefore provided. For any fractional six months period immediately preceding the termination of the lease, the rental shall be at the same rate as that paid for the preceding six months period.'

"(c) In place of Subdivision 22 of the Lease as executed (I R. 72), the proposed Agreement of Lease contained Subdivisions 22 and 23, reading as follows:

"'22. The Lessee covenants to perform and observe all the covenants and agreements of the Lessor, except those as to the payment of the principal of the bonds, contained in its mortgage to the Trust Company of America, dated October 1st, 1902, securing an issue of bonds in the sum of Seven Million Five Hundred Thousand Dollars ($7,500,000) hereinabove referred to; and also all covenants and agreements of the Lessor, except those as to the payment of the principal of the bonds contained in any refunding or renewal mortgage executed pursuant to the provisions of Article 7 of this lease.

"'As between the parties hereto it is agreed that the Lessee may at any time invest its funds in the outstanding bonds of the Lessor, but its acquirement thereof shall be not deemed a cancellation or retirement thereof unless the Lessee expressly elects to have the same cancelled or retired.

"'23. The Lessee covenants that it will upon the original or other maturity of any of the obligations secured by the aforesaid mortgage of the Lessor, or by any mortgage or mortgages taking its place, refinance such debts with new bonds secured by mortgage on the leased property, or with other obligations of the Lessor, in such manner and form as the Lessee shall deem advisable and the Lessor in writing approves, and the Lessor covenants to do such acts as may be reasonably required of it to carry out such refinancing.')".

8. Plaintiffs' Stipulation Exhibits 8 and 9 should be omitted in printing.

9. Plaintiffs' Stipulation Exhibit 30, the bill of com-

plaint in *Todd* v. *Citizens Gas Company*, appears on pages 2 to 72 of Plaintiffs' Exhibit 2 for Identification (the transcript of the record in said cause). This exhibit should be printed in full with the following exceptions:

(a) In place of the last 28 lines on page 5, all of pages 6 and 7, and the first 23 lines on page 8 insert:

"(Here follows detailed description of real estate owned by Citizens Gas Company)."

(b) In place of the last 25 lines on page 9, all of pages 10 to 21, inclusive, and all of page 22 except the last 10 lines insert:

"(Here follows the Franchise Contract of August 25, 1905, which appears as part of Exhibit C to the bill (I R. 81-94))."

(c) In place of the last 6 lines on page 23, and all of pages 24 to 27, inclusive, insert:

"(Here follows the Articles of Incorporation of Citizens Gas Company, which appears as part of Exhibit C to the bill (I R. 95-100))."

(d) In place of the last 21 lines on page 34, all of pages 35, 36 and 37, and the first 15 lines on page 38 insert:

"(Here follows a certificate of amendment to the Articles of Incorporation of Citizens Gas Company, filed August 27, 1921, which appears as part of Exhibit C to the bill (I R. 112-116))."

(e) In place of the last 25 lines on page 41, all of page 42, and all of page 43 except the last two lines insert:

"(Here follows the resolution adopted by the Board of Public Works on March 20, 1929, a copy of which is in evidence as Plaintiffs' Stipulation Exhibit 22)."

(f) In place of the last 26 lines on page 44 and the first 12 lines on page 45 insert:

"(Here follows the first resolution of the Board of Directors of Citizens Gas Company adopted on April 3, 1929, a copy of which is in evidence as Plaintiffs' Stipulation Exhibit 23)."

(g) In place of the last 21 lines on page 45, all of page 46, and the first 27 lines on page 47 insert:

"(Here follows the second resolution of the Board of Directors of Citizens Gas Company adopted on April 3, 1929, a copy of which is in evidence as Plaintiffs' Stipulation Exhibit 24)."

10. Plaintiffs' Stipulation Exhibit 31, the answer of

the City of Indianapolis in said Todd case, appears on pages 115 to 152 of Plaintiffs' Exhibit 2 for Identification (the record in said cause). This exhibit should be printed in full.

11. Plaintiffs' Stipulation Exhibit 32, plaintiff's amended motion to strike out portions of the answer of the City of Indianapolis, et al. in the Todd case, appears on pages 154 to 161 of Plaintiffs' Exhibit 2 for Identification. This exhibit should be printed in full with the following exceptions:

(a) Omit all but the first 5 lines on page 156 and all of page 157 except the last 6 lines and in lieu thereof insert:

"(Here follows all but the first paragraph of subdivision 8 of the answer of the City of Indianapolis, et al. in the Todd case, a copy of which answer is in evidence as Plaintiffs' Stipulation Exhibit 31)."

(b) Omit the last 32 lines on page 160 and the first 16 lines on page 161 and in lieu thereof insert:

"(Here follows all of the first paragraph of subdivision 2 of the answer of the City of Indianapolis, et al. in the Todd case (Plaintiffs' Stipulation Exhibit 31) except the first few lines of said paragraph, reading as follows: 'These answering defendants deny the allegations of Subdivision II of the complaint that the plaintiff is the owner of 250 shares of the common capital stock of defendant Citizens Gas Company of Indianapolis')."

12. Plaintiffs' Stipulation Exhibit 35, the bill of complaint in *Williams* v. *Citizens Gas Co., et al.*, appears on pages 110 (last 12 lines) to 228 (all except last 10 lines), inclusive, of Plaintiffs' Exhibit 3 for Identification (being Appellants' Brief in said cause in the Supreme Court of Indiana). This exhibit should be printed in full with the following exceptions:

(a) In place of the matter beginning on the third line of page 115 and continuing through the third line on page 132 insert:

"(Here follows the Franchise Contract of August 25, 1905, which appears as part of Exhibit C to the bill (I R. 81-94))."

(b) In place of the last 11 lines on page 132, pages 133 to 136, and the first 19 lines on page 137 insert:

"(Here follows the Articles of Incorporation of Citizens Gas Company, which appears as part of Exhibit C to the bill (I R. 95-100))."

(c) In place of the last 14 lines on page 146, pages 147 to 150, inclusive, and the first 21 lines on page 151 insert:

"(Here follows the Agreement of November 29, 1911, between the City of Indianapolis and Citizens Gas Company, modifying the Franchise Contract of August 25, 1905, which Agreement appears as part of Exhibit C to the bill (I R. 108-112))."

(d) In place of the last 8 lines on page 152, all of pages 153, 154, 155, and the first 21½ lines on page 156 insert:

"(Here follows a detailed description of the property of the Citizens Gas Company)."

(e) In place of the matter beginning on the fourth line of page 163 and continuing through page 164 insert:

"(Here follows the joint petition of Citizens Gas Company of Indianapolis and The Indianapolis Gas Company to the Public Service Commission, previously set forth as part of Plaintiffs' Stipulation Exhibit 13)."

(f) In place of the last 19 lines on page 165, all of pages 166 to 199, inclusive, and all of page 200 except the last 8 lines insert:

"(Here follows a copy of the Lease between Indianapolis Gas and Citizens Gas, a copy of which is attached to the bill as Exhibit B (I R. 51-80))."

13. Plaintiffs' Stipulation Exhibit 36, the Supplemental Complaint in *Williams* v. *Citizens Gas Co., et al.*, appears on pages 228 (last 6 lines) to 230 (first 11 lines), inclusive, of Plaintiffs' Exhibit 3 for Identification (being Appellants' Brief in said cause in the Supreme Court of Indiana). This exhibit should be printed in full.

14. As to Plaintiffs' Stipulation Exhibit 37:

(a) In subdivision 4, omit the last 26 lines on page 5 and the first 29 lines on page 5 and insert:

"(Here is quoted the first three grammatical paragraphs of subdivision (20) of the complaint in the Williams case, which complaint is set forth as Plaintiffs' Stipulation Exhibit 35))".

(b) In subdivision 6, omit lines 6 to 30 on page 8 and insert:

"(Here is quoted the last grammatical paragraph of subdivision (24) of the complaint in the Williams case, which complaint is set forth as Plaintiffs' Stipulation Exhibit 35)".

(c) In subdivision 8, omit the first 25 lines on page 10 and insert:

"(Here is quoted the last grammatical paragraph of subdivision (25) of the complaint in the Williams case (Plaintiffs' Stipulation Exhibit 35))".

(d) In subdivision (8), omit the last 24 lines on page 10 and insert:

"(Here is quoted all of subdivision (31) of the bill of complaint in the Williams case (Plaintiffs' Stipulation Exhibit 35))".

(e) In subdivision 9, omit all of page 12 except the last 3 lines and insert:

"(Here is quoted the first grammatical paragraph of subdivision (25) of the complaint in the Williams case (Plaintiffs' Stipulation Exhibit 35))".

(f) In subdivision 10, omit lines 7 to 35 on page 13 and insert:

"(Here is quoted the next to the last paragraph of subdivision (30) of the complaint in the Williams case (Plaintiffs' Stipulation Exhibit 35))".

15. Plaintiffs' Stipulation Exhibit 38 appears in Plaintiffs' Exhibit 3 for Identification (last 3 lines on p. 232, all of pages 233 and 234, and first 10 lines on p. 235). This exhibit should be printed in full.

16. As to Plaintiffs' Stipulation Exhibit 47, in place of pages 9 to 15, inclusive, insert:

"(Here follow detailed provisions in accordance with the applicable Indiana statutes as to advertising for, making, and acceptance of bids for the City's Gas Plant Revenue Bonds)".

17. As to Plaintiffs' Stipulation Exhibit 48, in place of page 3 insert:

"(Here follows a form of 'Notice of Payment of Citizens Gas Company Mortgage Bonds', which form of Notice is identical with the Notice set forth as Plaintiffs' Stipulation Exhibit 49)".

18. As to Plaintiffs' Stipulation Exhibit 55, omit:

(a) The four "whereas" paragraphs (beginning on the third line of page 1 and continuing through the 18th line on page 2) and in lieu thereof insert:

"(Here follow 4 paragraphs which are identical with the first 4 paragraphs of the Assignment of Lease attached to the bill of complaint as Exhibit F (I R. 127-9))".

(b) Pages 3 and 4, and substitute the following:

"(Here follows a detailed description by metes and bounds of the Citizens Gas Company property)".

(c) Page 6, and substitute:

"(Acknowledgment omitted in printing)".

19. As to Plaintiffs' Stipulation Exhibit 56, omit:

(a) The first four "whereas" paragraphs (beginning on the second line of page 1 and continuing through the 16th line of page 2) and in lieu thereof insert:

"(Here follow 4 paragraphs which are identical with the first 4 paragraphs of the Assignment of Lease attached to the bill of complaint as Exhibit F (I R. 127-9))".

(b) Page 4, and insert:

"(Acknowledgment omitted in printing)".

20. As to Plaintiffs' Stipulation Exhibit 87, omit the first two "whereas" paragraphs appearing on page 1 and in lieu thereof insert:

"(Here appear 2 paragaphs which are identical with the first 2 paragraphs of Plaintiffs' Stipulation Exhibit 86)".

21. As to Plaintiffs' Exhibit 88, in place of page 2 insert:

"(Certificate to qualifications of certifying Officer omitted in printing)".

22. Plaintiffs' Exhibit 89 is the answer of the City of Indianapolis, et al., in the case of *Cotter* v. *Citizens Gas Co., et al.*, and appears in the form of a photostat of pages 73 to 104, inclusive, of the transcript of record in that case. This exhibit should be printed in full.

23. As to Plaintiffs' Exhibit 90, this should be printed in full with the exception of the last page, in lieu of which insert:

"(Here follows revenue statement of Citizens Gas Company for year ending December 31, 1918, and balance sheet as of same date)".

24. As to Plaintiffs' Exhibit 92, print only:

(a) Page 1, first 6 lines.

(b) Page 3, lines 12 to 49, inclusive (the heading "Relations with Indianapolis Gas Company" and the two paragraphs appearing immediately thereunder).

(c) Page 4, last 10 lines.

25. As to Plaintiffs' Exhibit 93, omit:

(a) Page 2, last 12 lines.

(b) All of page 3.

(c) Page 4, all except last 11 lines.

26. As to Plaintiffs' Exhibit 94, print only:

(a) Page 1, except last 11 lines.

(b) Last 11 lines of page 4.

27. As to Plaintiffs' Exhibit 95-A, print only:

(a) Line 1 and lines 7 to 25 of page 1 (page 857).

(b) Line 1 and lines 11 to 44 of page 3 (page 859).

28. As to Plaintiffs' Exhibit 96-A, print only:

(a) Line 1 and lines 19 to 44, inclusive, of page 1 (page 2310).

(b) Line 1 and lines 9 to 32, inclusive, of page 4 (page 2313).

29. As to Plaintiffs' Exhibit 97-A, print only:

(a) The heading "Citizens Gas Company of Indianapolis" on page 1 (page 54).

(b) All of first column on page 1 (p. 54) down to "Miscellaneous Statistics" and first 6 lines of second column under this heading.

(c) The third grammatical paragraph in the second column on page 1 (p. 54), being lines 19 to 24, inclusive, in said second column.

(d) From page 3 (p. 56) the heading "The Indianapolis Gas Company" and all material appearing in the column following this heading except the last 9 lines.

30. As to Plaintiffs' Exhibit 98-A, print only:

(a) Lines 1 to 25, inclusive, of page 1 (page 373).

(b) "Table A" appearing at the bottom of page 1 (page 373), including all of the remainder of page 1.

(c) The first 7 lines of page 2 (page 374).

31. Plaintiffs' Exhibits 99 to 109, both inclusive, s[illegible]d be omitted in printing and the following inserted i[illegible] thereof:

"(Plaintiffs' Exhibits 99 to 109, inclusive, ar[illegible] tostats of the pages from Moody's Manual of I[illegible]stments—Public Utility Securities—for the years 1924 to 1934, inclusive, which set forth material with respect to Citizens Gas Company of Indianapolis and The Indianapolis Gas Company. Statements appear in each of these 11 exhibits which are substantially identical with the statements quoted above from Plaintiffs' Exhibit 98-A from Moody's Manual of Investments—Public Utility Securities—for 1923)".

32. As to Plaintiffs' Exhibit 110, print only:

(a) From page 1 (page 2336) the heading at the top of

the page, "Moody's Manual of Investments", the heading "Citizens Gas Company of Indianapolis" and all material under that heading on page 1.

(b) All of page 2 (page 2337) down to the table headed "Comparative Operating Statistics, Years Ended Dec. 31".

(c) The heading at the top of page 3 (page 2338) "Moody's Manual of Investments", all the material between the end of the "Comparative Condensed Balance Sheet, as of Dec. 31" and the beginning of "Table B—Stock Records", and the note in the 2 columns preceding the last 4 lines on the page.

(d) The heading at the top of page 4 (page 2339) "Moody's Manual of Investments" and the paragraph on said page headed "Liquidating Dividend Rescinded".

33. As to Plaintiffs' Exhibits 123A, 123B and 123C:

(a) In place of the letter dated April 8, 1936 which appears in Plaintiffs' Exhibit 123A (p. 55) insert:

> "(Here appears a copy of the letter dated April 8, 1936 from Thompson, Rabb & Stevenson to The Indianapolis Gas Company, a copy of which letter is in evidence as City's Stipulation Exhibit 80)".

(b) In place of the letter dated May 12, 1936 which appears in Plaintiffs' Exhibits 123A and 123B (pp. 55-56) insert:

> "(Here appears a copy of the letter dated May 12, 1936 from The Indianapolis Gas Company to Thompson, Rabb & Stevenson, a copy of which letter is in evidence as City's Stipulation Exhibit 81)".

(c) In place of the letter dated May 4, 1936 which appears in Plaintiffs' Exhibit 123B (p. 56) insert:

> "(Here appears a copy of a letter dated May 4, 1936 from Baker, Hostetler, Sidlo & Patterson to The Indianapolis Gas Company)".

(d) In place of the letter dated May 12, 1936 which appears in Plaintiffs' Exhibit 123C (p. 57) insert:

> "(Here appears a copy of a letter dated May 12, 1936 from The Indianapolis Gas Company to Baker, Hostetler, Sidlo & Patterson)".

34. Omit Plaintiffs' Exhibit 124 and in lieu thereof insert:

> "(This exhibit is identical with Plaintiffs' Exhibit 93)".

35. As to Plaintiffs' Exhibit 126, in place of the last

seven grammatical paragraphs of the body of the letter, down to the date (all but the first paragraph), insert:

"(Here follows 7 paragraphs which are identical with the last 7 paragraphs in Plaintiffs' Exhibit 125)".

36. Plaintiffs' Exhibits 127, 128, 128-A, 128-B, 129 and 130 should be omitted in printing.

37. Plaintiffs' Exhibit 133 is the deposition of Robert E. Simond and the exhibits thereto, being Plaintiffs' Deposition Exhibits 101 to 116-B and City's Deposition Exhibits 1 to 5. This exhibit should be printed in full with the following exceptions:

(a) Omit the entire "Notice of Intention to Take Depositions upon Oral Examination" in cause 1844 (2 pages), the entire "Proof of Service of Notice of Intention to Take Depositions" in cause 1844 (1 page), the entire "Notice of Intention to Take Depositions upon Oral Examination" in cause 1950 (2 pages), and the entire "Proof of Service of Notice of Intention to Take Depositions" in cause 1950 (1 page), all of which appears as part of said exhibit prior to the deposition itself. In lieu thereof insert:

"(Notice to take Deposition, and Proof of Service thereof omitted in printing)".

(b) Omit page 1 of deposition except last 5 lines.

(c) Omit pages 3 and 4 of deposition and insert:

"(Stipulation as to waiver of notice, waiver of signature, etc., omitted in printing)".

(d) Omit pages 69 and 70 of deposition and insert:

"(Certification of notary to deposition omitted in printing)".

(e) Omit Plaintiffs' Deposition Exhibit 102 and insert:

"(Plaintiffs' Deposition Exhibit 102 is identical with Exhibit B attached to the Answer and Counter-Claim of the City of Indianapolis, et al., (I R. 192-199))".

(f) As to Plaintiffs' Deposition Exhibit 103 omit:

(i) All of page 1 except the heading "Re: City of Indianapolis, Indiana Gas Plant Revenue 4½% Bonds".

(ii) All of page 2 except the heading "Acquisition of Gas Properties" and the material appearing under said heading.

(iii) All of page 3 except last 21 lines.

(iv) All of pages 4, 5, 6 and 7.

(v) All of page 8 except last 3 lines and date.

(g) In place of Plaintiffs' Deposition Exhibit 106 insert:

"(Plaintiffs' Deposition Exhibit 106 is identical with City's Exhibit 11)".

(h) As to Plaintiffs' Deposition Exhibit 110, print only:

(i) The title page, all of page 1, and all of page 2 except last 10 lines.

(ii) The last 3 lines on page 3 and all of pages 4 and 5.

(i) As to Plaintiffs' Deposition Exhibit 114, reproduce in full by photolithographic or other similar process.

(j) Omit all of Plaintiffs' Deposition Exhibit 115 and in lieu thereof insert:

"(Plaintiffs' Deposition Exhibit 115 is the report of Arthur Mullergren and Company dated June 22, 1935. The testimony concerning this report appears in the deposition of R. E. Simond, Plaintiffs' Exhibit 133)".

(k) Omit Plaintiffs' Deposition Exhibit 116-A and substitute:

"(Plaintiffs' Deposition Exhibit 116-A is identical with Plaintiffs' Deposition Exhibit 104)".

(l) Omit Plaintiffs' Deposition Exhibit 116-B and substitute:

"(Plaintiffs' Deposition Exhibit 116-B is identical with Plaintiffs' Deposition Exhibit 105)".

38. Plaintiffs' Exhibit 134 is the deposition of Chester M. Clark and Joseph Edwards Baker, together with Plaintiffs' Deposition Exhibits 1 to 12, inclusive, and should be printed in full except as follows:

(a) Omit the entire "Certificate of Notary Taking Depositions" (3 pages), which appears prior to the depositions themselves, and in lieu thereof insert:

"(Certificate of notary omitted in printing)".

(b) Omit all of page 1 of the depositions except the last 10 lines.

(c) Omit the Index of Witnesses at the end of the depositions.

(d) Omit Plaintiffs' Deposition Exhibits 1 and 2, and insert:

"(Stipulation and notice re taking deposition omitted in printing.)"

(e) Reproduce Plaintiffs' Deposition Exhibits 3 to 9, inclusive, by photolithographic or some other similar process.

(f) Omit Plaintiffs' Deposition Exhibits 11 and 12.

39. As to Plaintiffs' Exhibit 135, mark at the head of the exhibit "Excluded by District Court" and print only the following:

(a) The cover, pages 1 and 2, and page 3 except last 9 lines.

(b) Heading "C", in black face type on page 5.

(c) The last 11 lines on page 6.

(d) The last 4 lines on page 7 and all of page 8 except last 2 lines.

(e) The heading "No Right to Receivership is Shown" on page 10, the last 2 lines on page 10, and the first 10 lines on page 11.

(f) All of page 13 and all of page 14 except last 8 lines.

(g) Lines 6 to 14, inclusive, on page 15.

(h) The heading "D." in black face type on page 16, the heading "E." in black face type on page 23 and the heading "F." in black face type on page 25.

(i) All of page 27, all of page 29 except the first 8 lines, all of page 30 and all of page 31 except the last 10 lines.

(j) The last 5 lines on page 33 and the first 11 lines on page 34.

(k) All of page 38 except the first 6 lines, all of pages 39 and 40 and the first 9 lines on page 41.

(l) The last 16 lines on page 41 and all of pages 42 to 46, inclusive.

40. Omit Plaintiffs' Exhibits 136, 137, and 138.

41. Plaintiffs' Exhibit 139, the stipulation in *Todd v. Citizens Gas Company, et al.*, appears on pages 186 to 248 of Plaintiffs' Exhibit 2 for Identification (the transcript of record in said cause). This exhibit should be omitted entirely in printing with the following exceptions:

(a) The caption and introductory paragraph (first 15 lines on p. 186).

(b) Subdivision 2(d) (last 22 lines on p. 190 and first 2 lines on p. 191).

(c) Subdivisions 4 and 5 and the first paragraph of sub-

division 6 (all of p. 192 except first 5 lines, and the first 20 lines on p. 193).

(d) Subdivision 8 (lines 9-19 on p. 197).

(e) The 4th and 5th paragraphs of subdivision 9(a) (last line on p. 197 and the first 7 lines on p. 198).

(f) Subdivision 9(d) (last 27 lines on p. 200 and first 25 lines on p. 201).

(g) Subdivision 13 and 14 (all of p. 234 except first 14 lines, and first 16 lines on p. 235).

(h) Subdivisions 19, 20 and 21 (lines 6-37 on p. 236).

(i) The concluding paragraph of the stipulation and the signatures thereto (last 11 lines on p. 247 and all of p. 248). A typewritten transcript of this exhibit as it is to be printed under the terms of this Stipulation has been prepared for the convenience of the Clerk and the printer and is attached to this Stipulation, marked "Plaintiffs' Exhibit 139."

42. Omit City's Exhibit C.

43. As to City's Exhibit 1, omit certificate of Marion County Circuit Judge (last 20 lines on page 2) and substitute:

"(Certificate to qualifications of certifying officer omitted in printing)".

44. As to City's Exhibit 2, omit page 3 and substitute:

"(Certificate to qualifications of certifying officer omitted in printing)".

45. As to City's Exhibit 3, omit last 11 lines of page 2 and all of page 3 and substitute:

"(Certificate to qualifications of certifying officer omitted in printing)".

46. As to City's Exhibit 4, omit last 9 lines on page 2 and all of page 3 and substitute the following:

"(Certificate to qualifications of certifying officer omitted in printing)".

47. Print only the following portions of City's Exhibit 5A:

(a) The heading on page 1.

(b) Interrogatories 23 to 45, inclusive, (all of pages 7 to 11, inclusive).

48. Print only the following portions of City's Exhibit 5B:

(a) All of page 1, except the title of the cause and the last 11 lines.

(b) Answers 23 to 45, inclusive, (last 8 lines on page 6, all of page 7, all of page 8 except last 4 lines).

(c) In place of the verification (pp. 10 and 11) insert:
"(Verification of William J. Yule, Secretary of The Indianapolis Gas Company, omitted in printing)."

(d) In place of Exhibits 1 to 34, inclusive, attached to these answers to interrogatories substitute the following:

"Here follows Exhibit 1, letter dated July 23, 1935, from Thompson, Rabb & Stevenson to The Indianapolis Gas Company, a copy of which is in evidence as Plaintiffs' Stipulation Exhibit 58.

"Exhibits 2 to 5, attached to these answers to interrogatories, have been omitted in printing by agreement of the parties.

"Exhibits 6 to 19, inclusive, to these answers to interrogatories, appear elsewhere in the record as follows:

"Exhibit to Indianapolis Gas answers No.	Appears in the Record as
6	Plaintiffs' Exhibit 121.
7	Exhibit 4 to plaintiff's answers to interrogatories.
8	Exhibit 6 to plaintiff's answers to interrogatories.
9	Exhibit 7 to plaintiff's answers to interrogatories.
10	Exhibit 12 to plaintiff's answers to interrogatories.
11	Plaintiffs' Exhibit 111A.
11	Plaintiffs' Exhibit 111B.
12	Plaintiffs' Exhibit 112.
12	Plaintiffs' Exhibit 112A.
13	Plaintiffs' Exhibit 113.
14	Plaintiffs' Exhibit 114.
15	Plaintiffs' Exhibit 115.
16	Plaintiffs' Exhibit 116.
17	Plaintiffs' Exhibit 117.
18	Plaintiffs' Exhibit 118.
19	Plaintiffs' Exhibit 119.

(Plaintiff's answers to the interrogatories propounded to it, and the exhibits thereto, are in evidence as City's Exhibit 6B.)

"Exhibits 20 to 34, attached to these answers to interrogatories, have been omitted in printing by agreement of the parties."

49. Print only the following portions of City's Exhibit 6A:

(a) The heading on page 1.

(b) Interrogatories 21 to 34, inclusive (last 2 lines on page 5, all of pages 6 and 7, and first 11 lines on page 8).

50. Print only the following portions of City's Exhibit 6B:

(a) All of page 1, except the title of the cause and the last 6 lines.

(b) Answers 21 to 34, inclusive, (all of page 3 and the first 7 lines on page 4).

(c) In place of the verification (page 6) insert:

"(Verification of Paul C. Beardslee omitted in printing)".

(d) In place of Exhibits 1 to 3 insert:

"(Exhibits 1 to 3, attached to these answers to interrogatories, have been omitted in printing by agreement of the parties)".

(e) Exhibits 4 to 12, inclusive, and Exhibits 12A and 12B to the answers.

(f) In place of Exhibits 13 to 24, inclusive, to the answers insert:

"(Exhibits 13 to 24, inclusive, to plaintiff's answers to the interrogatories propounded to it appear elsewhere in the record as follows:

Exhibit to Plaintiff's Answers No.	Appears in the Record as Plaintiffs' Exhibit No.
13	111A
14	111B
15	111C
16	112
17	112A
18-24, inclusive	113-119, inclusive)".

(g) In place of Exhibits 25 to 45 insert:

"(Exhibits 25 to 45, attached to these answers to interrogatories, have been omitted in printing by agreement of the parties)".

51. As to City's Exhibit 7-A:

(a) Omit on page 1 (page 37) letter of July 23, 1935, and substitute:

"(Here follows copy of letter of July 23, 1935, which letter appears above as Plaintiffs' Stipulation Exhibit 58)".

(b) Omit on page 1 (page 37) letter of August 31, 1935, and substitute:

"(Here follows copy of letter of August 31, 1935, which

letter appears above as Plaintiffs' Stipulation Exhibit 59)".

(c) Omit letter of September 9, 1935 on page 2 (page 38) and substitute:

"(Here follows copy of letter of September 9, 1935, which letter appears above as City's Stipulation Exhibit 60)".

(d) Omit Resolution for Rejection of Assignment of Lease: Rejection of Assignment of Lease, and Resolution for Temporary Use of Property of Indianapolis Gas Company, appearing on pages 2, 3, 4 and 5 (pages 38-41) and substitute:

"(Here follows copy of resolution for rejection of assignment of lease, rejection of assignment of lease, and resolution for temporary use of property of Indianapolis Gas Company, copies of which are attached to the answer and counterclaim of the City of Indianapolis, et al. as Exhibit C (I R. 200-204)".

(e) Omit first letter of September 24, 1935 on page 6 (page 42) and substitute:

"(Here follows copy of letter of September 24, 1935, which letter appears above as City's Stipulation Exhibit 62)".

(f) Omit second letter of September 24, 1935, on page 6 (page 42) and substitute:

"(Here follows copy of letter of September 24, 1935, which letter appears above as City's Stipulation Exhibit 61)".

52. As to City's Exhibit 7-B:

(a) Omit first letter of September 30, 1935 on page 1 (page 43) and substitute:

"(Here follows copy of letter of September 30, 1935, which letter appears above as Plaintiffs' Stipulation Exhibit 66)".

(b) Omit second letter of September 30, 1935 on page 2 (page 44) and substitute:

"(Here follows copy of letter of September 30, 1935, which letter appears above as City's Stipulation Exhibit 64)".

(c) Omit third letter of September 30, 1935, on page 2 (page 44) and substitute:

"(Here follows copy of letter of September 30, 1935, which letter appears above as City's Stipulation Exhibit 65)".

53. As to City's Exhibit 7C, omit the letter from The

Indianapolis Gas Company to the Chase National Bank and in lieu thereof insert:

"(Here follows a form of letter from The Indianapolis Gas Company to the Chase National Bank Company, which is identical with the letter of November 7, 1935, a copy of which is set forth as Plaintiffs' Exhibit 116)".

54. As to City's Exhibit 7D, in place of the letter of March 2, 1936 (all of p. 1 (p. 51) except first 16 lines, and all of p. 2 (p. 52) except last 15 lines) insert:

"(Here appears a copy of the agreement of March 2, 1936 between The Indianapolis Gas Company and the Department of Utilities of the City of Indianapolis, a copy of which appears as part of Exhibit E to the answer and counter-claim of the City of Indianapolis, et al. (I R. 205-207))".

55. As to City's Exhibit 7E:

(a) Omit the letter dated March 20, 1936 on page 1 (p. 53) and in lieu thereof insert:

"(Here appears a copy of letter dated March 20, 1936 from Thompson, Rabb & Stevenson to The Indianapolis Gas Company, a copy of which is set forth as City's Stipulation Exhibit 78)".

(b) Omit the letter from The Indianapolis Gas Company to Thompson, Rabb & Stevenson on pages 1 and 2 (pp. 53-54) and in lieu thereof insert:

"(Here follows a form of letter from the Indianapolis Gas Company to Thompson, Rabb & Stevenson, which is identical with the letter of April 6, 1936, a copy of which is set forth as City's Stipulation Exhibit 79)".

56. No Exhibit 7F was offered in evidence by the City.

57. As to City's Exhibit 7G:

(a) Omit the letter dated May 23, 1936 and in lieu thereof insert:

"(Here appears a copy of letter dated May 23, 1936 from Thompson, Rabb & Stevenson to The Indianapolis Gas Company, a copy of which is set forth as City's Stipulation Exhibit 82)".

(b) Omit the letter dated June 3, 1936 and in lieu thereof insert:

"(Here appears a copy of letter dated June 3, 1936 from The Indianapolis Gas Company to Thompson, Rabb & Stevenson, a copy of which is set forth as City's Stipulation Exhibit 84)".

58. Print City's Exhibit 8 in full, with the following exceptions:

(a) Omit all of page 1 except the first 5 lines, all of page 2, and all of page 3 except the last 10 lines, and substitute in lieu thereof:

"(The part here omitted recites in appropriate 'Whereas' clauses certain historical facts in regard to Citizens Gas Company and its relationship to the City of Indianapolis, which appear elsewhere in this record)".

(b) Omit page 6 except first 2 lines and insert:

"(Certificate of City Clerk omitted in printing)".

59. Omit City's Exhibit 9 and substitute the following:

"(This exhibit entitled 'Rejection of Assignment of Lease and Refusal to Assume, Take Over, or be Bound Thereby' appears as part of paragraph 5 of the Resolution for Rejection of Assignment of Lease which is part of Exhibit C to the answer and counterclaim of City of Indianapolis, et al. (I R. 203-4))".

60. As to City's Exhibit 11, omit all except:

(a) The cover or title page.

(b) Pages 57, 58 and 59.

(c) Page 71.

At the end of the Exhibit insert:

"(Only those parts of the transcript which are material to the present appeal have been printed)".

61. As to City's Exhibit 12:

(a) In place of pages 182-184, inclusive, insert:

"(Here follows a certified copy of a resolution of the Board of Directors of the Citizens Gas Company as to the irrevocability of certain trust deposits for the payment of the preferred and common stock of said Company)".

(b) Omit all of page 226 except the first six lines and all of pages 227-235, inclusive, and in lieu thereof insert:

"(Here appears several miscellaneous resolutions relating to the affairs of the Department of Utilities of the City of Indianapolis, none of which resolutions is material to this appeal)".

62. Omit City's Exhibits 13B, 14 (two letters), 15 (three letters), 16 to 24, inclusive, 25A, 25B, 26 and 27.

63. Omit all of City's Exhibit 30 and in lieu thereof insert:

"(City's Exhibit 30 is a typewritten statement offering various exhibits on behalf of plaintiff. Copies of this statement were furnished to the Court and counsel and the

statement was read into the record just prior to the calling of the first witness, Franklin Vonnegut)".

Dated November 10th, 1939.

William L. Taylor,
Howard F. Burns,
John Adams,
Solicitors for Plaintiff-Appellant.
Edward H. Knight,
Corporation Counsel of Indianapolis.
Michael B. Reddington,
City Attorney of Indianapolis.
W. H. Thompson,
Patrick J. Smith,
Solicitors for the City of Indianapolis and the individual defendants who are members of the Board of Trustees or of the Board of Directors for Utilities of the City of Indianapolis.
Wm. R. Higgins,
Louis B. Ewbank,
Solicitors for defendant, The Indianapolis Gas Company.
Davis, Pantzer, Baltzell & Sparks,
by William G. Sparks,
Solicitors for defendant, Citizens Gas Company of Indianapolis.

PLAINTIFFS' EXHIBIT 139.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Indiana,

Indianapolis Division.

Newton Todd, *Plaintiff.*
vs.
Citizens Gas Company, *et al.*, *Defendants.*
In Equity No. 1191.

STIPULATION OF FACTS

The parties hereto agree that for the purpose of the trial and final hearing of this case, the following facts, in addition to those admitted in the answers, are true. All parties reserve the right to object to the introduction of any part of this stipulation on any ground other than that the facts therein contained have not been established by the best evidence.

* * * * * *

(2) (d). Plaintiff, Newton Todd, brought and has maintained this suit on behalf of himself and other holders of certificates issued by said Board of Trustees who may wish to join in this suit and contribute to the expense thereof, and plaintiff, Newton Todd, in this suit, is asserting what he claims are corporate rights and immunities of the Citizens Gas Company of Indianapolis. At the time of the commencement of this action and now, there were and are approximately 1400 persons who were the owners and holders of such Certificates issued by said Board of Trustees, and in whose names stock certificates were issued by Citizens Gas Company as aforesaid. Plaintiff, Newton Todd, asserts in this suit that rights guaranteed by the Constitution of the United States to Citizens Gas Company and to him and other holders of certificates issued by said Board of Trustees, are being violated by acts of the defendants, under color of certain statutes of the State of Indiana, and seek to enjoin such acts and asks for a decree quieting title of the Citizens Gas Company to certain real and personal property situated within the Southern District of Indiana. The claims of the plaintiff, Newton Todd, with respect to the violation of his constitutional rights and those of other holders of Certificates issued by said Board

of Trustees and of the Citizens Gas Company are denied by the defendants.

* * * * * *

4. Defendant Citizens Gas Company of Indianapolis, during its corporate existence, has acquired title to and is now the owner of certain real estate, together with the buildings, fixtures, machinery and equipment used and useful for the manufacture, storage and distribution of artificial gas and the by-products thereof, together with pipe lines, mains and other equipment necessary for distributing artificial gas in the City of Indianapolis, and also a manufacturing plant and ovens for the production, manufacture and sale of commercial coke. Said real estate is situated in the City of Indianapolis, Marion County, State of Indiana, and within the jurisdiction of the District Court of the United States for the Southern District of Indiana, Indianapolis Division, and said property, so situated, is correctly described in Paragraph IV of the Bill of Complaint.

Defendant Company owns all of the capital stock of Milburn-By-Products Coal Company, a corporation, which has acquired title to and now owns certain leasehold rights in coal lands located in the Counties of Raleigh and Fayette, in the State of West Virginia, used and useful for the purpose of mining and producing therefrom coal for use in the operation of the business of defendant Company which leaseholds are those referred to in Paragraph VI of the bill of complaint. Defendant Company also is the owner of a certain leasehold estate in and to the property of the Indianapolis Gas Company, as created by a certain contract of lease for ninety-nine years dated September 30, 1913, and recorded in Miscellaneous Record 78, pages 257-278, inclusive, of the records in the Recorder's office of Marion County, State of Indiana.

Said Indianapolis Gas Company was organized as an Indiana corporation for the purpose of furnishing artificial gas in the City of Indianapolis on the 10th day of January, 1881, and continued actively in business, until the execution of the lease aforesaid, under a franchise granted to its predecessor in title by ordinance of the City of Indianapolis on the 3rd day of April, 1876. On the 7th day of October, 1913, said Indianapolis Gas Company surrendered said Franchise in accordance with the provisions of the Shively-Spencer Utility Commission Act described in Stipulation 10 hereof, and in lieu thereof accepted an Indeterminate Permit. Said Indianapolis Gas Company

now owns, subject to said lease, the legal title in 518.10 miles of gas mains and pipes in the central portion of the city, and said Citizens Gas Company now owns 328.85 miles of gas mains and pipes within such city.

5. This suit is not a collusive one to confer jurisdiction on a court of the United States of a suit of which it would otherwise not have cognizance.

6. On the 25th day of August, 1905, the Common Council of the City of Indianapolis passed an ordinance ratifying, confirming and approving a certain Franchise Contract executed on the 25th day of August, 1905 by and between the Board of Public Works of said City, and Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, contracting for themselves and their associates and assigns, which said ordinance was approved by the Mayor of said City and became effective on the 30th day of August, 1905. Said Franchise Contract and Ordinance ratifying the same are correctly set out in Paragraph VI of the Bill of Complaint.

* * * * * *

8. On the 24th day of May, 1906, the said Alfred F. Potts, Frank D. Stalnaker, and Lorenz Schmidt, who were the parties named in the Franchise set out in Stipulation 6 hereof, assigned and transferred to the defendant, Citizens Gas Company of Indianapolis, all of their rights in the aforesaid Franchise Contract, which assignment was accepted by the defendant company, and said defendant company continuously thereafter operated under said Franchise until it surrendered the same as hereinafter stated, and said defendant has had no other franchise granted by the City of Indianapolis.

* * * * * *

(9. (a)) Said company is to be formed on the plans set forth in said franchise for the protection of the public interests, with authority to pay its stockholders dividends of 10% per annum payable semi-annually.

Said company is to accept and operate under said franchise, and may acquire, through the city or by purchase, the pipe lines and other property lately operated by the Consumers Gas Trust Company in said City.

* * * * * *

(d) Some subscriptions were also received in consideration of making extensions of the gas mains to reach the property of certain subscribers, which subscriptions were accepted on condition that enough subscriptions be obtained to warrant the proposed extensions. Such subscriptions were taken on a form which is as follows:

"Subscription to Stock of
Citizens Gas Company of Indianapolis
Temporary Office 1201 Law Building
New Phone 361

Trustees	Directors
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....

I hereby subscribe for and agree to take ..... shares (par value $25.00 each) of the capital stock of the Citizens Gas Company of Indianapolis, and to pay for the same at the rate of $25.00 per share to the Union Trust Company of Indianapolis, Trustee for said Citizens Gas Company as follows: 10 per cent on demand, and 20 per cent on the 10th day of each month thereafter (except that the last payment shall be 30 per cent) until the full amount of said subscription shall have been paid.

All money paid on this subscription shall be held by the Union Trust Company, Trustee, until the first installment of 10 per cent shall have been paid on not less than $500,000 of subscriptions; but if for any reason such installment shall not be paid by October 31, 1906, then the full amount of money paid on this subscription shall be returned to subscriber by said Union Trust Company Trustee.

"I hereby agree that the stock above subscribed shall be issued to a board of five trustees, named in the articles of incorporation of said company, in perpetual and irrevocable trust, in the manner and according to the terms and conditions of the articles of incorporation under which said company is formed; and that when the indebtedness of said company is fully paid, and the subscribers shall have received an amount equal to the amount by them subscribed and paid, with dividends equal to 10% per annum, then the trustees and directors shall execute proper instruments transferring all the property of said company of every kind and description, to the city of Indianapolis; and that thereupon all my interest in said company and all its property shall thereby be cancelled, released and extinguished."

Name .....
Address .....

Date .....

Oct. 30, 1907
Pay no money to solicitors."

13. At the Seventy-sixth General Assembly of the State of Indiana, held during the early part of the year 1929, there was adopted a bill which was published as Chapter 78, pages 268-271, Acts 1929, the title of which is as follows:

"A Bill for an Act relating to corporations organized before May 1, 1913, for the purpose of furnishing gas for fuel or illuminating purposes or electric lights or water, or light, heat and power to any town or city or the citizens or inhabitants thereof, and the articles of incorporation of which provide for the transfer of the property of such corporations to such town or city, legalizing certain provisions in the articles of incorporation thereof and authorizing the conveyance of the property of such corporations to such towns or cities and authorizing such towns or cities to accept such conveyance, repealing all laws in conflict therewith and declaring an emergency."

Said bill was prepared by the legal department and special counsel of the City of Indianapolis employed for the purpose of bringing about a transfer of the plant and property of the defendant, Citizens Gas Company of Indianapolis, to the City of Indianapolis; said bill was introduced in the House of Representatives of the General Assembly by members residing in the City of Indianapolis and elected from Marion County and was passed in the exact form prepared and submitted by said counsel for the defendant City without change or amendment of any kind or character. Said bill contained an emergency clause providing for its taking effect immediately upon its passage, was approved on the 11th day of March, 1929, and, so far as it was valid, became a law on said day.

14. On the 20th day of March, 1929, the defendant City of Indianapolis, acting only by and through its Board of Public Works, but without any action thereon by its Common Council and without an election thereon by the qualified voters of said City, passed a resolution asserting a right to acquire the plant and property of the defendant, Citizens Gas Company of Indianapolis. Said resolution is correctly set out in Paragraph XIV of the Bill of Complaint. Defendant City of Indianapolis served said resolution upon the defendant Citizens Gas Company of Indianapolis, its directors and trustees, on said 20th day of March, 1929. Defendant City of Indianapolis through its agents and employees, on said 20th day of March, 1929, served a copy of said resolution upon the defendants Citizens Gas Company of Indianapolis, its officers, the members of its Board of Directors and the members of its Board of Trustees.

* * * * * *

19. After the passage of the ordinance of August 30, 1905 and the incorporation of the Citizens Gas Company on May 23, 1906, the City of Indianapolis took no affirmative steps in its own behalf in connection with the taking over of the property of the Citizens Gas Company until the 20th day of March, 1929. Defendant City of Indianapolis has not proceeded under the terms of said Shively-Spencer Utility Commission Act in making its aforesaid demand, and the Public Service Commission of Indiana has neither ordered nor approved the acquisition by defendant City of said plant and property nor determined the value of said plant and property nor fixed the terms and conditions of said acquisition.

20. At no time has the question of the acquisition of the plant and property of defendant, Citizens Gas Company of Indianapolis, by defendant City been submitted to the qualified voters of said City at a special or general election.

21. The directors of the defendant company have caused the two resolutions set out in Stipulation 15 hereof to be printed and mailed to all holders of certificates issued by said Board of Trustees of the Citizens Gas Company, including plaintiff; said resolutions Nos. 1 and 2 have been published in the newspapers of Indianapolis and elsewhere and said directors have publicly expressed their intention of acceding to the demands of the defendant City and of conveying the plant and property of the defendant company to the City in accordance with the notice, resolution and demand set out in Stipulation 14 hereof. The directors and trustees of the Citizens Gas Company intend to and will carry out their expressed intention and will convey said plant and property of the defendant company pursuant to said demand by the defendant City unless enjoined and restrained from such action.

* * * * * *

By agreeing to the statements contained in the above stipulations, the parties hereto are not agreeing as to any legal rights resulting therefrom, and in particular are not agreeing as to the rights flowing to plaintiff and other holders from the issuance of the certificates in the forms set forth in Stipulations 2(b) and 2(c) hereof, nor as to the relation to the Citizens Gas Company of plaintiff and others to whom such certificates were issued; but said legal rights and relations are to be determined by the facts set forth in these stipulations and the facts proved at the trial and the law applicable thereto. Any party to this cause shall have the right at the final hearing to introduce any additional or further evidence in this cause, providing that

the same is not in contradiction of any of the facts herein stated.

Frederick E. Matson,
Earl B. Barnes,
Austin V. Clifford,
Attorneys for Plaintiff, Newton Todd.
Edw. H. Knight,
John W. Holtzman,
Fred C. Gause,
Attorneys for City of Indianapolis; Reginald Sullivan, as Mayor of the City of Indianapolis, Henry O. Goett, as City Clerk of the City of Indianapolis, and E. Kirk McKinney, Louis G. Brandt and Charles O. Britton, as and constituting the Board of Public Works of the City of Indianapolis.
Thompson, Rabb & Stevenson,
Smith, Remster, Hornbrook & Smith,
Attorneys for Citizens Gas Company of Indianapolis, John R. Welch, Gustav A. Efroymson, Henry H. Hornbrook, William H. Insley, Clarence L. Kirk, James H. Hooker, Franklin Vonnegut, James I. Dissette, Edgar H. Evans; Gustav A. Schnull, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis; Otto Lieber, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis; Frank C. Dailey, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis; Thomas L. Sullivan, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis; Henry Kahn, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis.

Endorsed: Filed November 22, 1939. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-second day of November, 1939, there was filed in the office of the Clerk of this Court in cause No. 7143, an appearance of counsel for appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7143. October Term, 1939.

The Chase National Bank of the City of New York, Trustee,
Plaintiff-Appellant,

vs.

Citizens Gas Company of Indianapolis, *et al.*,
Defendants-Appellees.

The Clerk will enter our appearances as counsel for the Plaintiff-Appellant.

John Adams,
Howard F. Burns,
1956 Union Commerce Bldg.,
Cleveland, Ohio.

Endorsed: Filed November 22, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-seventh day of November, 1939, there was filed in the office of the Clerk of this Court, in cause No. 7144, an appearance of counsel for appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7144. October Term, 1939.

The Chase National Bank of the City of New York,
Plaintiff-Appellee,

vs.

The Indianapolis Gas Co.,
Defendant-Appellant.

The Clerk will enter our appearances as counsel for the Plaintiff-Appellee.

John Adams,
Howard F. Burns,
1956 Union Commerce Bldg.,
Cleveland, Ohio.

Endorsed: Filed November 27, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-eighth day of November, 1939, there was filed in the office of the Clerk of this Court, in cause No. 7144, an appearance of counsel for appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7144. October Term, 1939.

The Chase National Bank of the City of New York,
Plaintiff-Appellant,

vs.

The Indianapolis Gas Company, *et al.*,
Defendant-Appellant.

The Clerk will enter our appearances as counsel for the Defendant-Appellant, The Indianapolis Gas Company.

Louis B. Ewbank,
1311 Fletcher Trust Bldg.,
Indianapolis, Ind.
William R. Higgins,
11 N. Penn St.,
Indianapolis, Ind.

Endorsed: Filed November 28, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-sixth day of December, 1939, there was filed in the office of the Clerk of this Court, in cause No. 7143, an appearance of counsel for appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7143. October Term, 1939.

The Chase National Bank of the City of New York,

vs.

Citizens Gas Co. of Indianapolis, *et al.*

The Clerk will enter our appearances as counsel for the Citizens Gas Co. of Indianapolis.

Paul Y. Davis,
Kurt F. Pantzer,
Ernest R. Baltzell,
William G. Sparks.

Endorsed: Filed December 26, 1939. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-sixth day of December, 1939, there was filed in the office of the Clerk of this Court, in cause No. 7143, an appearance of counsel for appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7143. October Term, 1939.

The Chase National Bank of the City of New York,

vs.

Citizens Gas Co. of Indianapolis, *et al.*

The Clerk will enter our appearances as counsel for the City of Indianapolis and the individuals who are members of the Board of Trustees and Directors of the Department of Utilities of said City.

William H. Thompson,
Patrick J. Smith,
1350 Consolidated Bldg.,
Indianapolis, Indiana.

Endorsed: Filed December 26, 1939. Frederick G. Campbell, Clerk.

And afterwards, to wit: On the twenty-eighth day of December, 1939, there was filed in the office of the Clerk of this Court, in cause No. 7143, an appearance of counsel for appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7143. October Term, 1939.

The Chase National Bank of the City of New York, Trustee, etc.,

Plaintiff-Appellant,

vs.

Citizens Gas Company of Indianapolis, *et al.*,

Defendants-Appellees.

The Clerk will enter my appearance as counsel for the Chase National Bank of the City of New York, Trustee.

Harry J. Elam,
129 E. Market St.,
Indianapolis, Indiana.

Endorsed: Filed December 28, 1939. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-eighth day of December, 1939, there was filed in the office of the Clerk of this Court, in cause No. 7144, an appearance of counsel for appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7144. October Term, 1939.

The Chase National Bank of the City of New York, Trustee, etc.,
Plaintiff-Appellee,

vs.

The Indianapolis Gas Company,
Defendant-Appellant.

The Clerk will enter my appearance as counsel for the Chase National Bank of the City of New York, Trustee.

Harry J. Elam,
129 E. Market St.,
Indianapolis, Indiana.

Endorsed: Filed December 28, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the seventeenth day of January, 1940, there was filed in the office of the Clerk of this Court, in cause No. 7143, an appearance of counsel for appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7143. October Term, 1939.

The Chase National Bank of the City of New York,

vs.

Citizens Gas Co. of Indianapolis, *et al.*

The Clerk will enter my appearance as counsel for the plaintiff-appellant.

William L. Taylor,
Indianapolis, Indiana.

Endorsed: Filed January 17, 1940. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the seventeenth day of January, 1940, there was filed in the office of the Clerk of this Court, in cause No. 7144, an appearance of counsel for appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7144. October Term, 1939.

The Chase National Bank of the City of New York,

vs.

The Indianapolis Gas Company.

The Clerk will enter my appearance as counsel for the plaintiff-appellee.

William L. Taylor,
Indianapolis, Indiana.

Endorsed: Filed January 17, 1940. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twelfth day of April, 1940, the following further proceedings were had and entered of record, to-wit:

Friday, April 12, 1940.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.
Hon. Michael L. Igoe, District Judge.

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellant,*
7143 *vs.*
Citizens Gas Company of Indianapolis, *et al.*, *Defendants-appellees.*

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellee,*
7144 *vs.*
The Indianapolis Gas Company, *Defendant-appellant.*

Appeals from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

Now this day come the parties by their counsel and these appeals now come on for oral argument by Mr. Howard F. Burns, counsel for The Chase National Bank of the City of New York, Trustee, by Mr. Louis B. Ewbank, counsel for The Indianapolis Gas Company, by Mr. William H. Thompson, counsel for The City of Indianapolis, et al., and by Mr. William G. Sparks, counsel for Citizens Gas Company of Indianapolis, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the sixth day of June, 1940, there was filed in the office of the Clerk of this Court, the opinion of the Court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Nos. 7143, 7144. October Term, 1939, April Session, 1940.

No. 7143.
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc.,
Plaintiff-Appellant,
vs.
CITIZENS GAS COMPANY OF INDIANAPOLIS, *et al.*,
Defendants-Appellees.

No. 7144.
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc.,
Plaintiff-Appellee,
vs.
THE INDIANAPOLIS GAS COMPANY,
Defendant-Appellant.

Appeals from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

June 6, 1940.

Before MAJOR and KERNER, *Circuit Judges* and IGOE, *District Judge.*

KERNER, *Circuit Judge.* This action was brought by Chase National Bank (as trustee under a deed of trust) against (1) the city of Indianapolis and the individual members of its Board of Trustees and its Board of Directors for Utilities, (2) the Citizens Gas Company and (3) the Indianapolis Gas Company. Hereafter Chase National Bank will be referred to as "Chase"; defendant (1) as the "City"; defendant (2) as the "Citizens Gas"; and defendant (3) as the "Indianapolis Gas."

Chase sued as trustee under a mortgage deed of trust securing the payment of principal and interest of the mort-

gage bonds of Indianapolis Gas. Among other things Chase sought to recover judgment for the overdue interest on the bonds against all of the defendants and also against the property formerly owned by Citizens Gas and now owned and operated by the City. Chase also sought a declaratory judgment holding that a certain lease hereafter described is binding on all the defendants and the property just referred to.

The cause was tried by the District Court who made special findings of fact and pronounced its conclusions of law thereon. In substance the Court concluded that the lease in question was invalid, and that Chase recover the sum of $1,032,150 from Indianapolis Gas (this being the amount of overdue and unpaid coupons on the Indianapolis Gas bonds at the time of the Court's decree). Chase and Indianapolis each prosecuted separate appeals from the Court's decree. These appeals have been consolidated and are now before this Court.

Both Chase and Indianapolis Gas contend that the District Court erred in holding the lease invalid and not binding on Citizens Gas and the City. Moreover Chase contends that the District Court erred in failing to render judgment for unpaid coupons against *all* the defendants and the property referred to above. These contentions and others as well shall be considered in the course of the opinion. Now we shall relate the pertinent facts which on the whole are not in dispute.

Natural gas was discovered in Indiana in 1886 several miles from Indianapolis. At that time the only gas plant in the City was that of Indianapolis Gas, which supplied artificial gas. Shortly after natural gas was discovered, Indianapolis Gas acquired all the natural gas lines extending from the city to the producing field. The people feared a possible monopoly by Indianapolis Gas. This led to the birth of the Consumers' Gas Trust Company, organized in 1887 for the purpose of furnishing natural gas. For more factual detail, see *Consumers' Gas Trust Company* v. *Quinby*, 137 F. 882; *Todd* v. *Citizens' Gas*, 46 F. (2) 855, 859-860.

In 1902 Indianapolis Gas executed a mortgage to secure the payment of bonds issued and to be issued in the future. The mortgage contained an after-acquired property clause, and Chase is now the sole trustee under the

mortgage deed of trust. Originally $4,000,000 bonds were issued. Later more bonds were issued, and now there are bonds outstanding in the amount of $6,881,000. For more factual detail, see *Chase Nat. Bank* v. *Citizens Gas,* 96 F. (2) 363, 364.

The Consumers' Gas Trust Company conducted its gas business until 1904, when the natural gas field failed. This marked the corporate death of this company, for the manufacture and sale of artificial gas was beyond the scope of its charter. *Quinby* case, 137 F. 882. At this time the City's right to purchase this plant arose, and the doubt was resolved in the City's favor. *City of Indianapolis* v. *Consumers' Gas Trust Co.,* 144 F. 640. See also Act of 1905, Ind., pp. 247, 252, 279, 280, 396, 434; *Todd* case, *supra,* pp. 857-858. The City did not purchase the plant, however, but the circumstances at this time gave birth to Citizens Gas (as shall be described below).

On August 25, 1905 the City passed its "franchise ordinance," by virtue of which it entered into a franchise contract granting the right to carry on the business of manufacturing and distributing artificial gas to the City and its inhabitants for 25 years. This franchise was granted on the express condition that the grantees would organize a corporation to which the franchise would be assigned and whose charter would include certain specified provisions. In 1906 Citizens Gas was organized and to it was assigned the franchise just mentioned. The provisions required to be embodied in the charter, described below, in the main related to the capital stock, the creation of the voting trust and the duty of the trustees to convey the plant to the city upon certain conditions.

Citizens Gas was organized for a corporate term of 50 years for the purpose of supplying the city of Indianapolis with light, heat and power. The capital stock was issued immediately and then turned over to the trustees, and certificates of equitable ownership were delivered to the owners of the stock. The trustees and directors elected by them were to operate the gas plant until the time came for them to convey the property to the City. The duty to convey was dependent upon the receipt by the certificate holders of an amount equal to their investment plus a return of 10% per year thereon. Upon

the satisfaction of the claims of the certificate holders, the plant and property of Citizens Gas was to be conveyed to the City subject to all outstanding legal obligations of the company.[1]

Once organized Citizens Gas purchased the gas plant property of Consumers Gas Trust Company and soon this public utility was actively engaged in the business of manufacturing and distributing gas. As such, Citizens Gas became "amenable to the law [of Indiana] to the same extent as any other public utility." *Williams* v. *Citizens Gas*, 206 Ind. 448, 457. Also "the Citizens Gas Company, as a public utility, had the privilege of surrendering its franchise and the right to receive an indeterminate permit," *Williams* case, *supra* p. 458, and this it did in 1921 although receiving this benefit under the law carried with it utility consent to a future purchase of its property by the municipality which it served. 10 Burns Indiana Stat. Anno. (1933), Secs. 54-605 and 54-606.

These then were the circumstances which gave birth to Citizens Gas, and to the courts these circumstances spelled out a public charitable trust. As this Court expressed it, Citizens Gas "was a quasi public corporation"; the "legal title to the property which was acquired with the money contributed by the certificate holders was in the Citizens' Company, subject to the trust in favor of the inhabitants of the City * * * *. The conveyance to the City to be made when the charge in

1. The basic provisions of the franchise contract and the articles of incorporation in this regard are the following:

Franchise Contract, Sec. 1 *(g)*. If the certificate holders receive x amount (*i. e.*, their investment plus a 10% return thereon) prior to the expiration of the franchise period, the plant property shall be conveyed to the City and the "corporation shall be wound up."

Franchise Contract, Sec. 1 *(i)*. If x amount not paid up and upon 6 months' notice by the City prior to the expiration of the franchise period, the plant shall be mortgaged in the sum of x amount, x amount paid up and the property transferred to the City "subject to such obligations and other legal obligations against said company."

Franchise Contract, Sec. 22. If x amount not paid up and the period expires, then the plant shall be conveyed upon the City paying up the balance of x amount or, at the option of the City the plant shall be mortgaged in the sum of x amount, the certificate holders paid up, and the plant property then conveyed to the City "subject to such obligations and other legal obligations against said company."

Articles of Incorporation. Sections 10 and 12 are substantially similar to Secs. 1(g) and 1(i) of the Franchise Contract. Sections 10 and 12, as amended, are also substantially similar to Secs. 1(g) and 1(i) of the Franchise Contract, except that Section 12 (as amended) provides for conveyance "subject to such mortgage and other legal obligations against said company."

favor of certificate holders was released was a continuance of the trust; the city being the successor in the fiduciary relationship." *Todd* v. *Citizens Gas*, 46 F. (2) 855, 865-866. Yet, even granting the "existence of a trust relationship between the Citizens Gas Company and a class of persons [inhabitants of the City] * * * * *, that relationship cannot qualify the power of control of the State over the Citizens Gas Company as a public utility." *Williams* v. *Citizens Gas*, 206 Ind. 448, 457.

And thus it came to pass that Citizens Gas and Indianapolis Gas became and were competing utilities in the city of Indianapolis. This competitive condition existed until 1913 when negotiations between the two rivals were begun which culminated in the execution of the 99 years lease in question. It is to be noted that in 1913 Indianapolis Gas had 375 miles of mains and was completing a modern coke oven and plant, and Citizens Gas had 184 miles of mains. The capital stock of the former was $2,000,000 and bonds in the amount of $4,835,000 were outstanding, while that of the latter was $1,250,000 and $1,247,000 respectively. In addition reports issued by Citizens Gas to its stockholders during this period indicated that it considered the existing competition between the two rivals dangerous to the company and to the community and that a merger would make possible certain important economies.

At any rate in March of 1913 the Indiana legislature passed the Shively-Spencer Act which created the Public Service Commission and conferred upon it certain broad powers of control and regulation over public utilities. 3 Burns R. S. 1926, p. 1238. Among other things the Act provided that when two public utilities are engaged in the same business in the same locality, one may lease or sell its property to the other if the transaction meets with approval by the Commission. Shortly thereafter the two utilities in question jointly petitioned the Public Service Commission for permission to execute the 99 years lease here involved.

The power to execute this 99 years lease was authorized by the Commission in October of 1913. According to the lease as finally approved and executed, Indianapolis Gas leased its gas plant property to Citizens Gas for a term of 99 years. In return the lessee agreed to pay a 6% return on the capital stock of Indianapolis Gas (par value

$2,000,000), interest on the mortgage bonds of Indianapolis Gas ($6,881,000 now outstanding), and taxes on the leased property plus certain additional miscellaneous expenditures. During the administrative proceedings one Frank S. Fishback intervened and objected to the execution of the lease. The City was represented by counsel but it did not object to the execution of the lease or to the order of the Commission. The objections were overruled, an order approving the lease entered, and Fishback's petition for rehearing denied.

Fishback intervened as an inhabitant of the city of Indianapolis and as certificate holder of Citizens Gas, and objected in essence that the lease was invalid. Among other things he stated the following: Citizens Gas had no power to execute the lease because (a) the duration of the lease exceeded the corporate life of the lessee and (b) the city of Indianapolis was the real owner of the lessee's property. In his petition for rehearing he stated the following: (1) Compliance with the terms of the lease would make it impossible for Citizens Gas to perform its contract with the City relating to the taking over of the property of Citizens Gas and (2) the City had not given its consent to the lease. The Commission overruled these grounds of objection and approved the lease.

Then Fishback instituted suit in the state court to set aside the order of the Commission, and joined as parties defendant the Commission, Citizens Gas, Indianapolis Gas, and the City. In the main the complaint alleged the grounds urged at the administrative proceedings. The City's answer denied these alleged grounds, and the other defendants demurred thereto. On the day of judgment and prior to entry thereof Fishback dismissed as to the City. A judgment was rendered sustaining the demurrers and an appeal was taken therefrom. Later the appeal was dismissed for failure to perfect it in time. *Fishback* v. *Public Service Commission et al.*, 193 Ind. 282.

Thus it happened that in 1913 the competition between Indianapolis Gas and Citizens Gas came to an end. Citizens Gas acquired the plant property of the other and from 1913 to September 9, 1935 operated the leased property with its own as part of a consolidated system. During this period Citizens Gas controlled the entire gas

business of the city of Indianapolis and after 1921 it operated the two properties in question under an indeterminate permit of the Public Service Commission. In all Citizens Gas made payments under the lease that amounted to $11,668,984.77. It also expended around $2,000,000 for capital improvements on the leased property, but for this it was reimbursed by the issuance of Indianapolis Gas bonds which Citizens Gas then sold to the public through a firm of investment bankers.[2]

On March 11, 1929 the Indiana legislature passed legislation which authorized cities to "take over, adopt and assume the performance of the provisions of any lease under which any utility property may be held at the time of acquisition of any utility by any such city." Chapter 77, Laws of 1929, Ind., pp. 252, 257, 259-260. This legislation also provided that the transferee city "shall be authorized to accept, hold and own all the property of such corporation so transferred to it * * * and any right, title or interest such transferring corporation [the utility] may have in any lease upon other property." Chapter 78, Laws of 1929, Ind., pp. 268-271. This legislation becomes pertinent in view of certain pleadings in a federal case filed April 30, 1929. *Todd* v. *Citizens Gas et al.*, 46 F. (2) 855. Therein the city of Indianapolis admitted in its answer to the complaint that the legislation above was introduced and passed at the request of the City and that the particular legislation was prepared by special counsel of the City "employed for the purpose of bringing about a

2. In marketing the Indianapolis Gas bonds the firm of investment bankers used circulars representing that Citizens Gas had a 99 years lease on the property of Indianapolis Gas and that Citizens Gas had guaranteed the payment of the interest on these bonds.

The record shows that copies of these circulars were first sent to the Secretary and General Manager of Citizens Gas for approval and correction. The record also shows that the firm knew the factual history leading up to the organization of Citizens Gas and knew also of Section 32 of the 99 years lease which provided that "In event it should be determined by a court * * * that the contract is *ultra vires* or void because of the length of term created * * * then this lease shall nevertheless be binding * * * for the longest term for which the parties hereto might lawfully contract."

The record also shows that in various reports to its stockholders Citizens Gas, through its Secretary and General Manager, made reference to the 99 years lease and to the guarantee of the interest on the Indianapolis Gas bonds.

transfer of the plant and property" of Citizens Gas to the City.[3]

Nine days later on March 20, 1929 the City gave Citizens Gas notice that it was exercising its right to take over the trust property as successor trustee of the public charitable trust. Thus in the resolution of March 20 the City resolved that it would take over "all rights, title, interests and ownership, of whatever nature or character * * * * transferred or vested in and to said City in * * * the gas plant, mains and property of said Citizens Gas Company by virtue of" (1) the franchise contract of August 25, 1905, (2) the articles of incorporation of Citizens Gas, (3) the conditions stated in the certificates of the owners of the stock, and (4) all "Statutes of this state and other laws relating to the subject matter hereof."

By this same resolution the City directed Citizens Gas to mortgage the property in a sum sufficient to discharge the certificate holders and then demanded Citizens Gas to convey "the plant, property and assets" subject to "such mortgage and other legal obligations against said company." This resolution was served upon Citizens Gas and on April 3, 1929 that company recognized "the trust created by the franchise * * * and by the Articles of Association," acknowledged the right of the city of Indianapolis to take over the property and assets, and directed its officers to comply with the resolution.

However, on April 30, 1929 one Newton Todd (certificate holder of Citizens Gas) commenced a suit in the Indiana federal court to enjoin Citizens Gas from con-

3. The admission in the *Todd* case also revealed that the legislation in question was passed in the "exact form prepared and submitted by said counsel." It appears too that the admission goes only to Chapter 78, but it is obvious that Chapters 77 and 78 go hand in glove. Chapter 77 was made available to cities having a population of not less than 300,000 and Chapter 78 referred only to transferor utility corporations organized prior to 1913.

In fact this legislation expressly authorized the transfer of utility property (held in fee or by virtue of a lease) under circumstances peculiarly similar to the factual situation existing between Citizens Gas, Indianapolis Gas and the City in the instant case. If the legislators had had in mind the exact factual situation here involved, they could not have passed more appropriate legalizing and enabling legislation.

The legislation also provided that the question of acquiring such utility property held by virtue of a lease need not be submitted to a vote of the city electors nor be subjected to the Public Service Commission for approval.

veying its property to the City in the mode proposed in the resolution of March 20. Shortly thereafter a similar action was brought by one Cotter and the cases were tried together. Todd and Cotter claimed that a city purchasing the property of a public utility must comply with the Shively-Spencer Public Utility Act of 1913, that is, it must pay the present day value of the property as determined by the Public Service Commission and obtain the approval of the Commission and city electors.[4] The complaints in the two cases were dismissed for lack of equity, and on appeal the decrees were affirmed. *Todd* v. *Citizens Gas*, 46 F. (2) 855; cert. den., 283 U. S. 852. The Court stated on page 866 that the conveyance in the instant case was not a purchase by the City and that "When they [certificate holders] are paid off, as provided [in the articles of incorporation], their interest [in the gas plant] is at an end."

In leaving the *Todd* and *Cotter* cases another admission in the pleadings is to be noted. In the *Cotter* case the City (a party defendant) admitted the following things in its answer to the complaint: (1) "after the passage of the Shively-Spencer Act of 1913 the Citizens Gas, pursuant to an order of the Public Service Commission of Indiana and with the full consent and approval of the city of Indianapolis, * * * leased from the Indianapolis Gas Company all of its plants and property for a period of ninety-nine years"; and (2) "since 1913 the Citizens Gas Company with full knowledge and consent of the City has operated the combined properties." This then brings us to the *Williams* case which was filed in 1930 while the *Todd* and *Cotter* cases were still pending. See *Williams* v. *Citizens Gas et al.*, 206 Ind. 448.

4. Todd and Cotter also urged the following things: (1) the surrender of the franchise in 1921 ended all rights and obligations and thereby relieved the directors and trustees of Citizens Gas from complying with the articles of incorporation (charter) requiring the conveyance to the City; (2) the legalizing legislation of 1929 was contrary to due process of law. The Court disposed of the contentions in the following way: (1) the franchise contract of 1905 was not a contract for a purchase, but an "agreement by which the City obtained an interest in the plant subject to the charge in favor of the certificate holders"; (2) the surrender of the franchise in 1921 did not relieve the directors and trustees from the duty to convey to the City, a duty inscribed in the charter, for the provisions of the charter "were not a part of the * * * franchise * * * and were not affected by the surrender."

The Court, however, did not pass on the validity of the legalizing legislation of 1929. Nor did the Court discuss whether the leasehold was part of the trust *res* or whether the particular transfer sought to be enjoined included the property held under the lease.

Williams, an inhabitant and taxpayer of the City, sued as a beneficiary of the public charitable trust (created by the franchise contract of 1905, the articles of incorporation, and the various circumstances already related) and the parties defendant were Citizens Gas, Indianapolis Gas, the City and others. The complaint was based on the theory that the trust was adversely affected and slowly being destroyed by complying with the lease in question which Williams alleged was invalid. He alleged that the lease in question was the product of a conspiracy by the officials of Citizens Gas and Indianapolis Gas and by others, and that some of the overt acts of the conspiracy were the following: (1) the procurement of the enactment of the Shively-Spencer Utility Commission Act; (2) the approval of the lease by the Commission; and (3) the surrender by Citizens Gas of its franchise and acceptance of an indeterminate permit.

Demurrers filed to the *Williams* complaint were sustained and the judgment of dismissal rendered thereon was affirmed on appeal.[5] *Williams* v. *Citizens Gas et al., supra.* As stated by the Indiana Supreme Court, "it appears from the complaint that the lease was one which the Citizens Gas Company and Indianapolis Gas Company had the power to execute." In passing on, one more thing pertaining to this case may be noted. In the trial court the City (one of the parties defendant) moved to strike out certain parts of the complaint and stated the following in support of its motion: (1) "Inasmuch as said lease was duly approved by the Public Service Commission," its order could not be collaterally attacked; (2) "The lease * * * having been validly made, the actions of any individuals leading up to such lease are wholly immaterial"; and (3) "The validity of the public charitable trust set up in the complaint is in no wise affected by the validity of such lease. If the lease is valid the leasehold interest created thereby constitutes a part of the

5. The complaint in the Williams case relates in detail the history of Citizens Gas and Indianapolis Gas and seeks to show that the 1913 lease was the product of a conspiracy. In affirming the judgment of dismissal the Indiana Supreme Court disposes of four pertinent points in the following way: (1) the Shively-Spencer Act of 1913 is constitutional; (2) Citizens Gas and Indianapolis Gas had the power to execute the lease in question; (3) the action of the Public Service Commission in approving the lease is valid; and (4) the action of Citizens Gas in surrendering its franchise and in accepting the indeterminate permit is valid.

public charitable trust * * *. If * * * the lease is invalid, it would fall without the scope of the trust."

After the resolution of March 20, 1929 came the *Todd, Cotter* and *Williams* cases and for five years the history just related was dragged through the courts. The litigation over, negotiations pertaining to the transfer of the utility property were again resumed. Then on May 7, 1935 the City authorized the issuance of Gas Plant Revenue Bonds in the amount of $8,000,000. See Laws of 1935, Ind., Chap. 311. The bonds were issued to provide funds for the taking over of the utility property "owned by Citizens Gas of Indianapolis and/or in which it has an interest." The bonds themselves recited that the payment of principal and interest was "secured by a charge upon all the revenue from the operation of all of the gas system owned and/or operated by the City of Indianapolis."

After the Revenue Bonds were issued, the City offered them for sale to security brokers and there was made available to bidders a prospectus which described the utility property and its history. This prospectus informed bidders that a public charitable trust existed in the "property of Citizens Gas" and that the City was preparing to acquire and to operate this "utility property in which the City has an interest." It described the gas "system operated by Citizens Gas" as "in part owned by Citizens Gas Company and in part * * * leased by it" for a term of 99 years. The prospectus was worded carefully: although the leased property was included expressly as part of the "system operated by Citizens Gas," it was not included expressly as part of the trust or "utility property in which the City has an interest." The unescapable impression, however, from reading the context of the prospectus is that the leased property was treated as being a part of the utility property subject to the trust.

On July 23, 1935 counsel for the City advised Indianapolis Gas by letter that the City would take over "the property which has been operated by Citizens Gas" but that in acquiring this property it did not become liable for the lease obligations of Citizens Gas under the legalizing legislation of 1929 (already discussed). Counsel also suggested in this letter that "the City * * * is willing to enter into negotiations * * * looking toward a revision

of this lease to meet the new conditions that will result from municipal operation." By August 27, 1935 counsel for Citizens Gas was also advised that "the City was going to attempt to reject the lease."

On September 9, 1935 Citizens Gas conveyed the entire gas plant operated by it to the City. In return the City had applied around $6,300,000 (part of the proceeds from the sale of the Revenue Bonds) to the retirement of the claims of the certificate holders and bondholders of Citizens Gas, in accordance with the franchise contract and articles of incorporation. In other words, the entire consideration for the transfer was paid to the certificate holders and bondholders of Citizens Gas, and thereafter that corporation had no property and engaged in no business activity. The City did execute an indemnity contract running in the favor of Citizens Gas, however, in which the City agreed to save the corporation harmless from any loss or liability occasioned by the transfer or any action thereafter brought against it.

Thus, on September 9, 1935 Citizens Gas executed and delivered four instruments to the City, which conveyed the entire utility property subject to the legal obligations of the transferring corporation: (1) a deed conveying the real estate; (2) an instrument transferring the personal property; (3) an assignment of a lease covering space in a certain building; and (4) an assignment of the 99 years lease in question. These instruments were received, retained and duly recorded by the City. On the same day the City passed two resolutions: one rejecting the lease and refusing to assume the lease obligations; the other accepting the property held under the lease temporarily and solely to prevent interruption of service.

And on September 9, 1935 the City acquired the utility property of Citizens Gas and assumed operation of the entire gas system including the leased property. On September 30, 1935 Indianapolis Gas notified the City that while it relied on the validity of the lease, it would enter into a stipulation (in the interest of a continued public service) under which the City might continue operation of the plant under the terms of the lease without prejudice to the legal rights of either party.

Nature of the Trust. These then are the facts in the instant case and summarizing they spell out the follow-

ing situation. In the history of the city of Indianapolis certain events and circumstances occurred. These things combined and the result was the creation of a charitable trust for an indefinite and unlimited period of time. *Todd* v. *Citizens Gas et al.*, 46 F. (2) 855, 866. The settlors of this trust were specific citizens of the City who subscribed for the capital stock of Citizens Gas, and the *cestuis* were the gas users of the City. The trust provided for two trustees: (1) the initial trustee, Citizens Gas, a corporate trustee; and (2) the successor trustee, the City, a municipal corporate trustee.

The terms of the trust (the franchise contract and the articles of incorporation) referred generally to the duties of the trustee and the rights of the beneficiaries. Thus the trust provided for a corporate trustee (Citizens Gas) with powers to operate a utility plant for the purpose of supplying the City with light, heat and power. This corporate trustee was to administer the trust until such time as the City exercised its right to succeed to the trusteeship and accepted the trust *res*. The City was required to exercise its right to succeed as trustee by August 25, 1930.[6]

Soon Citizens Gas was organized with powers to supply the City with light, heat and power and in accordance with the terms of the trust this corporate trustee proceeded to engage in the utility business. In 1907 it purchased the gas plant property of the old Consumers Gas Trust Company. In 1913 it purchased the leasehold interest in question, that is, it leased the gas plant property of its rival for a term of 99 years. Then it operated the two properties as a unit and controlled the entire gas busi-

6. According to the franchise contract and articles of incorporation, the City was to declare its intention to take over the trust *res* at the end of the franchise period (25 years) or sooner, whenever the claims of the certificate holders were satisfied. See footnote 1. Also *Todd* case, *supra*, at p. 866: "The conveyance to the city to be made when the charge in favor of certificate holders was released was a continuance of the trust; the city being the successor in the fiduciary relationship."

In the event that this charge in favor of the certificate holders was not released or that the City failed to accept the trust *res*, Citizens Gas was to continue operating the plant as trustee. In this regard it is significant to remember that Citizens Gas held an indeterminate permit to operate within the City, subject to the right of the City to succeed to the trusteeship as related above and subject to the right of the City to purchase the plant under Indiana law. *Todd* case, *supra*.

It is to be noted too that Citizens Gas had a corporate life of 50 years. This is really immaterial: it is conceivable that at the end of such time corporate rebirth would be in order; at any rate a charitable trust will not ordinarily fail for want of a trustee.

ness of the City. In 1929 the City declared its intention to succeed to the trusteeship. Further action was delayed pending the settlement of interfering litigation. Finally in 1935 the City accepted the property held in fee but rejected the leasehold interest.

What has just been said, reveals the real nature of this public charitable trust. The trust runs for an indefinite and unlimited period of time. Its corporate trustee is given the duty to operate a gas plant under an indeterminable permit, and is instructed to administer the trust for an unlimited period of time subject to the City's power to succeed as trustee. This power to succeed must be exercised by the City within a certain time (25 years) and upon a certain condition (satisfaction of particular claims). Thus this initial trusteeship may be short-lived or it may be coextensive with the life of the corporate trustee.

Nature of the Lease. We have related the factual history of the utility business in the city of Indianapolis and have shown that many courts and many parties have concerned themselves therein over one phase or another. And until this litigation was started it appears that every one proceeded on the basis that the lease contract covered a term of 99 years. In this case the argument is advanced that the lease contract is not a 99 years lease at all but that it is one for 99 years or for such shorter time as Citizens Gas might remain as trustee. We are not convinced by the argument made in this regard.

In making this point counsel for the City and for Citizens Gas emphasize Sections 13 and 32 of the lease contract. Section 13 states that certain agreements of the lease (*i. e.*, to secure new franchises and to extend the corporate life of the lessee) are "subject to the rights now held by the city of Indianapolis under the terms of the franchise." Section 32 (see footnote 2) provides against judicial disapproval of the lease contract because of the length of the term involved. As expressed by counsel for the City, "those who drew the lease intended that Citizens Gas should be bound only for the period of its trusteeship, and that they never intended that the City as successor trustee should be bound."

This construction of the contract lease—that the lease is one for 99 years or for such shorter time as Citizens

Gas might remain as trustee—reduces itself to the absurd in light of the real nature of the trust. Our analysis of the trust indicates that the initial trusteeship might well have terminated in 1914 as at any later time. Under such circumstances it becomes inconceivable that "those who drew the lease" intended that the lease ever be for such shorter time. Moreover the granting clause of the lease contract expressly fixes the term at 99 years. To accept counsel's construction in the face of this, is to ignore the plain statement of the granting clause and to change unduly the contractual obligation. We conclude that the lease contract is a 99 years lease.

Nor are Sections 13 and 32 inconsistent with our conclusion. Section 13 treats certain promises of the lessee, *e. g.*, the promise to extend its corporate life, as being subject to the City's "rights." Obvious it is that if the City chooses to succeed as trustee of the trust *res* or to take over the plant property subject to the "legal obligations" of Citizens Gas (footnote 1), then it is unnecessary to fulfill the certain promises mentioned. In this regard Section 13 does not compel the construction urged that the contractual obligation ends with the initial trusteeship. Moreover it is confined to the promises therein described and wholly fails to refer to the 99 years obligation. At the most Section 13 presents the question whether this obligation is a "legal obligation" (one which Citizens Gas had power to incur), and whether the City takes over the plant property subject to it.

On the other hand Section 32 anticipates a possible judicial determination as to whether a corporation having a life of 50 years has the power to incur an obligation running for 99 years. Surely this Section does not require the construction urged by counsel that the contractual obligation ends with the initial trusteeship. At the most Section 32 merely anticipates the question possibly presented by Section 13 and soon to be answered, namely, whether the corporate trustee in the instant case had the power to incur the 99 years obligation. In passing we repeat that our consideration of Sections 13 and 32 leaves undisturbed our conclusion that the real nature of the contract in question discloses a lease for a term of 99 years.

Trust Res. What is the trust rest of this particular charitable trust? The answer to this question will dis-

pose of most of the contentions urged by counsel in this appeal. In fact a consideration of the briefs and the various arguments made therein indicate plainly that counsel disagree seriously in this regard. In essence counsel for Chase and Indianapolis Gas argue in the following vein: the lease is valid and therefore a part of the trust *res;* it follows that the City may not accept a part of the trust *res* and refuse to accept another part.

On the other hand counsel for the City states his argument thus: the "City has not, as is asserted, accepted a part of the trust *res* and refused to accept another part. It has accepted the entire trust *res* and rejected a lease which the initial trustee had no power to make (p. 38) * * * The trust *res* was the property and plant of Citizens Gas, and this consisted of the property formerly owned by the Consumers Gas Trust Company (p. 56)."

Moreover counsel for Citizens Gas expresses his argument as follows: "Citizens Gas has never denied its power and authority to bind itself as trustee and the trust property for the term of its trusteeship (p. 14) * * * and this lease would have been binding upon Citizens Gas for the full term of 99 years if it had been permitted to act as a public utility for that length of time (p. 15) * * * the Lease was a binding contract between the parties throughout the term of its trusteeship (p. 23)." In this regard the City in its pleadings conceded "for the purpose of this litigation" that the lease in question, if valid at all, was valid during the trusteeship of Citizens Gas.

That a valid leasehold interest may constitute the subject-matter of a trust is not open to dispute, nor do counsel in this case contend differently. If the lease is valid, the rental obligation binds the trust and it matters little that a new trustee succeeds the old one. Otherwise any obligation incurred by a particular trustee would cease with the death, resignation or removal of that trustee: such a rule would lead inevitably to ridiculous results. Therefore, if the lease in question is valid, two conclusions follow: (1) the subject-matter of the lease contract is an asset and becomes part of the trust *res;* (2) the lease obligation binds the trust and is not discharged by a mere substitution of trustees. Earlier in our opinion we have discussed the real nature of the trust and the City's part in the scheme of things; the City is a successor trustee and as such must

accept or disclaim the entire *res*. We have also discussed the real nature of the lease and its part in the scheme of things: the lease is one for 99 years and if valid the leasehold interest is part of the trust *res*. We have just related the arguments of counsel which indicate agreement in one regard and disagreement in another. Counsel agree that if the lease is valid, the leasehold interest is part of the trust *res*. Counsel disagree on the question whether the lease is valid and this we now answer.

Our problem relates to the administration of the trust and particularly concerns itself with the extent of the corporate trustee's powers. Did the trustee have the power to make this lease, *i. e.*, to acquire this leasehold interest and to incur the rental obligation? The rule is that a trustee can properly exercise such powers as are conferred upon him in specific words by the terms of the trust or are necessary or appropriate to carry out the purposes of the trust and are not forbidden by the terms of the trust. We must apply that rule here.

The terms of the trust neither expressly conferred upon nor expressly denied the trustee the power to acquire a non-freehold interest in property. In truth the terms of the trust remain silent on the subject of trustee's powers. The only applicable language relates to duties and not to powers. This language imposes upon the trustee the duty "to supply the City of Indianapolis and its inhabitants with light, heat and power." Plainly the extent of the trustee's powers are measured by the scope of the duty imposed in the terms of the trust, and it is reasonable to conclude that the trustee had the power to secure what utility property was necessary or appropriate to enable it to engage in the gas business and to supply the City with light, heat and power.

Counsel for the City argues but not impressively that the trustee lacked the power to lease the property of its rival because such action might contravene public policy. In this connection it is a fact that Citizens Gas leased and operated the Indianapolis Gas property for the period of the initial trusteeship. The actual point urged by counsel for the City is that (1) the trustee lacked the power to lease property from anyone for a term of 99 years and that (2) if the trustee had power to lease, it only had power to lease for a term of years not exceeding the initial trusteeship. On

this point counsel for Citizens Gas admits that the trustee had power to lease for a term of years not exceeding the initial trusteeship.

Yet we know that the trustee had the power to acquire adequate gas plant equipment. And it is admitted that the freehold estate in the property purchased in 1907 became part of the trust *res*: the trustee had the power to purchase in fee simple and consequently the freehold estate became trust property. From what has just been said, certain conclusions follow as a matter of logic: (1) the trustee had the power to purchase the Indianapolis Gas property in 1907 or in 1913; and (2) the trustee had the power to lease this property in 1907 and 1913 for a term of years not exceeding the initial trusteeship. In situation (1) the property would have become a permanent part of the trust *res*. In situation (2) the property would have become a temporary part of the trust *res*.

Thus counsel's argument that the trustee lacked the power to make this particular lease narrows to an attack on the *mode* of the acquisition of the property. In view of the circumstances counsel can not argue, nor does he argue, that the trustee lacked the power to acquire the property in question: manifestly the trustee had the power to acquire either a freehold or a nonfreehold interest in the property. His argument condemns the acquisition in 1913 because of the duration of the term. In effect counsel states that the trustee had power to acquire property but no power to acquire it for a term of 99 years or for any term of years exceeding any particular trusteeship.

Counsel relies considerably on the leading case of *In re Hubbell Trust*, 113 N. W. (Iowa) 512 as expressing judicial disapproval of long-term leases. In that case the *private* trust had a probable duration of 71 years and the trustee (an individual) leased the trust property to others for a term of 99 years. The court disapproved of the long-term lease because the duration of the lease exceeded the period of the trust and hence incumbered the rights of the remainderman. The court laid down several rules for the guidance of trustees (page 522): "(1) The trustees may lease for such reasonable terms as are customary * * *; (2) Such terms should not, save on showing of reasonable necessity * * *, extend beyond the period the trust is likely to continue; (3) Should they extend unreasonably beyond such period, the excess only will be void * * *."

We believe that the *Hubbell Trust* case is a well-reasoned one but it does not support counsel's argument that the trustee did not have the power exercised in 1913. The *Hubbell Trust* case does not stand for the proposition that a trustee has no power to lease for a term of years. At the most it stands for the rule that a trustee has no power to lease trust property for a term of years exceeding the period of the trust. It does not take much comparison to see that such a rule does not support the proposition here urged, namely, that the trustee lacked the power to lease beyond its period of trusteeship.

Moreover in the instant case the trustee's power to acquire a long-term leasehold interest is in issue, not the trustee's power to lease trust property for a long term of years. Yet even if applicable, and we believe the *Hubbell Trust* case is analogous, the trustee in our case did not lease for a term of years exceeding the period of the trust. In fact the court in the *Hubbell Trust* case recognized that charitable trusts were to be treated differently than private trusts in this regard, for it said on page 522 that "the decisions with reference to charitable trusts afford no aid, for the trust period in these is indeterminable, and the length of the lease is considered only as bearing upon the reasonableness of its provisions and of the rentals stipulated. Such leases have been approved where otherwise reasonable with terms varying from 80 to 1000 years. See * * * *City of Richmond* v. *Davis*, 103 Ind. 449 * * * [other cases cited]."

Thus counsel's argument that the trustee lacks the power to lease this property because the duration of the lease exceeded the trusteeship (or even the trustee's life), has no real foundation in the law. Obviously the principle of law that a trustee has no power to lease where the term of years exceeds the period of the trust, has no application here. In the end our case is this: under the terms of the lease the trustee had the power to acquire certain property; the power of acquisition might well have assumed at least two forms—acquisition by outright purchase or by long-term lease; the trustee selected the latter mode of acquisition. Selecting one mode of acquisition rather than the other does not alter the situation: the trustee had the power to acquire.

However, another point arises where as here the trus-

tee has the power to make leases. In making a long term lease a trustee is under a duty to act with prudence. If a trustee makes a lease which is unreasonable under the circumstances, he thereby commits a breach of trust. For this a trustee incurs liability to the beneficiaries who in addition may have such a lease set aside. This record discloses that the trustee was justified in selecting the mode of acquisition which it did. When the prudence point was urged before the Indiana Supreme Court, that court did not find the lease in question unreasonable as to time or as to its other terms. *Williams* v. *Citizens Gas, et al.*, 206 Ind. 448, 458, 460.

We therefore conclude that the trustee had the power to make the long-term lease in question and that this particular leasehold interest in the Indianapolis Gas property is part of the trust *res*. In passing it might be said that the few cases discussed in the opinion above are determinative of the immediate issue here, *i. e.*, as to the validity of the 99 years lease. See in particular *Fishback* v. *Public Service Commission, et al.*, 193 Ind. 282; *Williams* v. *Citizens Gas, et al.*, 206 Ind. 448; *Todd* v. *Citizens Gas, et al.*, 46 F. (2) 855; *Chase Nat. Bank* v. *Citizens Gas, et al.*, 96 F. (2) 363, 365. No amount of verbal magic resorted to by counsel for the City will avail to brush aside the barrier these cases present to him. Nor have we overlooked the various admissions and apparent inconsistencies of the City during the history of this gas utility controversy in the courts and before the administrative bodies, but these points we find unnecessary to the decision herein reached.

Successor Trustee. In this case the City declared its intention to succeed as trustee and to accept the trust. Then it proceeded to accept the property held in fee and to disclaim the property held under the lease. We have shown that the predecessor trustee had the power to acquire the properties in question and that upon acquisition these properties became the subject-matter of the trust. The facts show that the gas plant is operated as a unit and that the continued operation of both properties is necessary in order to prevent disruption of service to gas consumers.

Thus we have a case where the successor trustee accepts the office of trustee but purports to accept the trust only as to a part of the trust property or only as to some of the duties. This cannot be done. We have shown that

the trust *res* consists of the two properties described. This is not a case of two separate and distinct trusts, one as to a freehold interest in property, the other as to a nonfreehold interest in property. We conclude that acceptance of the office of successor trustee and of part of the trust, operates as an acceptance of the whole trust. The City takes the trust property subject to the lease obligation incurred by Citizens Gas.

Form of Relief. Counsel for Indianapolis Gas contends that the instant suit was one asking for a declaration of rights and that hence the District Court erred in granting both declaratory and coercive relief. The original bill of complaint alleged facts relating to the history of this utility controversy, describing the escrow arrangement between the City and Indianapolis Gas in 1936 whereby a sum equal to the rentals under the lease would be deposited with an escrowee, and indicating the probable effect of these events on Chase's rights to the payment of bond principal and interest coupons. The prayer sought a declaratory judgment concerning the validity of the lease and a "judgment • • • in the amount of all unpaid interest payable under said lease." At the time of this complaint no interest coupons were yet due. Later a supplementary bill was filed, which set up subsequently occurring facts showing default as to interest coupons and which prayed a coercive judgment in the amount of the unpaid coupons.

These pleadings reveal that the pleader joined claims for a declaration of rights and claims for personal coercive relief, and that the pleader requested a declaration as to the validity of the lease and a coercive form of relief as to the unpaid coupons and interest thereon. The lease and coupon claims arose out of the same factual background and represented the aftermath of the instant utility controversy. The supplemental pleading merely presented subsequent matter already related to the claims as presented in the original pleading. See *Texarkana* v. *Arkansas Gas Co.*, 306 U. S. 188, 203; Rule 15 (d), Federal Rules of Civil Procedure. Nor does counsel urge that the handling together of these claims interfered with trial convenience.

The District Court did not err in treating the complaint as above stated and in deciding the issues thus presented. Such a procedure is proper under the Federal Declaratory

Judgments Act and the Federal Rules of Civil Procedure. 28 U. S. C. Sec. 400; Federal Rules 18, 54, 57; see also, Borchard, Declaratory Judgments (1934), pp. 175-176. Counsel relies on *Brindley* v. *Meara*, 209 Ind. 144, where the Indiana Supreme Court interpreted the Indiana Declaratory Judgments Act. This decision can not bind us in our interpretation of the Federal Declaratory Judgments Act, even if it could be said to be inconsistent with the position we take here.

It is not improper for a pleader under the Federal Rules of Civil Procedure to combine in one complaint a request for a declaration and for some coercive relief. Nor is it improper for the District Court to render a judgment or judgments granting both forms of relief. Our conclusion in this regard is not at variance with anything said by the United States Supreme Court in the following cases, as counsel would have us believe. *Nashville, C. & S. Ry.* v. *Wallace*, 288 U. S. 249; *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227; *Perkins* v. *Elg*, 307 U. S. 325, 349.

Chase's Authority to Sue. In this case Indianapolis Gas issued bonds payable to bearer. To secure the payment of principal and interest thereon, Indianapolis Gas mortgaged its property to certain trustees in behalf of the many bond purchasers. Chase is now the sole Trustee and is here suing for the benefit of the bondholders. Chase's authority to bring this suit is derived from the mortgage deed of trust (or Indenture of Mortgage) executed by Indianapolis Gas and the certain trustees. Our immediate task is to measure the extent of Chase's powers to sue in behalf of the bondholders.

Each bond provided for the payment of $1000 principal in a certain future year and the payment of 5% interest per annum. Payment of the interest was to be made at the office of the trustee of the mortgage deed of trust upon the presentation and surrender of the interest coupons. Each bond also provided for an acceleration clause in case of interest default, subject to the conditions of the mortgage deed of trust. In addition each bond provided that it had been issued by Indianapolis Gas "under and in accordance with the terms and conditions" of the mortgage deed of trust (Indenture of Mortgage).

Among other things the mortgage deed of trust provided in Section IX that Indianapolis Gas "agrees to and with" the Trustee to "pay the principal and interest of and upon

the bonds * * * as the same shall become due and payable" and that upon any "default in the due performance of this covenant" due presentment and demand for payment of the "bonds and coupons" is waived. Section XIV then provided that the "right of action under this indenture is vested exclusively in the Trustees, and under no circumstances shall any bondholder or bondholders have any right to institute an action * * * for the purpose of enforcing any right herein and hereby provided, or of foreclosing this mortgage, * * * and all actions and proceedings for the purpose of enforcing the provisions of this indenture shall be instituted and conducted by the Trustees according to their sound discretion."

An intelligent reading of the mortgage deed of trust, properly incorporated by reference in each bond sold, is sufficient to dispose of counsel's argument that Chase is without authority to sue for the unpaid interest coupons. The two sections stated above expressly give Chase as Trustee the power to recover judgment for either principal or interest in default. Of course the Trustee holds the judgment or its money equivalent for the benefit of the bondholders. That a trustee has the right to enforce the provisions of a mortgage where as here the mortgagor has made an express promise to the trustee that it will pay the principal and interest, is recognized. See *Carey* v. *Brown*, 92 U. S. 171, 172; *New York Trust Co.* v. *Michigan Traction Co.*, 193 F. 175, 180; *First Nat. Bank and Trust Co.* v. *Dolph*, 283 N. W. (Mich.) 35, 38.

We conclude therefore that Chase was authorized to sue for the default in the payment of interest coupons and that the judgment in its favor as Trustee for the benefit of the bondholders was proper. Counsel also objects to the judgment on the following grounds: (1) the original interest coupons (best evidence) were not produced or read in evidence; (2) the judgment failed to provide that the Trustee pay over recovered sums to bondholders only upon the surrender and cancellation of the coupons; and (3) the maker of the bonds owned part of them. Assuming the truth of these objections would not compel reversal, for the objections are not substantial in character.

As for objection (1), a copy of the mortgage (the mortgage deed of trust) was attached to the complaint and this included the form of each bond and coupon held by bondholders. Furthermore the parties by express stipula-

tion waived any necessity for producing the original of each bond or coupon in evidence. As for objection (2), the bond itself provides that coupons are payable only upon presentation and surrender of the coupons. As for objecton (3), the basis thereof was stipulated to be so by the parties, yet counsel waited to urge the objection at this time. These objections, urged for the first time, are technical at the most and merit no further consideration.

Right to Interest on Interest. Our case is one where the bonds in question incorporate by reference the provisions of the mortgage deed of trust. Our case is also one where the Trustee for the bondholders was authorized to sue on the bonds in order to enforce (1) the covenant to pay the interest coupons or (2) the covenant to pay the principal. Had the Trustee elected to enforce covenant (2), it would have had the concomitant power under Section III of the mortgage deed of trust to foreclose the mortgaged property (the security) and to collect the proceeds from the sale thereof. The Trustee however elected to enforce covenant (1). See *New York Trust Co.* v. *Michigan Traction Co.*, 193 F. 175, 180.

Now the usual rule in these matters is to allow interest on the unpaid interest coupons after default. *City of Jeffersonville* v. *Patterson*, 26 Ind. 15, 16; *Gelpcke* v. *Dubuque*, 68 U. S. 175, 206. Yet the District Court denied this claim to interest on the interest coupons from the date of maturity to the date of the judgment. Necessarily the rule applies, unless the bonds themselves or the mortgage deed of trust incorporated by reference therein qualify this right to interest on interest. The District Court pointed to Section III of the mortgage deed of trust as limiting the right to interest on the unpaid interest coupons. That Section relates that after a foreclosure and sale by the Trustee for the bondholders, the proceeds shall be applied first "to the payment of interest on said bonds * * * but without interest upon such interest" and then to the payment of the principal on the bonds.

But in the instant case the Trustee did not elect to enforce covenant (2) above, that is, the Trustee for the bondholders is not seeking here to foreclose the mortgaged property and to collect the proceeds from the sale thereof. Instead the Trustee has elected to enforce covenant (1), that is, it seeks here to recover the unpaid interest coupons in default. Obviously the limitation contained in

Section III is not applicable. Nor should it be assumed that the right to interest upon enforcing covenant (1) can not be more extensive than the right to interest upon enforcing covenant (2). The covenants are independent. As to one there is a limitation. It does not follow at all that as to the other a similar limitation is implied. We conclude that the judgment should have included interest on the unpaid coupons from the date of maturity to the date of the judgment.

Rate of Interest. According to the case and statutory law of Indiana, if an obligation bears a specific rate of interest (the contract rate), then the obligation will continue to bear interest at the contract rate after maturity and the judgment thereon will bear interest at the same rate. On the other hand if there is no contract rate, the rate is the statutory 6%, both as to the obligation after maturity and as to the judgment thereon. See *Shaw* v. *Rigby*, 84 Ind. 375; *Kerr* v. *Haverstick*, 94 Ind. 178; *Gale* v. *Corey*, 112 Ind. 39; 5 Burns Indiana Statutes Annotated (1933), Secs. 19-2002 and 19-2003.

It is Chase's contention that in applying the Indiana law in this matter, these results follow: (1) as to the bonds, the contract rate is 5%, and therefore after maturity the bonds will bear interest at 5% and any judgment for the principal will also bear interest at 5%; (2) as to the amount due on the coupons, there is no contract rate specified but instead there is a direct promise to "pay to the bearer * * * Twenty-five dollars * * *" at a specified date, and therefore the rate of interest on the coupons after maturity is 6% and the rate of interest on the judgment for the overdue and unpaid coupons is also 6%.

We disagree with Chase when it contends that there is no rate of interest specified on the coupons. In describing the coupons above, Chase omits the following significant words: "being six months' interest on its First Consolidated Mortgage *Five Per Cent.* Gold Bond No. ....." Moreover the face of each bond reads as follows: "The Indianapolis Gas Company * * * promises to pay * * * [the principal] * * * with interest * * * at the rate of five percent. per annum * * *; that is to say, on the first day of April and of October * * * upon the presentation and surrender of the *annexed coupons* respectively." (The emphasis is our contribution.) We conclude that the unpaid interest coupons bear interest at 5% (the contract rate) from the date of maturity to the judgment and that

the judgment for the overdue and unpaid coupons also bears interest at 5% until the same is satisfied.

Liability of Citizens Gas. We have considered the complete argument made by counsel for Citizens Gas and conclude without further discussion that its liability under the lease continues but that its liability is secondary to the liability of the City as successor trustee and to the liability of the trust property. We have also concluded that the indemnity contract executed by the City and running in favor of Citizens Gas, is valid and effective. In passing it is to be noted that the lease obligation carries with it the payment as rental of the interest on the bonds of Indianapolis Gas.

Conclusions. Our conclusions in this case follow: (1) the 99 years lease is valid; (2) the assignment of the lease did not relieve Citizens Gas from its obligations as lessee; (3) the indemnity contract is effective; (4) the lease binds the City as successor trustee and the trust property; (5) the leasehold interest is part of the trust *res;* (6) the City has accepted the trust *res;* (7) Chase has a right to interest; (8) Chase has a right to interest on interest; and (9) Chase is entitled to interest at the rate of 5%.

Therefore the judgment of the District Court is reversed. Chase is entitled to a declaratory judgment to the effect that the lease is valid and enforceable against the parties in the following order of liability: (1) the City as successor trustee and the trust property; and (2) Citizens Gas. Chase is also entitled to a coercive judgment for the unpaid and overdue interest coupons, the judgment to include interest at 5% both on the coupons from maturity to the judgment and on the judgment from entry to satisfaction. Moreover this coercive judgment is enforceable against the parties in the following order of liability: (1) the City successor trustee and the trust property; (2) Citizens Gas; and (3) Indianapolis Gas. The District Court is directed to proceed in accord with this opinion. It is so ordered.

Endorsed: Filed June 6, 1940. Kenneth J. Carrick, Clerk.

And, on the same day, to-wit: On the sixth day of June, 1940, the following further proceedings were had and entered of record, to-wit:

Thursday, June 6, 1940.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.
Hon. Michael L. Igoe, District Judge.

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellant,*
7143 *vs.*
Citizens Gas Company of Indianapolis, *et al.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause appealed from be, and the same is hereby, reversed with costs taxed in favor of The Chase National Bank of the City of New York, Trustee, and that this cause be, and the same is hereby remanded to the said District Court with directions to enter a declaratory judgment for The Chase National Bank of the City of New York, Trustee, to the effect that the lease is valid and enforceable against the parties in the following order of liability:

(1) The City as Successor Trustee and the Trust Property; and

(2) The Citizens Gas Company.

It is further ordered and adjudged that this cause be further remanded to the said District Court with directions that The Chase National Bank of the City of New York, Trustee, also have a coercive judgment for the unpaid and overdue interest coupons, the judgment to include interest at five per cent (5%) both on the coupons from maturity to the judgment and on the judgment from entry to satisfaction.

It is further ordered and adjudged that this coercive judgment be enforceable against the parties in the following order of liability:

(1) The City as Successor Trustee and the Trust Property;

(2) Citizens Gas Company; and

(3) Indianapolis Gas Company.

It is further ordered, adjudged and decreed by this Court that the District Court proceed in accord with the opinion of this Court.

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellee,*
7144 *vs.*
The Indianapolis Gas Company, *Defendant-appellant.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause appealed from be, and the same is hereby, reversed with costs taxed in favor of The Chase National Bank of the City of New York, Trustee, and that this cause be and the same is hereby remanded to the said District Court with directions to enter a declaratory judgment for The Chase National Bank of the City of New York, Trustee, to the effect that the lease is valid and enforceable against the parties in the following order of liability:

(1) The City as Successor Trustee and the Trust Property; and

(2) The Citizens Gas Company.

It is further ordered and adjudged that this cause be further remanded to the said District Court with directions that The Chase National Bank of the City of New York, Trustee, also have a coercive judgment for the unpaid and overdue interest coupons, the judgment to include interest at five per cent (5%) both on the coupons from maturity to the judgment and on the judgment from entry to satisfaction.

It is further ordered and adjudged that this coercive judgment be enforceable against the parties in the following order of liability:

(1) The City as Successor Trustee and the Trust Property;

(2) Citizens Gas Company; and

(3) Indianapolis Gas Company.

It is further ordered, adjudged and decreed by this Court that the District Court proceed in accord with the opinion of this Court.

And afterwards, to-wit: On the twentieth day of June, 1940, there was filed in the office of the Clerk of this Court, a petition for rehearing, which said petition for rehearing is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-Appellant*, *vs.* Citizens Gas Company of Indianapolis, *et al.*, *Defendants-Appellees*. } Nos. 7143

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-Appellee*, *vs.* The Indianapolis Gas Company, *Defendant-Appellant*. } and 7144.

Defendants-appellees City of Indianapolis and the members of its Board of Trustees for Utilities and its Board of Directors for Utilities, viz.: A. Dallas Hitz, Edward W. Harris, Charles S. Rauh, Merle E. Sidener, Thomas Sheerin, Henry L. Dithmer, Brodehurst Elsey, Roy Sahm, Isaac E. Woodard, David J. Angus, Leroy J. Keach and John E. Ohleyer, respectfully petition the Court to grant a rehearing of said cause, to reconsider its opinion of June 6, 1940, and reverse its direction to the lower court to enter judgment against the City and to affirm the judgment of the lower court.

As grounds for this petition, these defendants-appellees submit that:

1. This Court held that a Trustee of a public charitable trust had no right to make a long term burdensome lease; that it incurred liability to the beneficiaries if it did so and

that in addition the beneficiaries were entitled to have such a lease set aside. *This Court therefore held that if a showing could be made that the lease was in fact burdensome it could be set aside and yet it has directed a final judgment to be entered against the City which by agreement with its opponents and by order of the Court was still to have the right to prove the burdensome character of the lease. If every other question raised by this petition for rehearing should be decided adversely to the defendants-appellees we ask that the order of the Court be modified so as to permit the City to have an opportunity to prove the averments of its counter-claim and to have the lower Court determine whether when executed this lease was in fact burdensome.*

With no opportunity for a hearing on this reserved issue, the defendants-appellees have been denied due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The right to a hearing extends both to a determination of question of fact and law by the trial court. The denial of a hearing on either is a denial of due process. The City affirmatively claims the protection of the Fourteenth Amendment.

2. This court for the first time in its opinion of June 6, 1940, held that the Chase National Bank, plaintiff-appellant, was entitled to a decree that the lease of September 30, 1913, was enforceable against the City and that Chase was also entitled to a coercive judgment against the City. The Court on its own motion should have reconsidered its decision in *Chase National Bank of New York* v. *Citizens Gas Company*, 96 F. 2d 363, in which it held that The Indianapolis Gas Company was an indispensable party to the controversy, but in which it also sustained the jurisdiction of the lower court on the ground that there was a collision of interest between Chase and Indianapolis Gas on certain questions involved and that this fact prevented a realignment of Indianapolis Gas with Chase. The court erred in sustaining the jurisdiction of the lower court of the subject-matter of this controversy and directing judgment to be entered against the city because Indianapolis Gas should have been realigned with Chase and thus diversity of citizenship destroyed, because alignment of the parties in any case must be determined by their relation to the main controversy. In this case there is no collision of interest between plaintiff and Indianapolis Gas on the main issue involved, viz.: the enforceability of the lease against

the City. It is clear from the Court's opinion that all questions other than the question of the enforceability of the lease against the city were dependent upon the decision of that question.

3. The Court erred in not realigning Indianapolis Gas with Chase and directing the lower court to dismiss this cause for lack of jurisdiction of the subject-matter, because:

(a) The Court held that Chase was entitled to a coercive judgment for the unpaid and over-due interest represented by the coupons together with five per cent interest thereon from maturity to judgment and five per cent interest on the judgment from entry to satisfaction, which judgment was to be enforceable against the parties in the following order of liability:

(1) The City and the trust property.
(2) Citizens Gas.
(3) Indianapolis Gas.

If a coercive judgment is entered against the City it may be mandated to pay that judgment through the medium of a tax levy. *Cox* v. *State*, 182 Ind. 497.

Even if this Court should modify or construe its opinion so that the judgment against the City would be payable solely out of the revenues from the property, there is still no possibility of the judgment being paid by Indianapolis Gas because the funds deposited in escrow and those remaining in the hands of the City from the operation of the property are more than sufficient to discharge the full amount of the judgment ordered entered. *The judgment will be against Indianapolis Gas in form only; in substance and reality it will be a judgment for the joint benefit of Chase and Indianapolis Gas against the City.*

The result is that in a case in which Indianapolis Gas is vitally interested in the enforcement of the lease and in procuring a coercive judgment requiring the City to pay the interest on its mortgage debt, this suit has been maintained in a Federal Court where no federal question is involved, where jurisdiction depends wholly on diversity of citizenship and a judgment ordered entered which as a practical proposition insulates Indianapolis Gas from possible coercion of payment.

(b) The result of the Court's opinion is that a judgment is ordered entered which will be equally beneficial to both Chase and Indianapolis Gas and which in reality

will amount to a judgment not against Indianapolis Gas but in its favor.

(c) The dominant question upon the answer to which depended the final decision in this cause was whether the lease was enforceable against the City and in that question Chase and Indianapolis Gas have identical interests.

(d) The decision of this Court is directly in conflict with controlling decisions of the United States Supreme Court wherein it is held that parties must be aligned in interest in accordance with their relation to the main controversy in the cause and the fact that there are dependent controversies in respect of which their interest may be adverse is not sufficient to sustain the jurisdiction of the Court on the ground of diversity of citizenship.

4. This Court apparently relied on the decisions in the following cases as *res adjudicata* of some or all of the issues presented in this case and inferentially, although not directly, held that the City was estopped by such judgments:

Fishback v. *Public Service Commission*, 193 Ind. 282;
Williams v. *Citizens Gas Co.*, 206 Ind. 448;
Todd v. *Citizens Gas Co., et al.*, 46 F. 2d 855;
Cotter v. *Citizens Gas Co., et al.*, 46 F. 2d 855.

None of these cases is *res adjudicata* of any issue involved in this case and this court should have so held.

(See *Jones* v. *Vert, et al.*, 121 Ind. 140, 141.)

5. The Court erred in directing that a coercive judgment, *presumably payable out of the general revenues of the City*, be entered in favor of Chase, thus requiring municipal revenues raised by taxation to be applied if necessary in payment of rentals under a lease which had no municipal sanction and which was executed in direct violation of applicable Indiana statutes. There was no limitation in the Court's opinion that the unpaid coupons and interest on them to the date of judgment and interest on the judgment from date of entry to payment should be collectible only out of the revenues arising from the operation of Indianapolis Gas property. The Court has thus imposed a burden on the City not authorized by any statute and not supported, so far as we know, by any decision and contrary to the very terms of the lease itself.

6. The Court erred in holding and deciding that the

lease was valid and enforceable against the City. The decision of the Court in this respect is susceptible of a construction that the rental reserved in the lease may be collected from the City out of revenues raised by taxation whereas in no event could the City lawfully be required to pay such reserved rent except out of the net income of the leased property and or the trust property.

While the proposition urged in Subdivision 5, supra, of this petition for rehearing cannot under the facts of this case result in the use of revenue derived from taxation for the payment of rentals presently due, if the language of the opinion is unmodified it may result in the future in requiring the City to pay rentals out of such revenues.

7. This court apparently relied upon certain acts as showing that the City of Indianapolis was estopped to deny the enforceability against it of the lease of September 30, 1913, although there is no express holding to that effect. The Court erred in giving any weight to the claimed estoppel because there was no proof that any present holder of the bonds of the Indianapolis Gas Company knew of or relied upon any such act and in addition under the applicable Indiana law unauthorized acts of city officers cannot be made the basis of a recovery against the city. The court erred in failing to hold that the city was not estopped by any such acts of its officers.

8. This Court erred in holding that the 99 year lease between Citizens Gas and Indianapolis Gas was valid and was enforceable against the City.

9. The Court erred in holding that the City accepted the lease.

10. The Court erred in holding that the initial trustee, Citizens Gas and the successor trustee, the City, had power to purchase in fee simple the property of Indianapolis Gas and that therefore the attack of the City was only upon the mode of the acquisition of this property.

11. The Court in its opinion stated that the City did not claim that the lease was unenforceable against it on grounds of public policy. In this it erred because the City made such direct claim and that claim should have been sustained by this Court.

12. The Court erred in holding that the lease of September 30, 1913, executed by Citizens Gas and Indianapolis Gas was enforceable against the City because:

(a) When that lease was originally executed the City was not a party to it and it has never been

contended by Chase that the lease was originally binding against the City. Indeed, it could not be known until the property was taken over, which was only in 1935, whether under any theory of the case the City would be bound to the terms of that lease. The whole theory of Chase's presentation of this case in its complaint, the amendments thereto, its evidence and the briefs in this court is that the City became bound to the terms of the lease by estoppel, res adjudicata and the operation of the property. The Court has apparently decided this case on an issue which was not presented to the court by Chase for its determination, and has erroneously held the City liable under the terms of the lease although that lease was never approved by any proper municipal action. Indeed, the only action taken by the City was to reject the lease.

13. This Court erred in not holding the lease invalid because violative of Sections 85 and 254 of Chapter 129 of the Acts of the Indiana General Assembly, 1905.

14. This Court erred in refusing to abide by the rule of United States Supreme Court laid down in the case of *Erie Railroad* v. *Tompkins*, 304 U. S. 64, 82 L. ed. 1188, in that it did not apply the established law of the State of Indiana to the questions involved in this case, and in particular it did not apply the law of Indiana in its determination of the questions of estoppel against the City and the question of whether or not certain judgments rendered by the Indiana Supreme Court were res adjudicata.

Edward H. Knight,
Corporation Counsel,
Michael B. Reddington,
Attorney for City of Indianapolis,
William H. Thompson,
Patrick J. Smith,
Attorneys for Defendants-Appellees.

June 20, 1940.

Endorsed: Filed June 20, 1940. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the twentieth day of June, 1940, there was filed in the office of the Clerk of this Court, a petition for reargument, which said petition for reargument is in the words and figures following, to-wit:

Nos. 7143 and 7144

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-Appellant,*
vs.
Citizens Gas Company of Indianapolis, *et al.*, *Defendants-Appellees.*
The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-Appellee,*
vs.
The Indianapolis Gas Company, *Defendant-Appellant.*

Nos. 7143 and 7144.
Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.
Honorable Robert C. Baltzell, Judge of said Court.

Petition of Defendant-Appellee City of Indianapolis and the Individual Defendants-Appellees Who Are Members of the Board of Trustees and Directors of the Department of Utilities of Said City for a Reargument of Said Causes.

Edward H. Knight,
Michael B. Reddington,
City Hall,
Indianapolis, Indiana,
William H. Thompson,
Patrick J. Smith,
Consolidated Building,
Indianapolis, Indiana.
Solicitors for said Defendants-Appellees.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, 1939, April Session, 1940.

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-Appellant*, *vs.* Citizens Gas Company of Indianapolis, *et al.*, *Defendants-Appellees.* } Nos. 7143

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-Appellee*, *vs.* The Indianapolis Gas Company, *Defendant-Appellant.* } and 7144

Defendants-Appellees City of Indianapolis and the members of its Board of Trustees and Directors for Utilities, viz.: A. Dallas Hitz, Edward W. Harris, Charles S. Rauh, Merle E. Sidener, Thomas D. Sheerin, Henry L. Dithmer, Brodehurst Elsey, Roy Sahm, Isaac E. Woodard, David J. Angus, Leroy J. Keach and John E. Ohleyer, respectfully petition the Court to grant, in connection with the rehearing requested by defendants-appellee, a reargument of this cause.

As grounds for this petition for a reargument these defendants-appellees submit that:

1. Under the decision of this Court as it now stands the Court has directed that a declaratory judgment be entered against the City determining the lease of September 30, 1913, as valid and a coercive judgment for unpaid interest coupons with interest thereon. This order has been made notwithstanding that this Court has held that if the lease was improvident or burdensome it could be declared to be invalid. Because the question of the bur-

densome character of the lease was reserved for future determination by the court without objection or exception by any parties the City has been deprived of its day in court and it should undoubtedly have the right to be heard on this issue before the lower court is directed to enter final judgment against the City.

2. The questions involved are of grave public importance inasmuch as the Court's decision imposes upon the City of Indianapolis a liability for future rentals of more than $45,000,000 under a lease which did not have the sanction of any proper municipal authority.

3. The Court has directed that a coercive judgment *presumably payable out of the general revenues of the City* be entered in favor of Chase, thus if necessary requiring revenues raised by taxation to be applied in payment of rentals under a lease which had no municipal sanction. If this be the correct interpretation of the court's decision then it follows that future rentals would be required to be paid by the city out of revenues raised from taxation if the revenue from the operation of the property were insufficient to pay the stipulated rentals. No such result can possibly be authorized by any statute or reported decision and is in direct conflict with the terms of the lease itself.

4. The Court misunderstood the position of the City in many important particulars, as for example, it stated in its opinion:

"Counsel for the City does not argue that the trustees lack the power to lease the property of its rival because such action might contravene public policy."

The Court entirely overlooked the averments contained in the city's answer and counter-claims (R. pp. 141 to 205, 314), and the argument of the City in its brief in this cause at pages 111-118, inclusive, where the point is expressly made that the lease in question was executed in direct violation of prohibitive Indiana statutes, was therefore void and could not be ratified or enforced by estoppel.

5. Because of the long record and the complicated nature of the factual situation the Court, in its written opinion, has inadvertently fallen into error in respect of important facts, and also in respect of the position taken by the City, all as pointed out in the City's brief on its petition for rehearing. The City should have an opportunity through its counsel to re-present its case orally to the Court so that the case may be decided in view of the

correct facts and the actual position taken by the City on such facts.

Respectfully submitted,

Edward H. Knight,
Corporation Counsel City of Indianapolis;
Michael B. Reddington,
Attorney for City of Indianapolis.
William H. Thompson,
Patrick J. Smith,
Attorneys for said Defendants-Appellees.

June 20, 1940.

Endorsed: Filed June 20, 1940. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the tenth day of July, 1940, there was filed in the office of the Clerk of this Court a stipulation re amplification of record, which said stipulation is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Nos. 7143 and 7144.

The Chase National Bank of the City of New York, Trustee, etc.,
Plaintiff-Appellant,
vs.
Citizens Gas Company of Indianapolis, *et al.*,
Defendants-Appellees.

The Chase National Bank of the City of New York, Trustee, etc.,
Plaintiff-Appellee,
vs.
The Indianapolis Gas Company,
Defendant-Appellant.

STIPULATION RE AMPLIFICATION OF RECORD.

It Is Hereby Stipulated by all of the parties to these two causes that this Stipulation and the facts recited herein and the exhibits attached hereto may be made a part of the record in the two above entitled causes as fully and completely as though all of said matters had been included in the Transcript of Record as originally certified to this Court by the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

The signing and execution of this Stipulation by the parties hereto shall not be considered as an admission by any of the parties of the materiality or relevance of any of the material so added to the record.

It Is Further Stipulated that the following facts are true:

(1) On January 4, 1939, a pre-trial conference was held before the Honorable Robert C. Baltzell, Judge of

the United States District Court, in causes 1844 and 1950, In Equity, on the docket of said District Court. An excerpt from the official Reporter's transcript of said proceedings is attached hereto, marked "Exhibit A", and made a part hereof.

(2) The two causes now pending in this Court, namely, Nos. 7143 and 7144, are appeals from the judgment in cause No. 1844, In Equity, in the District Court of the United States for the Southern District of Indiana, Indianapolis Division. Cause No. 1950, In Equity on the docket of said District Court, entitled "Massachusetts Mutual Life Insurance Company, *et al.*, plaintiffs, *vs.* Citizens Gas Company of Indianapolis, *et al.*, defendants", was tried with cause No. 1844 but has not yet been decided by the District Court.

(3) On the 14th day of January, 1939, at a pre-trial conference held before the Honorable Robert C. Baltzell, in causes 1844 and 1950, In Equity, William H. Thompson, counsel for the City of Indianapolis, *et al.*, in both of said causes, presented a proposed form of order respecting the separate trial of certain issues in Cause 1844, a copy of which proposed form of order is attached hereto, marked "Exhibit D", and made a part hereof.

(4) On January 16, 1939, Howard F. Burns, counsel for plaintiffs in both causes 1844 and 1950, wrote and mailed a letter to Honorable Robert C. Baltzell, Judge of the United States District Court, enclosing a proposed form of order entitled "Order Directing Separate Trial of Certain Claims and Causes of Action and Reserving Other Claims and Causes of Action for Subsequent Trial." Copies of said letter of January 16, 1939, and the enclosed form of order are attached hereto, marked "Exhibit B" and "Exhibit C", respectively, and made a part hereof. Copies of said letter of January 16th (Exhibit B) and of the enclosed form of order (Exhibit C) were mailed on January 16, 1939 to counsel for each of the defendants in said causes.

(5) On February 27, 1939, counsel for plaintiffs in said causes 1844 and 1950 filed with the District Court a brief entitled "Plaintiffs' Brief on the Admissibility of Evidence to Support Allegations That the Lease of September 30, 1913 Is or Was Burdensome", and on the same day served copies of said brief on counsel for each of the defendants in said causes. An excerpt from said

brief is attached hereto, marked "Exhibit E", and made a part hereof.

William L. Taylor,
John Adams,
Howard F. Burns,
Solicitors for The Chase National Bank, Trustee, plaintiff-appellant in cause No. 7143 and plaintiff-appellee in cause No. 7144.
Louis B. Ewbank,
William R. Higgins,
Solicitors for The Indianapolis Gas Company, defendant - appellee in cause No. 7143 and defendant-appellant in cause No. 7144.
Edward H. Knight,
Michael B. Reddington,
William H. Thompson,
Perry E. O'Neal,
Patrick J. Smith,
Solicitors for the City of Indianapolis, et al., defendants-appellees in causes Nos. 7143 and 7144.
Paul G. Adams,
William G. Sparks,
Solicitors for Citizens Gas Company of Indianapolis, defendant-appellee in causes Nos. 7143 and 7144.

EXHIBIT A.

(pages 2-3):

"Be It Remembered, That, in the District Court of the United States, for the Southern District of Indiana, Indianapolis Division, at the United States Court House, in the City of Indianapolis, Indiana, on Wednesday, January 4, 1939, commencing at nine-thirty o'clock in the forenoon, the following proceedings were had in Chambers, before the Honorable Robert C. Baltzell, Judge of said Court.

Appearances:

The plaintiff, The Chase National Bank of the City of New York, Trustee, appeared by Thompson Kurrie, Esq., representing Messrs. Taylor & Carter, its attorneys.

The plaintiff, Massachusetts Mutual Life Insurance Company, appeared by Harvey J. Elam, Esq., representing Messrs. Fesler, Elam, Young & Fauvre, its attorneys.

The defendant, Citizens Gas Company of Indianapolis, appeared by Paul Y. Davis, Esq., and William G. Sparks, Esq., representing Messrs. Davis, Pantzer, Baltzell & Sparks, its attorneys.

The defendants, City of Indianapolis and the individual defendants who are members of the Board of Trustees and Directors for the Utilities of the City of Indianapolis, appeared by William H. Thompson, Esq., and Albert L. Rabb, Esq., representing Messrs. Thompson & Rabb, their attorneys.

The defendant, The Indianapolis Gas Company, appeared by Louis B. Ewbank, Esq., representing Messrs. Ewbank, Dowden & Adams, and by William R. Higgins, Esq., representing Messrs. McTurnan & Higgins, its attorneys.

The defendant, The Indiana National Bank, appeared by Louis B. Ewbank, Esq., representing Messrs. Ewbank, Dowden & Adams, its attorneys.

The Court: I want to take up these Gas cases this morning, informally. I believe that they are assigned for trial on January 24th. Is that right?"

* * * * * *

(pages 23-26):

* * * * * *

"Mr. Elam: I think there was a motion to strike out parts of their Answer, that you haven't mentioned.

The Court. You mean in the Chase case?

Mr. Elam: I think it is in both the Chase case and the bondholders case.

The Court: There was a motion, there on the consolidation, that I didn't think was necessary to mention at this time.

Mr. Thompson: There is a motion in each case, your Honor, by the plaintiff to strike out that part of our Answer which alleges that this lease was burdensome.

The Court: Is it necessary to go into that at this time? Wouldn't that come under the further hearing, if it is necessary?

Mr. Thompson: We claim that that goes to the question of the validity and the binding effect of this lease upon the City of Indianapolis and, inasmuch as we didn't

sign the lease—the City didn't sign the lease—and inasmuch as the leased property was not a part of the corpus of the public charitable trust when the City took it over,—

The Court: I don't have that motion. It doesn't seem to be among these papers which I have here. I had in mind that those questions and the question with reference to the burdensome lease perhaps might not enter into the question of the validity of the lease so much. They are seeking to strike that from your Answer?

Mr. Thompson: Yes. My thought on that was that, if there is nothing in his proposition as a legal proposition, we don't need to go into the fact, whether it is a fact or not.

The Court: It would require some proof, wouldn't it?

Mr. Thompson: A substantial amount.

The Court: Well, I didn't have in mind going into that question at this time. I don't know whether that would be necessary to determine the validity of the lease or not.

Mr. Elam: Well, I suppose when we have our hearing, we could prove that question then in connection with the validity of the lease, on the assumption that the fact is one way or the other and, then, let it go until later to find out what the fact is.

The Court: That motion is just to strike out those allegations. I would think the allegations would be proper. It is in the Massachusetts Mutual case, a motion to strike immaterial matter from the Answer and the counterclaim of the defendant, City of Indianapolis. I assume that is the motion. I will go into that. I will examine that question and pass on it before the time for the hearing.

I notice there is cited here *Public Service Commission* versus *Indianapolis*, 193 Indiana. Somebody gave me that citation.

Mr. Thompson: When you have reached a conclusion on that question, your Honor, will you also notify counsel as to whether any evidence is to be heard in respect to that issue?

The Court: Yes. My present thought would be, if it just goes to the question of striking that out, that the motion would not be well taken. However, I want to go into that question.

Mr. Elam: I think the motion is well taken and it will simplify the case a good deal if it is sustained.

The Court: I thought I had it simplified once, but the other court said I didn't.

Is that in both cases?

Mr. Thompson: Yes, sir, I think so.

The Court: I don't find it in the Chase National Bank case. I will look through the file later.

I will take up this matter of the motion to strike within a very short time.

Mr. Elam: All right.

The Court: I am sorry I did not have that in mind. I thought I had in mind everything that had been presented."

* * * * * *

EXHIBIT B.

Baker, Hostetler & Patterson
Union Commerce Building
Cleveland

Received
January 17 1939
Albert C. Sogemeier,
Clerk

US Clerk

January 16, 1939.

Honorable Robert C. Baltzell,
Judge,
United States District Court,
Federal Building,
Indianapolis, Indiana.

Dear Judge Baltzell:

re: Chase National Bank, Trustee, *vs.* Citizens Gas Company, et al.; In equity No. 1844.

Massachusetts Mutual Life Insurance Company, et al. *vs.* Citizens Gas Company, et al.; In Equity No. 1950.

I am taking the liberty of writing you further in regard to the proposed order directing separate trial of certain claims and causes of action because I had no opportunity to see the order proposed by Mr. Thompson until he presented it to you Saturday morning. I am sending a copy of this letter to counsel for each of the defendants.

It seems to us that the form of order presented by Mr. Thompson on Saturday is designed to prevent the trial of many issues which are purely matters of law and should be decided at the first trial of the case. The order presented by the City would almost certainly require a second trial.

Plaintiffs on the other hand, are anxious to have the validity of the lease determined and all other questions which may be presented upon the same evidence without any additional burden upon the Court, because they feel that this will in all probability avoid the necessity of any further trial.

Several issues which we wish to have presented at the first trial, but which are excluded by the City's form of order, will require no evidence in addition to that produced on the question of the validity of the lease. Among these issues are:

(1) Whether plaintiffs are entitled to a judgment against The Indianapolis Gas Company.

This issue does not relate in any way to the validity of the lease, but is fully presented by the allegations and admissions of the pleadings as they now stand.

(2) Whether plaintiffs are entitled to interest on the unpaid instalments of interest on said bonds from the time when such instalments became due and are entitled to their costs and expenses in the prosecution of these cases.

No additional evidence will be required on these issues and the question as to the amount, if any, of the allowance for plaintiffs' expenses is expressly reserved.

We believe that it is particularly necessary to have express provisions in the order such as those included in our tendered form of order, one of which reads as follows:

"In the determination of said questions all grounds based upon the facts alleged in plaintiff's bill of complaint as amended and supplemented, or in any of the answers or counterclaims filed herein, for entering judgment, or refusing to enter judgment, against any of said persons or any of said property for the items enumerated shall be tried and determined."

A single example will illustrate why we consider this language necessary. It is admitted by the pleadings that the Citizens Gas Company conveyed all of its property to the City, thus leaving it no assets with which to satisfy

any of its creditors. If the Court comes to the conclusion that the lease is binding upon the Citizens Gas Company but not binding upon the City, the obligations of the lease or the judgment against Citizens Gas Company for the rent under the lease would be a valid claim against the property of Citizens Gas Company which was transferred to the City in violation of the rights of the creditors of Citizens Gas. This and other similar questions will require no additional evidence and should be submitted and passed upon at the first trial so that we can have one trial and one review of all these questions.

Since Mr. Thompson objected to the length of the order which we presented to the Court and defendants' counsel on Friday, we have redrafted the order and I am enclosing a copy of the order as redrafted herewith. There are two principal changes in this order from the one which we originally submitted. First, we have simply reserved for the subsequent trial all issues not enumerated, without enumerating any of the reserved issues. Second, with respect to the burdensomeness of the lease, we have in large part adopted Mr. Thompson's language in his form of order as presented on Saturday.

We believe it is important to have an explicit order defining which issues are to be tried and which reserved, because it may be necessary two or three years from now for counsel and some appellate court to know precisely what issues were presented and what issues were reserved. A definite order which makes these distinctions clear is essential to the protection of the Court and all parties.

It is the earnest wish of the plaintiffs and plaintiffs' counsel that the first trial shall include those issues which will in all probability dispose of the entire controversy. They hope by this method to dispose of the entire case by one trial and one review. We believe the order tendered by the City will effectually prevent this very desirable result.

Respectfully submitted,
(signed) Howard F. Burns.
Howard F. Burns.

T:2A
enclosure
1494-G-1-a
cc William R. Higgins, Esq.
Honorable Louis B. Ewbank.
William H. Thompson, Esq.
William G. Sparks, Esq.

EXHIBIT C.

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Southern District of Indiana,

Indianapolis Division.

In Equity No. 1844.

The Chase National Bank of the City of New York, Trustee, *Plaintiff,*
vs.
Citizens Gas Company of Indianapolis, *et al.*, *Defendants.*

ORDER DIRECTING SEPARATE TRIAL OF CERTAIN CLAIMS AND CAUSES OF ACTION AND RESERVING OTHER CLAIMS AND CAUSES OF ACTION FOR SUBSEQUENT TRIAL.

This day this matter came on to be heard upon the application of the parties for an order directing a separate trial of certain claims, causes of action, questions, and issues, and reserving certain other claims, causes of action, questions, and issues for a subsequent trial, and the Court being fully advised in the premises finds that it will be to the advantage and convenience of both the Court and the parties to make such a separation of claims, causes of action, questions, and issues.

It is therefore ordered, in pursuance of the provisions of Rules 42 and 54 of the Rules of Civil Procedure, that the following claims, causes of action, questions, and issues shall be determined upon the first trial of this action and appropriate judgments entered accordingly:

I. Whether the obligations of the lease between The Indianapolis Gas Company and Citizens Gas Company dated September 30, 1913, particularly as to the payment of rental and performance of other executory obligations to be paid or performed after September 9, 1935, are binding on

a. The Indianapolis Gas Company,
b. The Citizens Gas Company of Indianapolis,
c. The City of Indianapolis,

d. The Utility District of the City of Indianapolis, and

e. The property formerly owned by Citizens Gas Company and conveyed to the City of Indianapolis on or about September 9, 1935,

or any one of more of said persons or said property. In the determination of said questions all grounds based upon the facts alleged in plaintiff's bill of complaint as amended and supplemented, or in any of the answers or counterclaims filed herein, for imposing or refusing to impose, the obligations of said lease upon any of said persons or said property shall be tried and determined.

II. Whether the plaintiff is entitled to judgment against

a. The Indianapolis Gas Company,

b. The Citizens Gas Company of Indianapolis,

c. The City of Indianapolis,

d. The Utility District of the City of Indianapolis, and

e. The property formerly owned by Citizens Gas Company and conveyed to the City of Indianapolis on or about September 9, 1935,

or any one or more of said persons or said property, for any one or more of the following items:

(1) Interest on the First Consolidated Mortgage Five Per Cent Gold Bonds of The Indianapolis Gas Company which has accrued since April 1, 1936, and the amount of such interest;

(2) Interest on the unpaid instalments of interest on said Bonds, from the time when such instalments became due to the time of judgment, and the amount of such interest;

(3) The costs and expenses of the plaintiff in and about the bringing and prosecution of this suit, including reasonable attorney's fees for plaintiff's solicitors, reserving, however, the question of the amount of such costs, expenses, and fees for later determination.

In the determination of said questions all grounds based upon the facts alleged in plaintiff's bill of complaint as amended and supplemented, or in any of the answers or counterclaims filed herein, for entering judgment, or refusing to enter judgment, against any of said persons or any of said property for the items enumerated shall be tried and determined.

It is further ordered that all other claims, causes of action, questions, and issues raised by the pleadings herein be reserved for subsequent trial.

It appearing further to the Court that one certain reason has been asserted in the separate answer and counter-

claim of the City of Indianapolis, *et al.*, why said lease of September 30, 1913, [illegible]t be enforceable against the City of Indianapo[illegible]gainst the property formerly owned by the C[illegible]as Company and conveyed to the City of Indianapolis on or about September 9, 1935, viz., that the City as successor trustee of a certain public charitable trust in property of the Citizens Gas Company of Indianapolis had the right as such successor trustee to refuse and reject the assignment of such lease on the ground that such lease was burdensome and not advantageous to such trust, and it further appearing that a substantial amount of evidence may be required on this issue and will put an unwarranted burden upon the time of the Court, and that such questions should, if material, be referred to a Special Master for report prior to the final decision of the claims, causes of action, questions, and issues to be separately heard at the first trial;

It is hereby ordered that the issues arising out of said certain reason for the claimed unenforceability of said lease and all evidence as to the burdensomeness of said lease or the value of said leasehold estate shall not be presented to the Court at the time of the first trial of the claims, causes of action, questions, and issues hereinbefore enumerated in subdivisions I and II of this order, but that as a part of the first trial of said claims, causes of action, questions, and issues the Court will decide whether such evidence is material to the determination of the claims, causes of action, questions, and issues to be determined at said first trial. If the Court then decides that such allegations of the City of Indianapolis, *et al.*, are material to the determination of the issues before it at the first trial, the Court will then refer the issues made by such allegations of the City of Indianapolis, *et al.*, to a special master to be appointed by the Court.

.....

District Judge.

Dated ....., 1939.

Endorsed: In the District Court of the United States For the Southern District of Indiana Indianapolis Division In Equity—No. 1844 The Chase National Bank of the City of New York, Trustee, Plaintiff, *vs.* Citizens Gas Company of Indianapolis, et al., Defendants Order Directing Separate Trial of Certain Claims and Causes of Action and Reserving Other Claims and Causes of Action For Subsequent Trial.

EXHIBIT D.

No. 1844 in Equity.

ORDER.

There shall first be tried the issue as to whether the lease dated September 30, 1913, from The Indianapolis Gas Company to Citizens Gas Company of Indianapolis, is binding upon and enforceable against the City of Indianapolis or any of the property acquired by it from Citizens Gas Company of Indianapolis on September 9, 1935; or against The Indianapolis Gas Company; or against Citizens Gas Company of Indianapolis; with the one exception, that there shall not be tried therewith but the trial thereof shall be deferred, one certain reason for claimed unenforceability of such lease against the City of Indianapolis or its said property, viz. that the City as successor trustee of a certain public charitable trust in property of the Citizens Gas Company of Indianapolis had the right as such successor trustee to refuse and reject an assignment of such lease on the ground that such lease was burdensome and not advantageous to such trust.

The trial of all other issues in this case is deferred until the further order of the court, with the right reserved to refer any or all of such issues to a special master.

EXHIBIT E.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Indiana,

Indianapolis Division.

The Chase National Bank of the City of New York, Trustee, *Plaintiff*, *vs.* Citizens Gas Company of Indianapolis, *et al.*, *Defendants.*	In Equity No. 1844.
Massachusetts Mutual Life Insurance Company, *et al.*, *Plaintiffs*, *vs.* Citizens Gas Company of Indianapolis, *et al.*, *Defendants.*	In Equity No. 1950.

PLAINTIFFS' BRIEF ON THE ADMISSIBILITY OF EVIDENCE TO SUPPORT ALLEGATIONS THAT THE LEASE OF SEPTEMBER 30, 1913 IS OR WAS BURDENSOME.

The plaintiff in cause 1844 and plaintiffs in cause 1950 (hereinafter collectively called the "plaintiffs") moved the Court to strike from the answer and counterclaim of the City of Indianapolis and its Trustees and Directors for Utilities (hereinafter collectively called the "City") in each cause, all allegations that the rentals required by the lease of September 30, 1913 are excessive or that the lease is burdensome. Although those motions were overruled, it plainly appears that none of these allegations is in any way material or relevant to the issue as to the validity and present binding effect of the lease, whatever possible relevancy they might have to some of the issues reserved for trial at a later date.

The order entered by this Court on January 18, 1939, provides that the evidence as to one alleged reason for the City's claim that the lease of September 30, 1913

(hereinafter called the "Lease") is not enforceable against it or the property which it received from Citizens Gas Company, namely that the City can reject the Lease on the ground that it is burdensome, shall be deferred, this matter to be tried at a later date if found to be relevant or necessary to the determination of the question whether the Lease is now valid and binding. The plaintiffs will object to the admission of any such evidence and to having a subsequent trial for the presentation of such evidence, on the ground that none of it is relevant to the question whether the Lease is binding upon the City or any of its property. This brief is submitted in support of plaintiffs' contentions on this point.

There are three distinct reasons why the evidence proffered by the City as to the burdensomeness of the Lease is wholly immaterial in determining whether the Lease is binding upon the City.

First: The parties, including the City, are estopped by prior adjudications of this question.

Second: Both the Citizens Gas Company and the City are estopped by their laches in failing to object for a period of twenty-two years that the Lease was burdensome and in accepting during the meantime all of the benefits arising from said Lease.

Third: A party to a contract—otherwise valid—or its successor in interest, cannot escape the obligations of such contract by proving that such obligations either were originally or have later become burdensome.

[Here follows on pages 3 to 20, inclusive, a discussion of the facts and the law presented by counsel for plaintiffs.]

Conclusion.

It is respectfully submitted that the evidence tendered by the City to establish the burdensomeness of the Lease cannot properly be admitted unless the Court finds affirmatively for the City on every one of the following propositions:

First: That the Public Service Commission did not determine that the Lease was in the public interest or that the City is now entitled to make a collateral attack upon that determination.

Second: That the City is now entitled to repudiate

the positions which it took in the *Fishback* and *Williams* cases that the Lease was entirely valid and was not burdensome.

Third: That the City is not concluded by the judgment in the *Williams* case, to which it was a party, establishing the validity of the Lease and holding that evidence as to the burdensomeness of the Lease did not justify invalidating it at the suit of a beneficiary of the trust.

Fourth: That the acquiescence in the Lease and the acceptance of the benefits thereunder, for a period of twenty-two years, by the City, and Citizens Gas Company, its predecessor in title, and by the inhabitants of Indianapolis as beneficiaries of the public charitable trust, do not constitute laches.

Fifth: That a party to a contract, or its successor, is entitled to escape from the obligations of an otherwise binding contract, which has been recognized and acted under for twenty-two years, because in the light of the present facts the contract is an improvident one.

As shown by the foregoing brief, the City cannot establish any one of these five propositions and since the failure to establish any one of them requires the exclusion of the evidence, we submit that any evidence as to the burdensomeness of the Lease should be excluded.

Respectfully submitted,

Howard F. Burns,
1956 Union Commerce Building,
Cleveland, Ohio.

Wm. L. Taylor,
State Life Building,
Indianapolis, Indiana.

Solicitors for The Chase National Bank, Trustee, Plaintiff, in Cause 1844.

Howard F. Burns,
1956 Union Commerce Building,
Cleveland, Ohio.

Harvey J. Elam,
129 East Market Street,
Indianapolis, Indiana.

Solicitors for Plaintiffs in Cause 1950.

Dated 2-27-39.

Copies of the foregoing brief have been served on Counsel for each defendant herein this 27th day of February, 1939.

Howard F. Burns.

Endorsed: Filed July 10, 1940. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the nineteenth day of July, 1940, the following further proceedings were had and entered of record, to-wit:

Friday, July 19, 1940.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.
Hon. Michael L. Igoe, District Judge.

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellant,*
7143 *vs.*
Citizens Gas Company of Indianapolis, *et al.*, *Defendants-appellees.*

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellee,*
7144 *vs.*
The Indianapolis Gas Company, *Defendant-appellant.*

Appeals from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

It is ordered by the Court that the petition of City of Indianapolis and the individual members of the Boards of Utilities of the City of Indianapolis for the issuance of a writ of certiorari to the District Court to certify to this Court a transcript of certain proceedings be, and the same is hereby denied.

It is further ordered by the Court that the stipulation of counsel filed in this Court on July 10, 1940, relative to amplification of the record be, and the same is hereby approved.

And on the same day, to-wit: On the nineteenth day of July, 1940, the following further proceedings were had and entered of record, to-wit:

Friday, July 19, 1940.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.
Hon. Michael L. Igoe, District Judge.

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellant.*
7143 *vs.*
Citizens Gas Company of Indianapolis, *et al.*, *Defendants-appellees.*

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellee,*
7144 *vs.*
The Indianapolis Gas Company, *Defendant-appellant.*

Appeals from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

It is ordered by the Court that the opinion of this Court filed on June 6, 1940, in these causes be, and it is hereby, amended as follows: On page 1, line 12, the words "a bond holder and as" are deleted; on page 12, line 27, the word "accepted" is deleted and the word "received" is substituted therefor; on page 13, line 14, the words "and power" are deleted; on page 17, line 34, the words "does not argue" are deleted and the words "argues but not impressively" are substituted therefor; and on page 26, line 34, after the words "the City" the words "as successor trustee" are inserted.

And on the same day, to-wit: On the nineteenth day of July, 1940 the following further proceedings were had and entered of record, to-wit:

Friday, July 19, 1940.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.
Hon. Michael L. Igoe, District Judge.

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellant.*
7143 *vs.*
Citizens Gas Company of Indianapolis, *et al.*, *Defendants-appellees.*

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellee.*
7144 *vs.*
The Indianapolis Gas Company, *Defendant-appellant.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

It is ordered by the Court that the petition for a reargument of these appeals be, and the same is hereby denied.

It is further ordered by the Court that the petition for a rehearing of these appeals be, and the same is hereby denied.

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellant.*
7143 *vs.*
Citizens Gas Company of Indianapolis, *et al.*, *Defendants-appellees.*

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellee.*
7144 *vs.*
The Indianapolis Gas Company, *Defendant-appellant.*

Appeals from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

On motion of counsel for The City of Indianapolis, et al., it is ordered that the mandates of this Court in these appeals be, and the same are hereby, stayed 90 days, and if

during such period there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court certifying that a petition for a writ of certiorari has been filed therein, then the said mandates shall be further stayed until final disposition of the case by the Supreme Court.

And afterwards, to-wit: On the twenty-fifth day of July, 1940, there was filed in the office of the Clerk of this Court, a stipulation as to printing of record, which said stipulation is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Nos. 7143 and 7144.

The Chase National Bank of the City of New York, Trustee, etc.,
Plaintiff-Appellant,
vs.
Citizens Gas Company of Indianapolis, *et al.*,
Defendants-Appellees.

The Chase National Bank of the City of New York, Trustee, etc.,
Plaintiff-Appellee,
vs.
The Indianapolis Gas Company,
Defendant-Appellant.

STIPULATION AS TO PRINTING OF RECORD.

It is hereby stipulated by all of the parties to this proceeding, in pursuance of the provisions of paragraph 8 of Rule 38 of the Revised Rules of the Supreme Court of the United States (effective February 27, 1939) that only parts of the transcript of record of the above cases in the United States Circuit Court of Appeals for the Seventh Circuit, in addition to the transcript of record of the United States District Court for the Southern District of Indiana, Indianapolis Division, shall be printed, and that the parts hereinafter stipulated to be printed are the only parts of the record of the proceedings in the United States Circuit Court of Appeals for the Seventh Circuit (in addition to the transcript of record of the United States Dis-

trict Court for the Southern District of Indiana, Indianapolis Division, pages 1 to 1238, inclusive), material to the determination of the questions presented by the petition for the writ of certiorari.

It is hereby stipulated by all the parties to this proceeding that the Clerk shall print the entire transcript of the record of the proceedings in the United States Circuit Court of Appeals for the Seventh Circuit, with the exception of the particular matters hereinafter specifically enumerated, to wit:

(2) Motion to extend time for oral argument, dated November 27, 1939, and supporting papers.

(3) Motion for leave to file briefs exceeding 75 pages in length, dated November 27, 1939, and supporting papers.

(4) Order of November 27, 1939, permitting filing of briefs not exceeding 200 pages in length.

(5) Stipulation correcting record as to "Findings of Fact and Conclusions of Law submitted by City of Indianapolis."

(6) Supplemental stipulation as to printing of record.

(7) Petition of defendants-appellees City of Indianapolis, *et al.*, for extension of time in which to file briefs, and all affidavits and briefs in support thereof or in opposition thereto.

(8) Motion to advance causes on calendar, dated January 9, 1940, and all papers, briefs, or affidavits filed in support thereof or in opposition thereto.

(9) Verified petition on behalf of Citizens Gas Company of Indianapolis for extension of time to file brief, and all papers, briefs, or affidavits filed in support thereof or in opposition thereto.

(10) "Motion of the City of Indianapolis and the Individual Members of the Boards of Trustees and Directors, Defendants-Appellees, in Reply to Brief of Plaintiff-Appellant in Opposition to Petition of the City of Indianapolis and the Boards, etc., for an Extension of Time in which to file their Brief in the above Entitled Causes" and the exhibits attached thereto.

(11) Motion of The Chase National Bank, Trustee, plaintiff-appellee in cause No. 7144, dated January 20, 1940, for extension of time to file brief as appellee.

(12) Consent to granting motion of The Chase National Bank, Trustee, for extension of time in which to file its brief as appellee in cause No. 7144.

(13) Petition of The Indianapolis Gas Company, defendant-appellant, for extension of time to file reply briefs.

(14) Motion of The Chase National Bank, Trustee, dated March 5, 1940, for extension of time to file reply brief.

(15) Consent to granting of the motion of The Chase National Bank, Trustee, for extension of time to file reply brief.

(16) Petition of defendants-appellees for writ of certiorari to the United States District Court for the Southern District of Indiana, Indianapolis Division, and all papers, briefs, and affidavits filed in support thereof or in opposition thereto.

(17) Motion of City of Indianapolis, *et al.*, for stay of mandate, dated July 22, 1940, and all papers, affidavits, or briefs filed in support thereof or in opposition thereto.

(18) Briefs of all parties filed in the United States Circuit Court of Appeals for the Seventh Circuit, either on the merits, on the petition for rehearing, or in any other connection.

(19) All proofs of service of briefs or other papers.

Howard F. Burns,
John Adams,
William L. Taylor,
Attorneys for The Chase National Bank of the City of New York, Trustee, etc.
Louis B. Ewbank,
William R. Higgins,
Attorneys for The Indianapolis Gas Company.
Paul G. Davis,
William G. Sparks,
Attorneys for Citizens Gas Company of Indianapolis.
W. H. Thompson,
Attorney for City of Indianapolis and the indiridual members of the Board of Trustees and Directors of the Department of Utilities.

Endorsed: Filed July 25, 1940. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the seventh day of August, 1940, there was filed in the office of the Clerk of this court, a motion for leave to file a petition for rehearing, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-Appellant,* *vs.* Citizens Gas Company of Indianapolis, *et al.*, *Defendants-Appellees.* } Nos. 7143

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-Appellee,* *vs.* The Indianapolis Gas Company, *Defendant-Appellant.* } and 7144.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING.

Comes now defendant-appellees City of Indianapolis and the individual members of its Board of Trustees for Utilities and its Board of Directors for Utilities, viz.: A. Dallas Hitz, Edward W. Harris, Charles S. Rauh, Merle E. Sidener, Thomas Sheerin, Henry L. Dithmer, Brodehurst Elsey, Roy Sahm, Isaac E. Woodard, Donald J. Angus, Leroy J. Keach and John E. Ohleyer, and respectfully move this Court for permission to file a petition for rehearing addressed to the opinion of this Court in the above entitled causes as modified by this Court, a copy of

which petition for rehearing and brief thereon is attached hereto, marked Exhibit A, and made a part of this motion as though fully set out herein.

Respectfully submitted,
Edward H. Knight,
Corporation Counsel,
Michael B. Reddington,
Attorney for City of Indianapolis,
William H. Thompson,
Perry E. O'Neal,
Patrick J. Smith,
Attorneys for Defendants-Appellees.

August 7, 1940.

Endorsed: Filed August 7, 1940. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the fifteenth day of August, 1940, there was filed in the office of the Clerk of this Court, a petition for rehearing and brief in support of petition, which said petition and brief are in the words and figures following, to-wit:

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc.,
Plaintiff-Appellant,

v.

CITIZENS GAS COMPANY OF INDIANAPOLIS, et al,
Defendants-Appellees.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc.,
Plaintiff-Appellee,

v.

THE INDIANAPOLIS GAS COMPANY,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION.

Honorable Robert C. Baltzell, Judge of Said Court.

PETITION FOR REHEARING AND BRIEF THEREON OF DEFENDANT-APPELLEE CITY AND THE INDIVIDUAL DEFENDANTS-APPELLEES WHO ARE MEMBERS OF THE BOARDS OF TRUSTEES AND DIRECTORS OF THE DEPARTMENT OF UTILITIES OF SAID CITY.

EDWARD H. KNIGHT,
MICHAEL B. REDDINGTON,
City Hall,
Indianapolis, Ind.
WILLIAM H. THOMPSON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
Consolidated Building,
Indianapolis, Indiana.
Solicitors for Said Defendants-Appellees.

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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc.,
Plaintiff-Appellant,
v.
CITIZENS GAS COMPANY OF INDIANAPOLIS, ET AL.,
Defendants-Appellees.

Nos. 7143

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc.,
Plaintiff-Appellee,
v.
THE INDIANAPOLIS GAS COMPANY,
Defendant-Appellant.

and 7144.

Defendants-appellees City of Indianapolis and the members of its Board of Trustees for Utilities and its Board of Directors for Utilities, viz: A. Dallas Hitz, Edward W. Harris, Charles S. Rauh, Merle E. Sidener, Thomas Sheerin, Henry L. Dithmer, Brodehurst Elsey, Roy Sahm, Isaac E. Woodard, David J. Angus, Leroy J. Keach and John E. Ohleyer, respectfully petition the Court to grant a rehearing of said cause, to reconsider its opinion of June

6, 1940, as modified and reverse its direction to the lower court to enter judgment against the City and to affirm the judgment of the lower court.

As grounds for this petition, these defendants-appellees submit that:

1. This Court held that a Trustee of a public charitable trust had no right to make a long term burdensome lease; that it incurred liability to the beneficiaries if it did so and that in addition the beneficiaries were entitled to have such a lease set aside. *This Court therefore held that if a showing could be made that the lease was in fact burdensome it could be set aside and yet it has directed a final judgment to be entered against the City which by order of the Court entered without objection or exception by any of the parties was still to have the right to prove the burdensome character of the lease. If every other question raised by this petition for rehearing should be decided adversely to the defendants-appellees we ask that the order of the Court be modified so as to permit the City to have an opportunity to prove the averments of its counter-claim and to have the lower Court determine whether when executed this lease was in fact burdensome.*

With no opportunity for a hearing on this reserved issue, the defendants-appellees have been denied due process of law as guaranteed by the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States and each of them.

The right to a hearing extends both to a determination of question of fact and law by the trial court. The denial of a hearing on either is a denial of due process. The City affirmatively claims the protection of the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States and each of them.

2. This court for the first time in its opinion of June 6, 1940, held that the Chase National Bank, plaintiff-appellant, was entitled to a decree that the lease of September 30, 1913, was enforceable against the City and that Chase was also entitled to a coercive judgment against the City. The Court on its own motion should have reconsidered its decision in *Chase National Bank of New York v. Citizens Gas Company*, 96 F. 2d 363, in which it held that The Indianapolis Gas Company was an indispensable party to the controversy, but in which it also sustained the jurisdiction of the lower court on the ground that there was a collision of interest between Chase and Indianapolis Gas on certain questions involved and that this fact prevented a realignment of Indianapolis Gas with Chase. The court erred in sustaining the jurisdiction of the lower court of the subject-matter of this controversy and directing judgment to be entered against the city because Indianapolis Gas should have been realigned with Chase and thus diversity of citizenship destroyed, because alignment of the parties in any case must be determined by their relation to the main controversy. In this case there is no collision of interest between plaintiff and Indianapolis Gas on the main issue involved, viz: the enforceability of the lease against the City. It is clear from the Court's opinion that all questions other than the question of the enforceability of the lease against the city were dependent upon the decision of that question.

3. The Court erred in not realigning Indianapolis Gas with Chase and directing the lower court to dismiss this cause for lack of jurisdiction of the subject-matter, because:

(a) The Court held that Chase was entitled to a coercive judgment for the unpaid and over-due interest

represented by the coupons together with five per cent interest thereon from maturity to judgment and five per cent interest on the judgment from entry to satisfaction, which judgment was to be enforceable against the parties in the following order of liability:

(1) The City and the trust property.

(2) Citizens Gas.

(3) Indianapolis Gas.

If a coercive judgment is entered against the City it may be mandated to pay that judgment through the medium of a tax levy. *Cox v. State*, 182 Ind. 497.

Even if this Court should modify or construe its opinion so that the judgment against the City would be payable solely out of the revenues from the property, there is still no possibility of the judgment being paid by Indianapolis Gas because the funds deposited in escrow and those remaining in the hands of the City from the operation of the property are more than sufficient to discharge the full amount of the judgment ordered entered. *The judgment will be against Indianapolis Gas in form only; in substance and reality it will be a judgment for the joint benefit of Chase and Indianapolis Gas against the City.*

The result is that in a case in which Indianapolis Gas is vitally interested in the enforcement of the lease and in procuring a coercive judgment requiring the City to pay the interest on its mortgage debt, this suit has been maintained in a Federal Court where no federal question is involved, where jurisdiction depends wholly on diversity of citizenship and a judgment ordered entered which as a practical proposition insulates Indianapolis Gas from possible coercion of payment.

(b) The result of the Court's opinion is that a judgment is ordered entered which will be equally beneficial to both Chase and Indianaplois Gas and which in reality will amount to a judgment not against Indianapolis Gas but in its favor.

(c) The dominant question upon the answer to which depended the final decision in this cause was whether the lease was enforceable against the City and in that question Chase and Indianapolis Gas have identical interests.

(d) The decision of this Court is directly in conflict with controlling decisions of the United States Supreme Court wherein it is held that parties must be aligned in interest in accordance with their relation to the main controversy in the cause and the fact that there are dependent controversies in respect of which their interest may be adverse is not sufficient to sustain the jurisdiction of the Court on the ground of diversity of citizenship.

4. This Court apparently relied on the decisions in the following cases as res adjudicata of some or all of the issues presented in this case and inferentially, although not directly, held that the City was estopped by such judgments:

Fishback v. Public Service Commission, 193 Ind. 282;
Williams v. Citizens Gas Co., 206 Ind. 448;
Todd v. Citizens Gas Co., et al, 46 F. 2d 855;
Cotter v. Citizens Gas Co., et al, 46 F. 2d 855.

None of these cases is res adjudicata of any issue involved in this case and this court should have so held.

(See *Jones v. Vert et al.*, 121 Ind. 140, 141.)

5. The Court erred in directing that a coercive judgment, *presumably payable out of the general revenues of the City*, be entered in favor of Chase, thus requiring municipal revenues raised by taxation to be applied if necessary in payment of rentals under a lease which had no municipal sanction and which was executed in direct violation of applicable Indiana statutes. There was no limitation in the Court's opinion that the unpaid coupons and interest on them to the date of judgment and interest on the judgment from date of entry to payment should be collectible only out of the revenues arising from the operation of Indianapolis Gas property. The Court has thus imposed a burden on the City not authorized by any statute and not supported, so far as we know, by any decision and contrary to the very terms of the lease itself.

6. The Court erred in holding and deciding that the lease was valid and enforceable against the City. The decision of the Court in this respect is susceptible of a construction that the rental reserved in the lease may be collected from the City out of revenues raised by taxation whereas in no event could the City lawfully be required to pay such reserved rent except out of the net income of the leased property and/or the trust property.

While the proposition urged in Subdivision 5, supra, of this petition for rehearing cannot under the facts of this case result in the use of revenue derived from taxation for the payment of rentals presently due, if the language of the opinion is unmodified it may result in the future in requiring the City to pay rentals out of such revenues.

7. This court apparently relied upon certain acts as showing that the City of Indianapolis was estopped to deny the enforceability against it of the lease of September 30,

1913, although there is no express holding to that effect. The Court erred in giving any weight to the claimed estoppel because there was no proof that any present holder of the bonds of the Indianapolis Gas Company knew of or relied upon any such act and in addition under the applicable Indiana law unauthorized acts of city officers cannot be made the basis of a recovery against the city. The court erred in failing to hold that the city was not estopped by any such acts of its officers.

8. This Court erred in holding that the 99 years lease between Citizens Gas and Indianapolis Gas was valid and was enforceable against the City.

9. The Court erred in holding that the City accepted the lease.

10. The Court erred in holding that the initial trustee, Citizens Gas and the successor trustee, the City, had power to purchase in fee simple the property of Indianapolis Gas and that therefore the attack of the City was only upon the mode of the acquisition of this property.

11. The Court in its opinion stated that the City did not claim that the lease was unenforceable against it on grounds of public policy. In this it erred because the City made such direct claim and that claim should have been sustained by this Court.

12. The Court erred in holding that the lease of September 30, 1913, executed by Citizens Gas and Indianapolis Gas was enforceable against the City because:

> (a) When that lease was originally executed the City was not a party to it and it has never been contended by Chase that the lease was originally binding against the City. Indeed, it could not be known until the property was taken over, which was

only in 1935, whether under any theory of the case the City would be bound to the terms of that lease. The whole theory of Chase's presentation of this case in its complaint, the amendments thereto, its evidence and the briefs in this court is that the City became bound to the terms of the lease by estoppel, res adjudicata and the operation of the property. The Court has apparently decided this case on an issue which was not presented to the court by Chase for its determination, and has erroneously held the City liable under the terms of the lease although that lease was never approved by any proper municipal action. Indeed, the only action taken by the City was to reject the lease.

13. This Court erred in not holding the lease invalid because violative of Sections 85 and 254 of Chapter 129 of the Acts of the Indiana General Assembly, 1905.

14. This Court erred in refusing to abide by the rule of United States Supreme Court laid down in the case of *Erie Railroad v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188, in that it did not apply the established law of the State of Indiana to the questions involved in this case, and in particular it did not apply the law of Indiana in its determination of the questions of estoppel against the City and the question of whether or not certain judgments rendered by the Indiana Supreme Court were res adjudicata.

EDWARD H. KNIGHT,
Corporation Counsel,

MICHAEL B. REDDINGTON,
Attorney for City of Indianapolis,

WILLIAM H. THOMPSON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
Attorneys for Defendants-Appellees.

BRIEF

ON PETITION FOR

REHEARING

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SUMMARY OF ARGUMENT.

I.

(Brief, pages 1-9.)

The decision of this Court entered on June 6, 1940, as modified, denies to the City and individual defendants due process of law as guaranteed by the Fifth Amendment and the Fourteenth Amendment to the United States Constitution and each of them, in this:

(a) The lower court, by agreement of parties, reserved for future determination the question of the burdensome character of the lease entered into on September 30, 1913. The judgment ordered entered by this Court declaring the lease to be enforceable against the City and a coercive judgment for unpaid interest, denies to the defendants their day in court on the question of whether Citizens Gas as initial trustee executed a lease burdensome in character and beyond its power to agree to.

(b) Due process of law entitles defendants to a hearing and a decision by the trial court on the law questions (as well as the facts) as to whether the order of the Public Service Commission approving the lease or the decision in the Williams case decided the question of burdensomeness. This hearing to which defendants are entitled has never been given them, and the judgment ordered entered by this Court precludes them from such hearing and thus denies to them the due process of law guaranteed by the Fifth Amendment and the Fourteenth Amendment and each of them to the United States Constitution.

II.

(Brief, pages 9-14.)

The Court erred in sustaining the jurisdiction of the lower court on the subject-matter of this controversy and directing judgment to be entered against the City for the reason that Indianapolis Gas should have been realigned with Chase, the plaintiff, and thus diversity of citizenship, the sole ground upon which Federal jurisdiction is based, would thereby be destroyed.

The opinion of this Court, and particularly the conclusions appearing on page 26 thereof, show that there was no collision of interest between Chase and Indianapolis Gas because the judgment ordered entered will be equally beneficial to both Chase and Indianapolis Gas. The City is named as first in liability. The taxing power of the City, according to this Court's opinion, is available to pay the lease rentals; the Citizens Gas plant and the Indianapolis Gas plant properties art available, and the revenues from the operation of the plant are available. With these levied on *first*, it is clear that Indianapolis Gas being *third* in order of liability, is more thoroughly insulated against execution than ever before. In reality the judgment ordered entered will not be *against* Indianapolis Gas but will be a judgment in its favor. Upon the dominant question in this case and the dominant point in the decision of this Court: whether the lease was enforceable against the City, Chase and Indianapolis Gas have identical interests.

Chase and Indianapolis Gas have a unity and identity of interest not only on the main issue involved in this cause, but on every other issue involved.

It is the duty of this Court to determine the fundamental question (the jurisdiction of the subject-matter),

and to order the dismissal of the case at any time whether the question has been suggested by counsel or not.

III.

(Brief, pages 14-16.)

The Court erred in directing that a coercive judgment presumably payable out of the general revenues of the City be entered in favor of Chase, thus requiring, if necessary, municipal revenues raised by taxation to be applied in payment of rentals under the lease. Section 29 of the lease shows the intention of the parties to have been that the corporate assets and franchises were the sole security relied on. As to future rentals, it may well be that the revenues of the City are subjected to this liability even though the property of Indianapolis Gas be destroyed by competition.

IV.

(Brief, pages 16-20.)

Neither the Fishback case (193 Ind. 282), the Williams case (206 Ind. 448), the Todd case (46 F. 2d 855), nor the Cotter case (46 F. 2d 855), is res adjudicata of the issues presented in this case, and this court in relying on such decisions as res adjudicata, and inferentially although not directly, holding that the City was estopped by such judgment, has erred in that it has not followed the rule laid down in *Erie Railroad v. Tompkins*, 304 U. S. 64, wherein it is held that there is no general Federal common law and that except in matters governed by the Federal Constitution or by the Acts of Congress, the law to be applied in any case is the law of the state.

The above enumerated decisions are not res adjudicata of the issues here involved when measured by the firmly

established principles laid down by the Indiana Supreme Court, nor is the City estopped by any of such judgments.

V.

(Brief, pages 20-22.)

The Court apparently relied upon certain acts as showing that the City was estopped to deny the enforceability against it of the lease of September 30, 1913, although there is no express holding to that effect. No such estoppel can be made the basis of any liability against the City. There is no proof that any present holder of Indianapolis Gas bonds knew of any such claimed acts of estoppel or relied upon them in the purchase of their bonds.

An estoppel cannot be made the basis of liability against the City, a municipal subdivision, because such municipal subdivision cannot be estopped by an act of any officer beyond the scope of his authority.

This rule is firmly settled by decisions of the Indiana Supreme Court.

VI.

(Brief, pages 22-29.)

The Court erred in holding that the 99 years lease between Citizens Gas and Indianapolis Gas is enforceable against the City for the additional reasons that the Shively-Spencer Act (Chapter 76, Acts 1913) did not give the Public Service Commission the power to abrogate the contract between the City and Citizens Gas as expressed in the trust instrument.

The charter of a corporation such as Citizens Gas cannot be changed by subsequently enacted laws unless there is reserve power so to do.

The record in this case shows that the City did not accept the lease; but, on the contrary, expressly rejected it.

The trust instruments, as the Court says on page 17 of its opinion, neither expressly conferred upon nor expressly denied the trustee the power to acquire a non-freehold interest in property. It is well settled that grants of rights and privileges by a state or municipality are strictly construed, and whatever is not unequivocably granted is withheld, and nothing passes by implication. The trust instruments being silent on the trustee's power, such power cannot be implied.

VII.

(Brief, pages 29-30.)

The Court erred in holding that the lease of September 30, 1913, was enforceable against the City for the reasons that the City never executed it nor signed it; was not a party to it; was not named as a party obligated; was not an assignee (an assignment was tendered and rejected); no municipal authority having the power to do so ever authorized the execution of the lease, ratified it, or agreed to be bound by its terms.

VIII.

(Brief, pages 30-33.)

The Court erred in not holding the lease invalid because against public policy of the State of Indiana and because in violation of Sections 85 and 254 of Chapter 129 of the Acts of the Indiana General Assembly 1905. These sections expressly limit power of City officials and City departments to contract, and Section 254 expressly limits

the power of a City to contract for the furnishing of utilities for a term longer than 25 years.

IX.

(Brief, page 33.)

The Court erred in refusing to abide by the rule of the United States Supreme Court in the case of *Erie Railroad v. Tompkins*. Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state whether declared by its Legislature in a statute or by the highest court in a decision. There is no Federal general common law.

In this case the Court has not followed the Indiana rule respecting any of the questions submitted in this case.

CONCLUSION.

(Brief, page 37.)

A rehearing and a reargument of this cause should be granted. The opinion of this Court entered on June 6, 1940, should be reconsidered and the opinion of the District Court affirmed, or in the alternative the case should be remanded to the District Court with instructions to hear and decide the issues of law and fact of burdensomeness.

We submit that if the alternative course is chosen that the cause be remanded to the District Court for a hearing and decision on the issues of law and fact of the burdensome character of the lease.

PROPOSITIONS OF LAW.

I.

Since the District Court with the agreement of all parties reserved the issue of the burdensomeness of the lease for future determination, it is a denial of due process of law to defendants, as guaranteed to them by the Fifth Amendment and the Fourteenth Amendment and each of them to the Constitution of the United States, for this Court to order a judgment entered declaring the lease of September 30, 1913, to be enforceable against it and directing the entry of a coercive judgment for past instalments of rental.

Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U. S. 292, 81 L. ed. 1093;

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 74 L. ed. 1107.

Hocaq v. Elliott, 167 U. S. 409, 42 L. ed. 215, 221.

(a) Defendants are entitled to be heard on both the questions of *law and fact* as to whether the order of the Public Service Commission, approving the lease, and the Williams case (206 Ind. 448) are res adjudicata. To deny such a hearing is to deny the process of law.

Requirements of due process are satisfied only by a hearing in the trial court.

Ohio Water Works Co. v. Ben Avon, 253 U. S. 287, 64 L. ed. 908, 914.

II.

The District Court has no jurisdiction of the subject matter. This court's opinion shows that the interests of

Chase and Indianapolis Gas are identical and thus Indianapolis Gas should be realigned with Chase, which would destroy diversity of citizenship, the sole ground upon which jurisdiction is asserted.

Sutton v. English, 246 U. S. 199, 62 L. ed. 644;

Niles-Bement Pond Co. v. Iron Moulders, 254 U. S. 77, 65 L. ed. 145;

City of Dawson, etc. v. Trust Co., 197 U. S. 178, 49 L. ed. 713.

III.

None of the following cases, viz:

Fishback v. Public Service Commission, 193 Ind. 282;

Williams v. Citizens Gas, 206 Ind. 448;

Todd v. Citizens Gas Co., et al., 46 F. 2d 855;

Cotter v. Citizens Gas Co., 46 F. 2d 855;

is res adjudicata of any of the issues presented in this case nor is the City or any of the individual defendants estopped by any of such judgments, under the settled law of Indiana as announced by its highest courts, which this court by reason of the decision in *Erie Railroad v. Tompkins*, 304 U. S. 64, is bound to follow.

Jones v. Vert et al., 121 Ind. 140, 141;
Maple et al. v. Beach, 43 Ind. 51, 59;
Kitts v. Wilson, 140 Ind. 604, 610.

IV.

Neither the City nor any of the individual defendants is estopped to deny the enforceability of the lease of September 30, 1913, because there is no proof that any present holder of Indianapolis Gas bonds knew of or relied upon any of the claimed acts of estoppel; and, furthermore, no municipal subdivision in Indiana can be estopped by an act of any officer beyond the scope of his authority.

Ross et al. v. Banta, 140 Ind. 120, 150;

Union School Township v. First National Bank, 102 Ind. 464, 476;

Hosford v. Johnson et al., 74 Ind. 479, 485;

Platter v. Board of Commissioners, etc., 103 Ind. 360, 381.

V.

The Public Service Commission law of Indiana (Chapter 76, Acts of 1913) did not affect the powers or duties of Citizens Gas as initial trustee because the charter of a corporation such as Citizens Gas cannot be changed by subsequently enacted laws unless there is reserve power to do so.

Trustees of Dartmouth College v. Woodard, 4 Wheat. 518, 4 L. ed. 629.

VI.

The lease executed on September 30, 1913, by Citizens Gas is not enforceable against the City because the City was not a party to it; it did not sign or execute it; it is not named as a party obligated; it is not an assignee of the

lease; no ordinance was ever adopted by the Common Council, nor any resolution by the Board of Public Works of the City, authorizing the execution of the lease, ratifying it or agreeing to be bound by its terms. No action was ever taken by the Board of Trustees or the Board of Directors of the Department of Utilities accepting the lease or agreeing to be bound by its terms. The only action which the City took in connection with this lease was to reject it.

II R. pp. 464, 468.

III R. pp. 982–986.

VII.

The lease of September 30, 1913, is invalid as against public policy because violative of Sections 85 and 254 of Chapter 129 of the Acts of the Indiana General Assembly 1905.

Chapter 192, Acts 1905.

VIII.

This Court erred in refusing to abide by the rule of the U. S. Supreme Court laid down in the case of *Erie Railroad v. Tompkins* (304 U. S. 64) in determining the questions of estoppel, res adjudicata, the powers of an Indiana corporation, and the powers of a trustee of an Indiana public charitable trust.

There is no general Federal common law, and this Court in this case is bound by the law of Indiana as it has been declared by the Indiana Legislature and by the Supreme Court of the State of Indiana.

Erie Railroad v. Tompkins, 304 U. S. 64, 82 L. ed. 1188.

ARGUMENT.

I.

This Court has directed that a final judgment be entered against the City declaring the lease of September 30, 1913, to be enforceable against it and directing the entry of a coercive judgment for unpaid interest without there having been any hearing on the question of the burdensome character of the lease of September 30, 1913. This the Court has done although it has held that if the lease was in fact improvident or burdensome Citizens Gas as initial trustee had no power to execute it and such lease can be set aside at the instance of the beneficiaries of the trust.

1. The lease of September 30, 1913, between Citizens Gas and Indianapolis Gas has been held by this court to be enforceable *against the City without the City having its day in Court on the question of whether Citizens Gas as initial trustee executed a lease which was burdensome in character and, therefore, beyond its power to agree to. This issue was reserved for further determination by the lower court by agreement of counsel for all parties.* Without an opportunity to be heard on this reserved issue defendants-appellees have been denied due process of law as guaranteed by the Fifth Amendment and the Fourteenth Amendment and each of them to the Constitution of the United States.

2. If all other points, upon all of which we confidently rely, are decided against the City by this Court we assert the undoubted right to be heard on the evidence on the issue of whether the initial trustee agreed to a burdensome lease which may, under the decision of the Court in this case, be held invalid at the instance of the City as successor trustee on behalf of the beneficiaries of the trust.

(a) Certainly, when this Court has ruled that an initial trustee is without power to execute a burdensome lease that issue may not be decided against the City with-

> under the terms of the lease, no facts are alleged to support such a conclusion. And if such a conclusion were justified, the complaint does not make out a case for equitable relief of cancellation and "recapture" of the rentals paid over a period of seventeen years during which the Citizens Gas Company had the use of the physical equipment and the benefit of the income derived from this use. Further it was within the jurisdiction of the public Service Commission to consider and approve the lease and the complaint discloses that the Public Service Commission did approve it. The complaint does not make out a case for any relief on the basis of invalidity of the lease or of the action of the Commission in approving the same."

Furthermore, due process of law entitles defendants-appellees to a hearing and decision by the trial court on the law questions as to whether the order of the Public Service Commission approving the lease, or the decision in the Williams case, decided the question of burdensomeness. It make no difference if defendants after a hearing are found to be wrong, they are nevertheless entitled to a hearing.

In *Hovey v. Elliott*, 167 U. S. 409, 42 L. ed. 215, 221, it was said:

> "Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the government sitting to uphold and

out the right, inherent in our system of law, to be heard on the factual question involved.

3. The proposition for which the City contends in this connection is expressly recognized by this Court in its opinion as modified in these causes. We quote from page 20 of the opinion of this Court the following relevant language:

> "In making a long term lease a Trustee is under duty to act with prudence. If a Trustee makes a lease which is unreasonable under the circumstances he thereby commits a breach of trust. For this a Trustee incurs liability to the beneficiaries who in addition may have such a lease set aside * * *."

(a) It is no answer to this argument to suggest that the Public Service Commission of Indiana approved the lease because, admittedly, it possesses and can exercise no judicial power. This Court recognized the administrative character of the Public Service Commission (opinion pp. 5 and 6). Nor is it an answer to the contention to state that the Supreme Court of Indiana in the case of *Williams v. Citizens Gas Company, et al.*, 206 Ind. 448, did not find that the lease had been improvidently executed or was burdensome because, admittedly, no such issue was before that Court. We quote below the relevant language of the Supreme Court of Indiana in *Williams v. Citizens Gas Co.*, 206 Ind. 448.

In *Williams v. Citizens Gas Co.*, 206 Ind. 448, at 458, it was said:

> "In respect to the alleged invalidity of the lease executed between the Citizens Gas Company and the Indianapolis Gas Company it appears from the complaint that the lease was one which the Citizens Gas Company and Indianapolis Gas Company had the power to execute and one which would result in great advantage to the Citizens Gas Company. If the lease was improvident from the standpoint of the lessee in that the consideration was excessive in view of the value of the use of the assets required

> enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent."
>
> • • •
>
> "And that the judicial department of the government is, in the nature of things, necessarily governed in the exercise of its functions by the rule of due process of law, is well illustrated by another observation of Judge Cooley, immediately following the language just quoted, saying: 'The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they "proceed upon inquiry," and "render judgment only after trial." ' "

The doctrine of res adjudicata is based on the ground that the party to be affected has litigated or had an opportunity to litigate a question before a court of competent jurisdiction.

Due process under the Fifth Amendment and the Fourteenth Amendment and each of them to the United States Constitution requires a hearing be given a party before conclusive effect is given to a prior judgment.

An appeal is a matter of grace; a hearing a matter of right. As was said in *Ohio Valley Water Co. v. Ben Avon*, 253 U. S. 287, 64 L. ed. 908, 911, "the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment *as to both law and facts; otherwise the order is void because in conflict with the due process clause.* . . ." (Our emphasis.)

This rule is certainly applicable in the case of a municipality, where it has had no opportunity to be head on either *the law or the facts* on the issue of the burdensome character of a lease imposing upon it under this court's decision a liability of $45,000,000 *and where all parties*

have agreed that there should be such a hearing and the trial court has so ordered.

Defendants are entitled to be heard on whether the lease is burdensome. They are entitled to a hearing on whether the order of the Public Service Commission approving the lease is res adjudicata. They are entitled to hearing as to whether the Williams case (206 Ind. 448) adjudicated the issue of burdensomeness.

4. That the question of the burdensomeness of the lease was directly in issue does not admit of debate. The counter-claim of the City (R. p. 186) contains the following averments:

> "Fourth. That said lease of September 30, 1913, was and is onerous and burdensome upon the City of Indianapolis and the property of said Public Charitable Trust and for that reason was a lease which the initial trustee had no power to make beyond the definitely fixed term of its trusteeship; that among its burdensome provisions are the following:
>
> (a) The payment of annual rent in a sum largely exceeding a fair return on the fair value of the property of The Indianapolis Gas Company.
>
> (b) The requirements heretofore referred to that the Lessee should during the entire term of the lease re-finance the bond issue of The Indianapolis Gas Company and if it should sell said bonds below par to pay the difference to said The Indianapolis Gas Company.
>
> (c) The requirement heretofore referred to penalizing the Lessee in the event it reduced the price of gas.
>
> Fifth. That said lease being burdensome and onerous in its character, as hereinbefore averred, was not binding upon the City of Indianapolis as successor Trustee and did not constitute an asset of said trust which it was bound to accept, but on the contrary it had the right under the law of Indiana to reject the same."

On the 18th day of January, 1939, the court entered pursuant to Rule 42(b) of Rules of Civil Procedure the following order without objection from or exception by any party:

> "It is ordered that evidence shall be heard upon the issues as to whether the lease dated September 30, 1913, from the Indianapolis Gas Company to the Citizens Gas Company of Indianapolis is binding upon and enforceable against the City of Indianapolis or any of the property acquired by it from the Citizens Gas Company of Indianapolis on September 9, 1935, or against the Indianapolis Gas Company or against Citizens Gas Company of Indianapolis and whether plaintiff is entitled to judgment for the rental under said lease or for the interest on the First Consolidated Mortgage Five Per Cent Gold Bonds of the Indianapolis Gas Company which has accrued since April 1, 1936, against any of said defendants or said property, with the one exception that evidence shall not be heard therewith but shall be deferred on one certain reason assigned by the City of Indianapolis in its answer, for claimed unenforceability of such lease against it or its said property, viz: that the City as successor trustee of a certain public charitable trust in property of the Citizens Gas Company of Indianapolis had the right as such successor trustee *to refuse and reject an assignment of such lease on the ground that such lease was burdensome and not advantageous to such trust;* reserving the right to make such order or decree as may seem just and appropriate to the Court at any stage of this proceeding.
>
> The trial of all other issues in this case is deferred until the further order of the Court with the right reserved to refer any or all issues to a Master." (Our emphasis.) R. pp. 321 and 322.

Chase's counsel at the time Chase's case was rested said:

"Of course there are other issues to be reserved for later trial." (R. p. 475.) (Our emphasis.)

It thus appears that one of the issues upon which, admittedly, the City had the right to be heard has been reserved for future determination. This was Chase's understanding at the trial.

The City has no desire or right to deny the validity of this order *which was entered without objection by the City, Chase or any other party.* Chase cannot in good faith deny its validity. If Chase should do so, then Chase's appeal should be dismissed because in such event the case has only been partially determined and there would be no appealable final judgment.

5. The fact that such reservation had been made was pointed out to this Court both in the briefs of Chase and the City.

(a) At page 2 of Chase's brief appears the following:

"By order of the Court entered January 18, 1939 (II R. p. 321), the other issues raised by the bill as amended and supplemented were reserved for trial at a later date."

(b) But this point was more clearly made in the City's brief. We quote from page 124 of our brief in No. 7143 as follows:

"The Court reserved the issue of the burdensomeness of the lease *and there is therefore no evidence before the Court on this question,* but this court can ascertain from the record some of the conditions imposed upon the City by the lease. In the first place the rental is absolutely fixed. The rental consists of 5% interest on the bonds, 6% dividends on the stock and taxes (see page 7 of this brief where the total payments made on these various accounts are set forth). When it is borne in mind that these payments were irrevocably fixed

and cannot be changed in any way, some idea of the character and extent of the claimed obligation of the City can be realized. No matter what the price level and a fair rate base may be, no matter what the condition of the property is, no matter what the economic condition is, and no matter what the prevailing interest rates may happen to be, it follows that if the lease is held to be valid and within the power of the initial trustee to execute, these large and fixed payments must be made. If at the present time, a municipal corporation may borrow money at $2\frac{1}{2}$ or 3 per cent, as this court will judicially notice, the payments go on to the stockholders and bondholders of Indianapolis Gas at approximately twice that rate. Can any one imagine that it was within the contemplation of the settlors of the trust that such a lease was within the granted authority of Citizens Gas to make." (Our emphasis.)

6. The fact that such a reservation was made was mentioned, but not stressed in oral argument at the Bar of this Court but apparently has been overlooked. There is no adjudication and there is no estoppel which prevents the City from having a determination of this issue on the facts.

We respectfully urge that whatever disposition may be made of the other points raised by us on this petition for a rehearing that if the Court should still hold that this cause should be reversed that it should not be reversed with directions to enter a final judgment but with instructions to determine on the fact and the law the issue of the burdensome character of the lease. Nothing short of such a hearing will satisfy the requirements of due process under the Federal Constitution. No party should have its cause determined against it without its day in court.

Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U. S. 292, 81 L. ed. 1093;

Brinkerhoff-Faris Trust & Savings Co. v. Kell, 281 U. S. 673, 74 L. ed. 1107.

II.

The Court erred in sustaining the jurisdiction of the lower court of the subject-matter of this controversy and directing judgment to be entered against the City because Indianapolis Gas should have been re-aligned with Chase, and thus diversity of citizenship would have been destroyed. Alignment of the parties in any case must be determined by their relation to the main controversy and not by their relation to dependent or subsidiary questions.

1. The Court on its own motion should have reconsidered its opinion in *Chase National Bank of New York v. Citizens Gas Co.*, 96 F. 2d 363, in which it held that the Indianapolis Gas Company was an indispensable party to the controversy, but in which it also sustained the jurisdiction of the lower court on the ground that there were questions involved in the case in which Chase and Indianapolis Gas were not aligned in interest.

2. The real controversy is whether the lease between Citizens Gas and Indianapolis Gas is valid and enforceable against defendant City of Indianapolis.

3. The actual position taker on the record by the parties to this controversy, is:

Defendant Citizens Gas Company says that whether or not the City is subject to this lease it has itself fully performed its duties and is under no further obligation to plaintiff or any other defendant. (R. p. 221, 230).

Defendant City maintains that the lease is invalid and unenforceable against the City. (R. p. 141-208, 209-212, 266-269).

On the other hand, plaintiff asserts that the lease is a binding obligation against the City. (R. p. 3, 20, 21). Defendant Indianapolis Gas also asserts the lease is binding upon the City (R. p. 137, 138; 215, 219).

4. The opinion of this Court holds that Chase was entitled to a coercive judgment for the unpaid and overdue interest represented by the coupons, together with 5% interest thereon from maturity to judgment, and 5% interest on the judgment from entry to satisfaction, which judgment was to be enforceable against the parties in the following order of liability:

First. The City and the trust property.

Second. Citizens Gas.

Third. Indianapolis Gas.

If a coercive judgment is entered against the City it may be mandated to pay that judgment through the medium of a tax levy. *Cox v. State*, 182 Ind. 497.

5. *There is no possibility that Indianapolis Gas will be required to pay this coercive judgment.*

Certainly this is true if the court intended to hold that the coercive judgment should be payable out of the general revenues of the City raised by taxation.

Even if the court should modify its opinion in this respect it is still true that the Indianapolis Gas Company cannot from a practical standpoint ever be required to pay the judgment. This results from the facts thoroughly established in the record:

First. That there has been deposited in escrow under the agreement of March 2, 1936, sums of money equal to the interest on the bonds and the dividends on the stock of Indianapolis Gas which are immediately to be paid over to the interested parties in the event there is a final decree determining that the lease of September 30, 1913, is valid. There, therefore, remains to be paid only the interest on the coupons from the date of their respective maturities at the rate of five per cent per annum and the interest on the judgment from the date of rendition to the date of satisfaction. The record shows the entire ability of the City to pay these sums out of the revenues arising from the operation of the trust property. (R. pp. 542, 543.)

The opinion of the court and particularly the conclusions appearing on page 26 of the opinion show that there was no collision of interest between Chase and Indianapolis Gas. This is true because the judgment which was ordered entered will be equally beneficial to both Chase and Indianapolis Gas in in reality will amount to a judgment not *against* Indianapolis Gas but a judgment in its favor.

The dominant question upon the answer to which depended the final decision in this cause and the dominant point in the decision of this court was whether the lease was enforceable against the City, and in that judgment which has been ordered entered Chase and Indianapolis Gas will have identical interests.

It has been held that Indianapolis Gas is an indispensable party to this controversy, and it is.

> *Chase National Bank v. Citizens Gas Co.*, 96 F. 2d 363, 366.

Where federal jurisdiction is wholly dependent on diversity of citizenship it is the duty of the court to align

the parties in accordance with their interests regardless of whether they are named as plaintiffs or defendants.

> *Sutton v. English*, 246 U. S. 199, 62 L. ed. 664;
> *Niles Bement Pond Co. v. Iron Moulders*, 254 U. S. 77, 65 L. ed. 145.
>
> *City of Dawson, etc., Trust Co.*, 197 U. S. 178, 49 L. ed. 713.

Looking at the judgment which this court ordered entered, we see that the City is named as *first* in liability. The taxing power of the City is available to pay the lease rentals; the Citizens Gas plant and the Indianapolis Gas plant properties are available, and the revenues from the operation of the plant are available. With these to be levied on *first* it is crystal clear that Indianapolis Gas being *third* in order of liability is more thoroughly insulated against execution than ever before. This opinion shows that Chase and Indianapolis Gas have interests which are identical.

If Indianapolis Gas be realigned according to its real interest in the dispute involved in this controversy, viz: the enforceability of the 99-year lease against the City it is inevitably realigned with Chase. This is true because the City has now been held to be bound by the lease and required to pay the obligations of Indianapolis Gas. No matter what the form of the judgment may be no one can realistically suppose that Indianapolis Gas has been harmed by the entry of this judgment or that it will be required to pay a single penny as a result of it. On the contrary, it will have obtained as a result of the decision of this Court exactly what it sought from the commencement of this litigation: A decree requiring the City to make the payment and as a practical proposition exempting it from all responsibility to Chase.

Chase and Indianapolis Gas have a unity and identity of interest not only on the main issue involved in this cause but on every other issue involved. It was to the interest of both to obtain a decree declaring that the lease was valid and enforceable against the City. It was to the interest of both to obtain a coercive judgment against the City requiring that the City pay either out of its general revenues raised by taxation, from the fund escrowed under the agreement of March 2, 1936, or from the revenues arising from the operation of the trust property, the interest on the bonds and the dividends on the stock of Indianapolis Gas. When this was done Indianapolis Gas was insulated from liability. The result is that Chase and Indianapolis Gas together have maintained an action in the Federal Court where this Court has recognized that Indianapolis Gas is an indispensable party and where the interest of Chase and Indianapolis Gas is a joint interest.

This they have done when in the language of the Supreme Court of the United States in the *City of Dawson v. Columbia Trust Co.*, 197 U. S. 178, 49 L. ed. 713,

> "The arrangement of the parties is merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist."

It is the duty of this court to determine the fundamental question of jurisdiction of the subject-matter and to order the dismissal of the bill at any time. In this respect it makes no difference whether the question has been suggested by counsel or not.

> *Defiance Water Co. v. Defiance*, 191 U. S. 184, 48 L. ed. 140;
>
> *Continental National v. Buford*, 191 U. S. 119, 48 L. ed. 119.

III.

The Court erred in directing that a coercive judgment, presumably payable out of the general revenues of the City, be entered in favor of Chase, thus requiring, if necessary, municipal revenues raised by taxation to be applied in payment of rentals under this lease.

There was no limitation in the Court's opinion that the unpaid coupons and interest on them to the date of judgment and interest on the judgment from the date of entry to satisfaction, should be collectible only out of revenues arising from the operation of the Gas property.

The lease itself shows that it was clearly the intention of the parties that the rental payments were to be made from revenue. Section 29 of the lease provides in part that:

> "The lessor and lessee mutually convenant that they will each look for the carrying out of the obligations of this lease solely to the corporate assets and franchises of the other . . ." (R. p. 78).

Under the facts shown by the record in this case it is clear that the City will be able to pay the amount of the coercive judgment directed to be entered against it for the past due interest together with interest thereon and interest on the judgment without a resort to a tax levy. We make no claim that in respect to the past due instalments of rent there is any danger to the City because of the failure of the Court to impose any limitation upon the City's liability for rental. *But the case in respect of future rentals is far different.* There are now outstanding $6,881,000 of bonds on which the annual interest is $344,050 and $2,000,000 of stock on which the annual dividends are $120,000. The City's liability under this lease thus

amounts to $464,079 annually without giving and consideration to income taxes, property taxes or organization expenses of Indianapolis Gas. These additional expenses amounted for the last 4 years to an average of $245,000 annually. (R. pp. 1020-1031.)

With the heavy overhead burden imposed upon the City as a result of the declaration of the validity of this lease it is entirely possible and indeed probable that future operation of this Company may be at a loss or alternatively that competition from many sources may be encountered by the City. We do not believe that this court intended by its decision that there should be guaranteed to the bondholders and stockholders of Indianapolis Gas for a period of more than 75 years in the future these tremendous sums of money irrespective of whether the plant might be successfully operated by the City and even though it may be destroyed by competition.

IV.

This Court apparently relied on the decisions in the following cases as res adjudicata of some or all of the issues presented in this case and inferentially, although not directly, held that the City was estopped by such judgments.

1. *Fishback v. Public Service Commission*, 193 Ind. 282;
2. *Williams v. Citizens Gas*, 206 Ind. 448;
3. *Todd v. Citizens Gas Co. et al*, 46 F. 2d 855;
4. *Cotter v. Citizens Gas Co.*, 46 F. 2d 855.

The settled rule of law in Indiana in order for a judgment to operate as res adjudicata has been well expressed in *Jones v. Vert, et al*, 121 Ind. 140, 141, where it is said:

> "Ordinarily, four things must concur before the principles of res adjudicata can be invoked: 1. A suit. 2. A final judgment. 3. Identity of subject-matter. 4. Identity of parties."

A long line of decisions by the Supreme and Appellate Court of Indiana from which counsel have found no departure hold, first, that a judgment in a former suit is binding as res adjudicata in a subsequent action *only between the same parties;* second, that a former judgment is not res adjudicata in a subsequent action even between the same parties except when *the issues in the two cases are the same, unless* the exact point involved in the second case was actually litigated in the first suit and the facts have not changed; and third, that any judgment in a prior action cannot be successfully pleaded as a bar unless it is *mutually binding on the parties.*

See *Maple, et al. v. Beach*, 43 Ind. 51, 59;
Kitts v. Wilson, 140 Ind. 604, 610.

This Court under the decision in *Erie Railroad v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188, is bound by the law of Indiana as announced by its highest courts.

1. The Fishback case is not res adjudicata of the issues presented here because:

> (a) Neither the City, any trustee under Indianapolis Gas mortgage nor any bondholder of Indianapolis Gas was a party to the final judgment. There is, therefore, a total lack of mutuality of estoppel.
>
> (b) The issues in the Fishback case were wholly different from the issues in this case and the question of the validity and enforceability of the lease

against the City was not and could not have been decided in that case.

(c) The capacity in which the parties sued and were sued negatives any claim of estoppel by judgment. No claim was asserted in the Fishback case that any public charitable trust existed.

(d) The transfer of the trust res to the City on September 9, 1935, has so altered the rights of the parties as to prevent the judgment in that case being an adjudication in this.

2. The Williams case is not res adjudicata because:

(a) The issues in the Williams case were essentially different from the issues in these cases. In the Williams case plaintiff attempted to procure a determination of the invalidity of the lease on the ground that the execution of the lease violated rights guaranteed to Williams by both State and Federal Constitutions and that said lease had been executed as the result of a fraudulent conspiracy. The enforceability of the lease against the City and the right of the initial trustee to bind the City to the terms of the lease were not actually litigated and could not have been litigated under the issues in the Williams case.

(b) The transfer to the City of the trust res on September 9, 1935, creates a situation which so alters the rights of the parties as to prevent a successful assertion of res adjudicata. When the Williams case was finally decided, the City had not taken over the trust res and until that was done the questions here involved were not in issue. No attempt was made to obtain a declaratory judgment against the City in respect of any *obligation* supposed to be imposed on it under the terms of the lease.

(c) Although Indianapolis Gas and its mortgage trustees and the City were co-defendants, and al-

though the City formally asserted in a pleading filed that the validity of the public charitable trust was in no wise affected by the question of whether the lease was valid or invalid, Indianapolis Gas and its mortgage trustees tendered no issue to their co-defendant, the City, in respect of the enforceability of the lease against it. *Under settled rules of law, the judgment cannot adjudicate the issues here presented as between such co-defendants.*

(See *Whitesell v. Strickler*, 167 Ind. 602.)

3. The Todd judgment is not res adjudicata because:

(a) Neither Indianapolis Gas, its mortgage trustee nor any of its bondholders were parties in any capacity. There is a total lack of mutuality of estoppel. Had the enforceability of the lease against the City been in issue and had the Court decided that the lease was unenforceable, none of these plaintiffs would have been bound by the judgment. How then can they successfully claim the benefit of it?

(b) The cause of action in the Todd case, and the cause of action in these cases are essentially different and the question of the enforceability of the lease against the City was not litigated, and could not have been litigated, under the issues presented in the Todd case.

(c) The estoppel of a judgment extends only to the facts in question as they existed at the time the judgment was rendered and does not prevent an examination of the same questions even between the same parties, where at a later time the facts have changed or new facts have occurred which may alter the legal rights or relations of the parties. At the time of the entry of the decree in the Todd case there was no existing controversy in respect of the enforceability of the lease between Indianapo-

lis Gas and its bondholders on the one side and the City on the other. The Todd case was finally disposed of on May 29, 1930. The facts and circumstances have altered and changed since the date of the decree in the Todd case by reason of the transfer of the trust property on September 9, 1935, to the City as successor trustee and because of the fact that shortly before the time of such transfer and in July, 1935, the first indication of a controversy arose as to the binding effect of the lease on the City.

The Cotter case was not pleaded as res adjudicata. Apparently, some weight is given to the admission made by former counsel for the City in the answer in that case that the lease in question was valid.

In the first place, the validity of the lease was not in issue but in the second place the answer was signed only by counsel, was unverified and there was no attempt to show that the information contained in the answer could have been furnished solely by the City.

Under such circumstances it is settled law that the answer could not bind the City.

Habirshaw etc. Cable Co. v. Cable Company, 296 Fed. 875.

V.

This Court apparently relied upon certain acts as showing that the City of Indianapolis was estopped to deny the enforceability against it of the lease of September 30, 1913, although there is no express holding to that effect. There are outstanding reasons why such an estoppel cannot be made the basis of any liability against the City. The first

of these is that it has been admitted throughout the entire conduct of this case that no attempt whatever has been made to prove and no proof has been made that any present holder of Indianapolis Gas bonds knew of any such claimed acts of estoppel or relied upon them in the purchase of their bonds. Under the controlling decisions in the following cases decided by the Supreme Court of Indiana this is one of the precedent conditions to the assertion of estoppel.

Hosford v. Johnson, et al., 74 Ind. 479, 485;

Ross et al., v. Banta, 140 Ind. 120, 150.

In *Ross, et al., v. Banta*, 140 Ind. 120, 150, the Supreme Court of Indiana thus announced the applicable rule which is absolutely decisive of the question of estoppel relied upon by our opponents:

> "Persons who set up acts of another as an estoppel must show that they acted upon the same, and were influenced thereby to do some act which would work injury, if such other party is allowed to deny the truth of what he did."

So far as the evidence in this case shows the last purchase made of Indianapolis Gas bonds for any bondholder represented by Chase was made in August, 1931, except certain bonds purchased by the Citizens Gas in 1932. We have repeatedly argued that no act or representation done or made by the City at any time subsequent to these dates could be relied upon as an estoppel. This argument has never been answered.

The second and controlling reason why estoppel cannot be made the basis of liability against the City is that

no municipal subdivision can be estopped by an act of any officer beyond the scope of his authority.

Union School Township v. First National Bank, 102 Ind. 464, 476;

Platter v. Board of Commissioners, etc., 103 Ind. 360, 381;

Citizens Bank, etc., v. Town of Burnettsville, 98 Ind. App. 92, 191.

These decisions, the controlling effect of which has never been challenged by any citation of authority by our opponents have been wholly disregarded by this Court and thus this court if it places any reliance upon the question of estoppel has disregarded the decision of the Supreme Court of the United States in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188.

Under the decision last cited it is held there is no general federal common law. This court is bound to follow the decisions of the Supreme Court of Indiana in determining the question of estoppel and we respectfully request that this court now hold that the City cannot be bound to the terms of the lease of September 30, 1913 on the doctrine of estoppel.

We have pointed out in our original brief that no representations as to the validity of this lease were ever made by any authorized officer of the City. This question of fact we do not desire to discuss further because no matter how it may be decided the City cannot be bound in this case by an estoppel.

VI.

This Court erred in holding that the 99 years lease between Citizens Gas and Indianapolis Gas is enforceable against the City for these additional reasons:

1. The Court in its opinion said:

> "The power to execute this 99 years lease was authorized by the Commission in 1913."

The Court refers to the Public Service Commission of Indiana which was created by the Shively-Spencer Act. Thus, the Court apparently holds that the Shively-Spencer Act gave the Public Service Commission the power to abrogate the contract between the City and Citizens Gas as expressed in the trust instruments including the corporate charter of Citizens Gas.

Citizens Gas charter was neither legally abrogated nor legally altered by the enactment of the Shively-Spencer Act. As was said by this Court in the case of *Todd v. Citizens Gas*, 46 F. 2d, 855, 868:

> "We find nothing in the language of the statute (Chapter 76, Acts 1913) or in the decisions of Wisconsin prior to its enactment which would indicate an intention on the part of the Legislature that a public utility, by surrendering its franchise, might *thereby destroy vested property rights which it had voluntarily created, and release itself from obligations respecting those rights which it had voluntarily undertaken before the existence of the franchise and as an inducement to the municipality to make the grant of the privilege.*" (Our emphasis.)

That the charter of a corporation such as Citizens Gas, cannot be changed by subsequently enacted laws unless there is reserved power, is settled by the case of *Trustees*

of Dartmouth College v. Woodward, 4 Wheat, 518, 4 L. ed. 629 (1819).

Furthermore, the Public Service Commission had no power to determine the validity of the lease, and therefore could bind no one on that proposition. The Public Service Commission being an instrument of the executive department of the State is neither legislative nor judicial in character, and any order made by the Public Service Commission are wholly administrative.

In *Northwestern Telephone Co.*, 201 Ind. 667, 680, 685, the Indiana Supreme Court pointed out that the Indiana Legislature by the enactment of the Shively-Spencer law, vested the Public Service Commission with authority subject to review by the courts, to supervise or regulate the terms of sale "*in so far only as they affect the public*" (Our emphasis).

See: *Public Service Commission, et al. v. City of La-Porte*, 207 Ind. 462, 465;

New York etc. Railroad Co. v. Singleton, et al., 207 Ind. 449, 458.

2. By holding that the City accepted the lease. (Opinion p. 12).

The record shows the exact contrary. At page 330 the record shows that Mr. Thompson representing the City stipulated that:

> "For the City of Indianapolis we will agree the instruments to which Mr. Burns has just referred (among them the lease) were *presented* to the Recorder of Marion County, Indiana, for recordation at 3:45 P. M. on the 9th day of September, 1935 . . .
> And that they were thereafter properly recorded."

Mr. William G. Sparks, one of the attorneys representing Citizens Gas Company, testified (R. p. 464, 467, 468) that he was advised on August 27, 1935, of the attitude of the City respecting the lease.

The record also shows that the assignments of the properties of Citizens Gas were made by four *separate* instruments. Respecting one of these instruments, viz: the assignment of the 99 years lease, Mr. William Sparks testified that Mr. Rastenburg (an officer of Citizens Gas Co.) handed it to either Mr. Rabb (of Thompson & Rabb, attorneys for the City) or to Mr. Dithmer (President of the Board of Directors). "They were all four handed either to Mr. Rabb or to Mr. Dithmer, or somebody there representing the City." On re-direct examination Mr. Sparks (R. p. 468) testified that at this same meeting there was delivered to him a rejection of the 99 year lease which had been signed by Mr. Dithmer as President of the Board of Directors for Utilities, along with a certified copy of a resolution of rejection and a resolution for the temporary use and occupancy of the property. He further testified as follows:

> "Q. You knew, when you went to the office of Thompson, Rabb & Stevenson, that the City was going to deliver the rejection to you when you turned over physically this assignment of the lease?
>
> A. That is right."

3. This Court held that the terms of the trust remained silent on the trustees' powers and that the only applicable language relates to duties.

On page 13 of the opinion the Court states quite to the contrary, as follows:

> "The terms of the trust (the franchise contract and the Articles of Incorporation) refer generally to the duties and *powers* of the trustee and the rights of the beneficiaries." (Our emphasis.)

The trust instruments were the franchise contract from the City to Citizens Gas and the Articles of Incorporation of Citizens Gas. The franchise provided a method for the obtaining of the objects of the corporation to be formed, and safeguarded the interests of the stockholders of such corporation by providing for the return of their money, together with interest. The duty of conveying to the City all the property of the trust was imposed upon the directors of Citizens Gas Company after the obligations to its stockholders had been discharged. The franchise also provided quite significantly that Citizens Gas Company could create no obligation for the purpose of reimbursing its stockholders which would extend for a longer period than *ten years* beyond the term of the franchise. The term of the franchise was twenty-five years.

The trust instruments contained detailed instructions respecting the retirement of the stock; the order in which the earnings should be used; the payment of the bonds; the time within which the City was to exercise its right to take over. Great space was given to these details, yet there is not one word granting power for the execution of a 99-year lease. As this Court said at page 17:

> "The terms of the trust neither expressly conferred upon nor expressly denied the trustee the power to acquire a non-freehold interest in property. In truth the terms of the trust remained silent on the subject of trustees' powers."

Since the trust instruments were the franchise contract from the City of Indianapolis which was a grant of right for the use of the streets and alleys for the laying of gas mains, and the corporate charter of Citizens Gas carrying out the directions of the franchise contract respecting rights, powers and duties, the rule announced in *Piedmont Power & Light Co. v. Town of Graham, et al.*, 253 U. S. 193, 64 L. ed. 855, is controlling. There it was said that:

> "Grants of rights and privileges by a state or municipality are strictly construed and whatever is not unequivocably granted—is withheld,—nothing passes by implication."

Thus if the terms of the trust (the franchise corporation and Articles of Incorporation) remain silent on the trustees' powers, the power to make the lease cannot be imp .

4. That the trustee had the power to purchase in fee simple the Indianapolis Gas property and that the attack of the City was as to the mode of acquisition. (Opinion p. 18.)

The initial basis upon which the Court founds this statement is that the City's counsel did not argue that the trustee lacked the power to lease the property of its rival because such action might contravene public policy. This statement entirely overlooks the City's position. The City in Cause No. 7143, at pp. 111, 112, and 113 of its brief made the point that the lease in question was executed in violation of the Indiana statutes, viz: Sections 85 and 254 of Chapter 129 of the Acts of the Indiana General Assembly, 1905. The second basis upon which the Court founds this statement is that:

> "Yet we know that the trustee had the power to acquire adequate gas plant equipment. And it is ad-

> mitted that the freehold estate in the property purchased in 1907 (the Consumers Gas Trust Co. mains) became part of the trust res. The trustee had the power to purchase in fee simple and consequently the freehold estate became trust property. From what has just been said certain conclusions follow as a matter of logic: (1) The trustee had the power to purchase the Indianapolis Gas property in 1907 or in 1913; and (2) the trustee had the power to lease this property in 1907 and 1913 for a term of years not exceeding the initial trusteeship." (Opinion p. 18.)

What the Court has definitely overlooked in connection with the lease by Citizens Gas of the property of Indianapolis Gas is the historical background of this public charitable trust. Citizens Gas as Trustee of the Trust was organized to foster and maintain competition against Indianapolis Gas. The citizens of Indianapolis who contributed to that enterprise were interested not in a combination and consolidation of the two properties, but in competition between them.

We call attention to subdivision 7 of the Articles of Incorporation of Citizens Gas (R. p. 97) which reads as follows:

> "Any member of the Board of Trustees may be removed by the Marion Circuit Court upon the showing that said Trustee is an employe or holder of any of the securities or common stock of any other company organized for the purpose of manufacturing or delivering gas to consumers residing in, or in the vicinity of the City of Indianapolis, or for any corrupt practice or any misconduct which said court may deem detrimental to the interests of said Company. * * * *"

If the settlors of the public charitable trust, the res of which was the property belonging to the Consumers Gas Trust Company regarded employment of the trustee by Indianapolis Gas or ownership of its securities as sufficient reason for the removal of the Trustee it is difficult for us to understand why they should have contemplated an implied power to merge the two properties by means of a lease.

The Acts of 1905 gave to the Common Council the power to license and regulate the supply, distribution, and consumption of artificial gas and to designate streets and alleys through which pipes might be laid (p. 252).

Power was also given to the Board of Public Works of the City to purchase gas works "provided, that none of the powers conferred by this paragraph shall be exercised except pursuant to an ordinance specifically directing the same, and after an election had in relation thereto * * *"

Also power was given such Board to authorize gas companies to use the streets and alleys and to prescribe the terms and conditions of such use. (Pp. 279, 280.)

Power was given the City to enter into a contract for the furnishing of heat and light provided such contract was for a term not longer than twenty-five years (p. 396).

Citizens Gas under such circumstances had no right to acquire a competing utility without the consent of proper municipal authority. The undisputed evidence in this case shows that no action was ever taken by the Board of Public Works or the Common Council of the City authorizing the lease of this property.

(Compare Acts 1905, p. 219 as amended by subsequent statutes, Sec. 48-7201 Burns' Ind Statutes 1933.)

It is one thing for an existing utility to extend or enlarge its own plant by construction and it is an entirely different proposition for it to purchase or acquire the plant of a competing company.

VII.

The Court erred in holding that the lease of September 30, 1913, executed by Citizens Gas and Indianapolis Gas was enforceable against the City because:

1. When that lease was originally executed the City was not a party to it; it did not sign or execute it; it is not named as a party obligated; it is not an assignee of the lease, an assignment having been tendered and rejected; no ordinance was ever adopted by the Common Council nor any resolution ever adopted by the Board of Public Works of the City authorizing the execution of the lease, ratifying it or agreeing to be bound by its terms; no action was ever taken by the Board of Trustees or the Board of Directors of the Department of Utilities accepting the lease or agreeing to be bound by its terms.

It has never been contended by Chase that the lease was originally binding on the City. Indeed it could not be known until the property was taken over, which was not until September 9, 1935, whether under any theory of the case the City would be bound by the terms of the lease.

The whole theory of Chase's presentation of this case in its complaint, the amendments thereto, its evidence and its briefs heretofore filed in this Court is that the City became

bound to the terms of the lease by estoppel, res adjudicata, and the operation of the property. As has already been pointed out there could have been no estoppel. The decisions relied on by Chase could not have operated as res adjudicata, and the operation of the property was pursuant to an agreement between Indianapolis Gas and the City which expressly reserved the rights of all parties.

VIII.

This Court erred in not holding the lease invalid because violative of Sections 85 and 254 of Chapter 129 of the Acts of the Indiana General Assembly 1905. Section 85 pro. les:

> "No executive department, officer or employee thereof shall have power to bind such city to any contract or agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purposes of such department; and all contracts and agreements, express or implied, and all obligations of any and every sort, beyond such existing appropriations are declared to be absolutely void: Provided, That the board of public works shall have power to contract with any individual or corporation for lighting the streets, alleys and other public places or for suppiy ing the City with gas, water, steam, power, heat or electricity, and for the collection, removal and disposal of garbage, ashes or refuse on such terms and for such times, not exceeding the term fixed by section 254 (Sec. 48-7302) of this act, as may be agreed upon; but any such contract shall be submitted to the common council of such city and approved by ordinance before the same shall take effect, and, if so approved, shall immediately become effective: Provided, further, That nothing herein contained shall prevent any such department from issuing any

bond or other obligation expressly authorized by this act and provided for by ordinance."

Section 254 provides:

"Any city or town may enter into contract with any person, corporation or association to furnish such city or town and its inhabitants with water, motive power, heat or light, or drainage or sewerage facilities, or to build or extend railroads, interurban or street-car lines, telegraph or telephone lines, drainage or sewerage system, or other public conveniences, into or through such city or town; and may provide in such contract the terms and conditions on which such water, motive power, heat, light, drainage, sewerage, railroad, interurban, street-car, telegraph or telephone service, or other uses and accommodations of such and other public conveniences may be furnished by such person, corporation or association to such city or town, and to its inhabitants; Provided, That no such contract shall be entered into by any such city or town for furnishing such city or town and its inhabitants with water, motive power, drainage, sewerage, heat or light, upon or along the streets of such city or town for a term longer than twenty-five (25) years: And, provided further, That before any such contract shall be made by any city of the first, second, third, or fourth class such contract shall be first agreed to by the board of public works of such city, after which agreement, such board shall cause a proper ordinance approving and confirming such contract to be presented for adoption by the common council of such city."

The 99-year lease was clearly within the terms of the above quoted statutes because such lease was a contract for supplying the City and its inhabitants with gas, heat and light for a period of years. The lease was not author-

ized or approved by the Board of Public Works or by an ordinance of the Common Council. (III R. 982, 983.) It was never approved by the Department of Utilities nor ratified by it. (III R. p. 984, 985.)

The decision of this court that the lease is enforceable against the City and that a coercive judgment should be rendered against the City for the unpaid interest with interest thereon is susceptible of construction that the rentals reserved in the lease may be collected from the City out of revenues raised by taxation. This question is of no practical importance so far as the past due rentals are concerned.[1] But this is not true as to future rentals.

The parties themselves did not intend that the reserved rentals should be collected through taxation. The lease provided in part the parties would each look "for the carrying out of the obligations of this lease solely to the corporate assets and franchises of the other . . ." (R. p. 78.)

If the rentals can be collected from the City out of revenues raised by taxation for approximately seventy-five years in the future, then even if the property should be destroyed by competition such rental payments would continue. Surely such a result was not contemplated.

---

[1] This is true because the amount of the unpaid interest on the bonds and dividends on the stock has been deposited with the Indiana National Bank as escrow agent under the agreement of March 2, 1936. In addition the record in this case shows that the revenues derived from the operation of the total property are more than sufficient to pay the interest on the unpaid coupons. (R. pp. 542, 543.)

IX.

This Court erred in refusing to abide by the rule of the United States Supreme Court laid down in the case of *Erie Railroad v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188.

In the Erie Railroad case it was said:

> "Except in matters governed by the Federal Constitution or by acts of Congress the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law."

The questions involved in this case deal with the powers of trustees of a public charitable trust which was formed in accordance with Indiana law. Also involved was the interpretation of a franchise from a city, the articles of incorporation of an Indiana corporation, as well as other instruments. The complaint seeks to impose the burdens of a 99 years lease upon the City on a theory of estoppel and res adjudicata, all of which must of necessity under the Erie Railroad case involve Indiana law. Thus the rule announced in that case is applicable here.

IN CONCLUSION.

The lease in question was executed in 1913 and approved by the Public Service Commission. That Body is purely an administrative one and can exercise no judicial authority. The lease, in our opinion, is burdensome and disadvantageous to the city and will impose upon future generations of gas users in Indianapolis a liability for payment of rentals wholly disproportionate to a fair return on the fair value of the property. This the City has alleged in its counter claim and stands ready to prove.

There are, in our opinion, two courses available in connection with the issue of the burdensome character of the lease:

1. The first would be to remand this case to the District Court with instructions to hear and decide the issue of burdensomeness *on both the facts and the law*.

2. The second would be to dismiss this appeal on the ground that there is no final appealable judgment.

We stand on the agreement which we made consenting to an order of the District Court reserving the issue of burdensomeness and submit that the first course is the proper one to be pursued.

1403

We respectfully submit that this petition for a rehearing should be sustained and that, for the reasons pointed out, the judgment of the lower court should be affirmed.

Respectfully submitted,

EDWARD H. KNIGHT,
MICHAEL B. REDDINGTON,
WILLIAM H. THOMPSON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
Attorneys for said Defendants-Appellees.

And on the same day, to-wit: On the fifteenth day of August, 1940, the following further proceedings were had and entered of record, to-wit:

Thursday, August 15, 1940.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge,
Hon. Otto Kerner, Circuit Judge.
Hon. Michael L. Igoe, District Judge.

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellant,*
7143 *vs.*
Citizens Gas Company of Indianapolis, *et al.*, *Defendants-appellees.*

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellee,*
7144 *vs.*
The Indianapolis Gas Company, *Defendant-appellant.*

Appeals from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

It is ordered by the Court that the motion of counsel for City of Indianapolis, *et al.*, for leave to file a second petition for a rehearing in this Court in these appeals be, and the same is hereby, granted.

It is further ordered by the Court that the said second petition for a rehearing be, and the same is hereby, denied.

And afterwards, to-wit: On the twentieth day of August, 1940, there was filed in the office of the Clerk of this Court, a praecipe for printing additional parts of the record, which said praecipe is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-Appellant,* *vs.* Citizens Gas Company of Indianapolis, *et al.,* *Defendants-Appellees.* } Nos. 7143

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-Appellee,* *vs.* The Indianapolis Gas Company, *Defendant-Appellant.* } and 7144.

PRAECIPE FOR PRINTING ADDITIONAL PARTS OF THE RECORD.

In addition to the matters stipulated to be printed in the record in the above causes by a stipulation of all parties heretofore filed on July 25, 1940, the Clerk will please print in the transcript of record to be used in the United States Supreme Court, in the above entitled causes, the following:

1. All orders and ruling of the Court in the above causes made subsequent to July 19, 1940.

2. Motion of City of Indianapolis and individual members of the Boards of Trustees and Directors in the above causes, for permission to file a petition for a rehearing addressed to the opinion of the Court as modified on July 19, 1940.

3. The petition of City of Indianapolis and individual members of Boards of Trustees and Directors for rehearing in the above causes, addressed to the opinion of the Court as modified on July 19, 1940.

4. The brief of City of Indianapolis and individual members of Boards of Trustees and Directors on the pe-

tition for rehearing, in the above causes, addressed to the opinion of the Court as modified on July 19, 1940.

5. This praecipe.

W. H. Thompson,
Perry E. O'Neal,
Patrick J. Smith,
Attorneys for Defendants-Appellees.

State of Indiana
County of Marion } ss:

Patrick J. Smith, first being duly sworn, upon his oath deposes and says that copies of the above and foregoing praecipe were mailed by first-class mail on August 19, 1940, to counsel for each and all of the parties in the above causes, viz.:

Howard F. Burns, counsel for Chase National Bank,

Will Sparks, counsel for Citizens Gas Company,

William R. Higgings, Judge Louis B. Ewbank, Counsel for Indianapolis Gas Company,

Harvey J. Elam, William L. Taylor, associates of Howard F. Burns, as counsel for Chase National Bank.

Patrick J. Smith.

Subscribed and sworn to before me, this 19th day of August, 1940.

Mary G. Robinius,
(Seal) *Notary Public.*

My Commission expires October 30, 1943.

Endorsed: Filed August 20, 1940. Kenneth J. Carrick, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1241 to 1407, inclusive, contain a true copy of proceedings had and papers filed made in accordance with the stipulation as to printing of record filed on the twenty-fifth day of July, 1940, and the praecipe for printing additional parts of the record filed on the twentieth day of August, 1940, in the following entitled appeals:

The Chase National Bank of the City of New York, Trustee, etc.,
Plaintiff-appellant,

7143 *vs.*

Citizens Gas Company of Indianapolis, *et al.*,
Defendants-appellees.

The Chase National Bank of the City of New York, Trustee, etc.,
Plaintiff-appellee,

7144 *vs.*

The Indianapolis Gas Company,
Defendant-appellant.

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 28 day of August, A. D. 1940.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1940

No. 421

ORDER ALLOWING CERTIORARI—Filed October 28, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1940

No. 422

ORDER ALLOWING CERTIORARI—Filed October 28, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1940

No. 423

ORDER ALLOWING CERTIORARI—Filed October 28, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1940

No. 424

ORDER ALLOWING CERTIORARI—Filed October 28, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. .....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

CITY OF INDIANAPOLIS, et al.,
Petitioners and Appellees below,

v.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., ET AL.,
Respondents and Appellants below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AND

BRIEF IN SUPPORT THEREOF

WILLIAM H. THOMPSON,
Indianapolis, Indiana,
Attorney for Petitioner.

EDWARD H. KNIGHT,
MICHAEL B. REDDINGTON,
City Hall, Indianapolis, Indiana,
THOMPSON, O'NEAL & SMITH,
of Counsel for Petitioners.
1350 Consolidated Building,
Indianapolis, Indiana.

C. E. Pauley & Co., Inc., Indianapolis

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ABBREVIATIONS

The following abbreviations will be used in the petition for a writ of certiorari and in the brief:

City of Indianapolis, when referred to alone: "City"

City of Indianapolis and the Individual members of the Board of Trustees and Directors, when referred to collectively: "Petitioners"

Chase National Bank of the City of New York, Trustee, when referred to alone: "Chase"

Citizens Gas Company of Indianapolis, when referred to alone: "Citizens Gas"

The Indianapolis Gas Company, when referred to alone: "Indianapolis Gas"

When Chase, Citizens Gas and Indianapolis Gas are referred to collectively: "Respondents"

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. .....

CITY OF INDIANAPOLIS, a Municipal Corporation of the State of Indiana, A. DALLAS HITZ, EDWARD W. HARRIS, CHARLES RAUH, MERLE SIDENER, AND THOMAS D. SHEERIN, as Members of the Board of Trustees for Utilities for Said City, and HENRY L. DITHMER, BRODEHURST ELSEY, ROY SAHM, DONALD J. ANGUS ISAAC E. WOODARD, LEROY J. KEACH, AND JOHN E. OHLEAFE, as Members of the Board of Directors for Utilities of Said City.

Petitioners and Appellees below,

v.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee; CITIZENS GAS COMPANY OF INDIANAPOLIS, THE INDIANAPOLIS GAS COMPANY,

Respondents and Appellants below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AND

BRIEF IN SUPPORT THEREOF

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The City of Indianapolis, a municipal corporation of the State of Indiana, and the members of its Board of

Trustees for Utilities, viz: A. Dallas Hitz, Edward W. Harris, Charles Rauh, Merle Sidener and Thomas A. Sheerin and the members of its Board of Directors for Utilities, viz: Henry L. Dithmer, Brodehurst Elsey, Roy Sahm, Donald J. Angus, Isaac E. Woodard, LeRoy J. Keach and John E. Ohleyer, respectively petitioning show to the Court:

I.

Summary Statement of Matters Involved

A. Nature of the Actions and Decrees Below.

In earlier litigation, the property owned by Citizens Gas was held to be the corpus of a public charitable trust created for the benefit of the gas users of the City.[1]

Todd v. Citizens Gas Co., 46 F. (2d) 855.

This is a suit in equity commenced against petitioners, impleaded with Indianapolis Gas and Citizens Gas by Chase.

Chase, as Trustee (R. 4) under a mortgage to secure bonds executed by Indianapolis Gas (R. 4), sought a decree, the main relief requested being a declaration that a lease for 99 years (R. 5, 6, 21) executed by Indianapolis Gas to Citizens Gas on September 30, 1913, (R. 5) was binding upon and enforceable against the City, as successor trustee of a public charitable trust (R. 20, 21, 22), as a claimed assignee of the lease (R. 16, 17) and allegedly because of estoppel (R. 18, 19) and res adjudicata. (R. 8, 9, 10, 11.)

Chase also sought to obtain an injunction requiring the City to make the payments and perform the covenants con-

[1] A prior attempt to create a public charitable trust had failed because the agreements were held to be insufficient for that purpose. *Consumers Gas Trust Co. v. Quinby*, 137 F. 882.

tained in the lease (R. 21, 306); to obtain judgment for unpaid interest and interest on overdue interest on the bonds (R. 21, 301), together with attorneys' fees and expenses (R. 22).

As relief against Indianapolis Gas, Chase asked that the lease be declared a valid obligation and part of the security which it, as trustee, held for the mortgage bonds of Indianapolis Gas; that pending final hearing Indianapolis Gas be enjoined from attempting to impair the lease; that the court declare Chase's rights as trustee are not altered by the temporary agreement (hereafter referred to) between Indianapolis Gas and the City; that the escrowed moneys (hereafter referred to) be declared the property of the bondholders of Indianapolis Gas; and that Chase have interest on overdue interest, its expenses and attorneys' fees (R. 20-22; 259-260).

The District Court entered a decree that Indianapolis Gas was an indispensable party to the relief sought by Chase and should be realigned with Chase and that when so realigned there was no diversity of citizenship and Chase's bill was dismissed for want of jurisdiction, no federal question being involved (R. 271).

The Circuit Court of Appeals reversed with opinions (R. 285-292, 293) reported in 96 F. (2d) 363. The majority opinion held that although Indianapolis Gas was an indispensable party to the essential question as to whether the lease was binding upon the City (R. 288) and although both Chase and Indianapolis Gas were contending that the lease was enforceable against the City, nevertheless there could be no realignment because on other questions tendered by the complaint there were controversies between Chase and Indianapolis Gas (R. 292).

Petitioners' petition for a rehearing was overruled with-

out opinion (R. 295) and this Court denied certiorari. (305 U. S. 600, 83 L. ed. 381.)

After the case was remanded to the District Court, there was a trial by that court of certain issues on the merits (other issues being reserved for future determination) (R. 321, 322). The District Court made special findings of fact (R. 1160-1190), stated its conclusions of law thereon (R. 1190-1193) and entered a decree that the lease was unenforceable against either City or Citizens Gas (R. 1192, 1193). The District Court entered judgment in favor of Chase against Indianapolis Gas for past due interest but denied interest on overdue interest (R. 1193). The District Court's memorandum opinion is unreported but appears at pages 1122 to 1159 of the record.

Both Chase and Indianapolis Gas appealed to the Circuit Court of Appeals, which reversed the decree of the District Court so far as it held the lease to be unenforceable against the City and in denying interest on interest against Indianapolis Gas and affirmed the District Court in entering judgment in favor of Chase against Indianapolis Gas (R. 1281-1306, 1307, 1308).

The Circuit Court of Appeals held that while Citizens Gas as initial trustee of a public charitable trust had no express power to execute a lease for 99 years that it had the implied power to do so, provided the lease was not burdensome in character (R. 1300).

Petitioners, in their answer to the bill, included a counter claim (R. 182-187) in which they directly and specifically put in issue the burdensome character of the lease and alleged that for that reason, among others, Citizens Gas had no right as initial trustee to execute the lease (R. 186).

On January 18, 1939, pursuant to Rule 42(b) of the Rules of Civil Procedure the District Judge entered the following order *without objection or exception by any party:*

"It is ordered that evidence shall be heard upon the issues as to whether the lease dated September 30, 1913, from the Indianapolis Gas Company to the Citizens Gas Company of Indianapolis is binding upon and enforceable against the City of Indianapolis or any of the property acquired by it from the Citizens Gas Company of Indianapolis on September 9, 1935, or against the Indianapolis Gas Company or against Citizens Gas Company of Indianapolis and whether plaintiff is entitled to judgment for the rental under said lease or for the interest on the First Consolidated Mortgage Five Per Cent Gold Bonds of the Indianapolis Gas Company which has accrued since April 1, 1936, against any of said defendants or said property, with the one exception that evidence shall not be heard therewith but shall be deferred on one certain reason assigned by the City of Indianapolis in its answer, for claimed unenforceability of such lease against it or its said property, viz: that the City as successor trustee of a certain public charitable trust in property of the Citizens Gas Company of Indianapolis had the right as such successor trustee *to refuse and reject an assignment of such lease on the ground that such lease was burdensome and not advantageous to such trust*; reserving the right to make such order or decree as may seem just and appropriate to the Court at any stage of this proceeding.

The trial of all other issues in this case is deferred until the further order of the Court with the right reserved to refer any or all issues to a Master." (Our emphasis). (R. 321, 322.)

The District Court, in its memorandum opinion, pointed out that only part of the issues in the case had been presented (R. 1159).

Counsel for Chase stated in resting his case that, "Of course, there are other issues which are to be reserved for later trial." (R. 475.)

In the petitioners' petitions for a rehearing (hereafter more specifically referred to), they made the express point that since the District Court had reserved the issue of the burdensome character of the lease, that it was a denial of due process of law to refuse the petitioners the right to be heard on this reserved issue.

We quote the following portion of petitioners' petition for a rehearing addressed to the opinion of the Circuit Court of Appeals as modified:

> "1. This Court held that a Trustee of a public charitable trust had no right to make a long term burdensome lease; that it incurred liability to the beneficiaries if it did so and that in addition the beneficiaries were entitled to have such a lease set aside. *This Court therefore held that if a showing could be made that the lease was in fact burdensome it could be set aside and yet it has directed a final judgment to be entered against the City which by order of the Court entered without objection or exception by any of the parties was still to have the right to prove the burdensome character of the lease. If every other question raised by this petition for rehearing should be decided adversely to the defendants-appellees we ask that the order of the Court be modified so as to permit the City to have an opportunity to prove the averments of its counterclaim and to have the lower Court determine whether when executed this lease was in fact burdensome.*" (R. 1346.)

> "With no opportunity for a hearing on this reserved issue, the defendants-appellees have been denied due process of law as guaranteed by the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States and each of them.

> "The right to a hearing extends both to a determination of questions of fact and law by the trial court. The denial of a hearing on either is a denial of due process. The City affirmatively claims

the protection of the Fifth Amendment and the Fourteenth Amendment and each of them." (R. 1346.)

In the petition for a rehearing it is also stated:

> "The Circuit Court of Appeals held that Chase was entitled to a coercive judgment for the unpaid and over-due interest represented by the coupons together with five per cent interest thereon from maturity to judgment and five per cent interest on the judgment from entry to satisfaction, which judgment was to be enforceable against the parties in the following order of liability:
>
> (1) The City as successor trustee and the trust property.
>
> (2) Citizens Gas.
>
> (3) Indianapolis Gas. (R. 1347, 1348.)"

The Circuit Court of Appeals held that the City was bound by estoppel and res adjudicata by the terms of the lease of September 30, 1913, although admittedly the City never executed the lease (R. 80), was not a party to it; was not named as a party obligated (R. 51-80); was not an assignee (an assignment was tendered and rejected (R. 468)) and no municipal authority having the power to do so ever authorized the execution of the lease, ratified it or agreed to be bound by its terms. (R. 982-986.)

The petitioners filed their petition for a rehearing within the time allowed (R. 1280, 1309) which was denied by the Circuit Court of Appeals without opinion (R. 1336); the Circuit Court of Appeals modified its opinion in unimportant particulars (R. 1335). Petitioners then filed a motion for permission to file a petition for rehearing addressed to the opinion as modified (R. 1340, 1341). The motion was granted (R. 1405). The petition was filed (R. 1341) and denied without an opinion (R. 1405).

All questions here presented were urged on the Circuit Court of Appeals.

II

JURISDICTION.

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, C-229 (43 Stat. 938; 28 U.S.C. Sect. 347). The decree of the Circuit Court of Appeals on the merits was entered, a petition for rehearing was filed within the time allowed by the rules of said court, to-wit: on June 20, 1940, (R. 1280, 1309) and was denied without opinion on July 19, 1940 (R. 1336). On July 19, 1940 the opinion of the Court was modified. A motion for permission to file a petition for rehearing, addressed to the opinion as modified, was filed on August 7, 1940 (R. 1340, 1341). The motion was granted (R. 1405). The petition for rehearing addressed to the opinion as modified filed (R. 1341) and denied (R. 1405). This petition for certiorari was filed before the expiration of three months from July 19, 1940.

III

STATEMENT OF FACTS.

(a) Indianapolis Gas, as lessor, and Citizens Gas, as lessee, entered into a written contract of lease for a term of 99 years (R. 51-80; 55, 77) or for the longest term for which the parties might lawfully contract (R. 80). The lessee was to use and maintain lessor's utility property and to pay as rental the interest upon the lessor's outstanding mortgage indebtedness, being the bonds whereunder Chase is trustee (R. 69-70), also the sum of $120,000 annually for payment to lessor's stockholders as dividends (subject to increase *if the price of gas was decreased*) (R. 70), also certain expenses; in default of which payments the lease was terminable (R. 78).

(b) In 1935 all the property of Citizens Gas, except this lease, was transferred to the city (R. 635) in order to perform the terms of the public charitable trust approved in *Todd v. Citizens Gas Company, et al.*, 46 F. (2d) 855 (C. C. A. 7; certiorari denied 283 U. S. 852).

(c) An assignment of the lease was tendered to the City but was rejected by it (R. 468, 202-204).

(d) The City took temporary possession of the property covered by the lease in order to prevent interruption of service to consumers, without prejudice to its rejection of the lease (R. 200) and Indianapolis Gas consented to such temporary possession and operation without waiving any of its rights (R. 17, 204, 205).

(e) The City and Indianapolis Gas then entered into a separate agreement, distinct from the lease, by the terms of which the City was to continue such temporary operation and meanwhile pay into a bank, to be held in escrow, sums equal to the amounts specified in the lease, as compensation for such temporary use of Indianapolis Gas property, until further arrangements could be made, or until the present controversy was finally adjusted or terminated by a decree of court; all without prejudice to the position taken by each party as to the binding effect of the lease on the city (R. 19, 205-208, 257, 261). Payments were accordingly made to and are held by the escrow (R. 258-260, 638).

(f) Chase claimed in its complaint (R. 3-22) that the City was estopped to deny the validity of the 99 year lease by reason of the following:

> (1) Findings and orders of the Indiana Public Service Commission on an intervening petition of one Frank S. Fishback (R. 8, 9, 18).

(2) Sale of Indianapolis Gas bonds by Citizens Gas (R. 11, 12).

(3) "The City of Indianapolis and the residents and inhabitants thereof have had the full benefit and advantage of such operations, and of the profits produced thereby and of the protection thus given to the public charitable purposes to which the property of the Citizens Gas Company of Indianapolis were dedicated." (R. 12.)

(4) Sale of revenue bonds and alleged representations made by the City (R. 14, 15).

(5) Claimed assignment by Citizens Gas to the City of the 99 year lease.

(6) The following decisions:

Fishback v. Public Service Commission, 193 Ind. 282 (R. 10, 18);
Todd v. Citizens Gas Company, 46 F. (2d) 855 (R. 13, 18);
Williams v. Citizens Gas, 206 Ind. 448 (R. 14, 18).

Chase also claimed that the foregoing decisions were res adjudicata of the question of the enforceability of the 99 year lease against the City (R. 8, 10, 13, 14).

IV

The Questions Presented.

Upon the record and the opinion of the Circuit Court of Appeals, three important Federal questions are presented.

First. Whether the decision of the Circuit Court of Appeals denies to the City due process of law as guaranteed by (a) the Fifth Amendment to the Constitution of the United States; and (b) the Fourteenth Amendment to the Constitution of the United States, in this:

The District Court, by an order entered without objection or exception by any party (the relevant parts of which are set out at page 5 of this petition), reserved for future determination the question of the burdensome character of the lease of September 30, 1913 (R. 321, 322). The Circuit Court of Appeals held (R. 1300) that if the lease were in fact burdensome Citizens Gas, as initial trustee, had no authority to execute the same, but held, without any trial in the lower court, that a certain order (non-judicial in character) of the Public Service Commission of Indiana and a judgment of the Supreme Court of Indiana were res adjudicata.[2]

The City was thus denied a hearing in a trial court on the issue of the burdensome character of the lease. The right to such a hearing by the trial court extends both to a determination of the law and the facts.

Second. The Circuit Court of Appeals held for the first time in its opinion of June 6, 1940, that Chase was entitled to a coercive judgment enforceable in the following order:

(1) Against the City as Successor Trustee and the trust property.

(2) Against Citizens Gas.

(3) Against Indianapolis Gas.

The evidence shows that from the funds deposited in escrow (R. 638) and the funds arising from the operation of the property (R. 542, 543) the City will be required and is abundantly able to pay the entire judgment and that Indianapolis Gas has thus been insulated from liability.

The result of the decision is that a judgment has been ordered entered which is equally beneficial to Chase and

[2] *Williams v. Citizens Gas Co.*, 206 Ind. 448.

Indianapolis Gas and which amounts in effect *not to judgment against Indianapolis Gas but one in its favor.*

The decision of the Circuit Court of Appeals is directly in conflict with controlling decisions of this Court to the effect that parties must be realigned in accordance with their relation to the *main controversy* in the case and the fact that there are dependent controversies in respect of which their interest may be adverse is not sufficient to sustain jurisdiction on the ground of diversity of citizenship, viz:

Sutton v. English, 246 U. S. 199, 62 L. ed. 664;
City of Dawson v. Columbia Trust Co., 197 U. S. 178, 49 L. ed. 713.

An examination of the record will show that Chase and Indianapolis Gas are friends attempting to assert hostility only for the purpose of conferring a jurisdiction which would otherwise not exist.

Third. The Circuit Court of Appeals wholly disregarded the applicable Indiana law in four important particulars and thus violated the rule established by this court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188 as follows:

1. It impliedly held that the City was bound by the ... se by the doctrine of estoppel, although admittedly there was no effort to prove that any present bondholder of Indianapolis Gas knew of any of the acts asserted as the basis of such estoppel, much less relied upon the same, and under a long line of Indiana cases the unauthorized act of a City official cannot be made the basis of an estoppel.

2. It applied the doctrine of res adjudicata to a decision of the Public Service Commission, to a case in which the City had been dismissed as a party before final judgment, to a case in which Indianapolis Gas and Chase were not

parties and to a case in which Indianapolis Gas, a predecessor trustee of Chase and City were defendants and in which neither of said defendants had tendered any issue against the other, although the City had directed the attention of the Court to the fact that whether the lease was valid or invalid was immaterial.

3. It held a municipal corporation liable (presumably out of revenues raised from taxation) for future payments of more than $45,000,000 under a lease solely because of the implied power of the initial trustee to execute the same although the Indiana law is that all powers granted by a municipal corporation must be strictly construed against the grantee and that nothing passes by implication. Among other things, the holding, in effect, guarantees to the stockholders of Indianapolis Gas 6% interest on their stock for approximately 77 years in the future or until 2013.

4. Sections 85 and 254 of the Acts of the Indiana General Assembly of 1905 expressly prohibit any such lease for more than 25 years and prohibit its execution without municipal sanction. The Indiana cases hold that any agreement made in violation of these sections is void ab initio and cannot be ratified. The Circuit Court of Appeals held the lease valid for its full term of 99 years, although the lease had no municipal sanction of any kind.

B

Reasons Relied Upon for Allowance of Writ.

The Circuit Court of Appeals for the Seventh Circuit has decided three Federal questions in a manner in conflict with the applicable decisions of this court, towit:

First. It has denied the City a hearing and trial on the question of the burdensome character of the lease of September 30, 1913. The City was entitled to a trial in the District Court on all questions of *fact and law*. Without

such hearing the requirements of due process are not satisfied.

Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U. S. 292, 81 L. ed. 1093;
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 74 L. ed. 1107.

(a) An attempt by an appellate tribunal to determine the question of res adjudicata does not satisfy the requirements of due process.

(b) The City was entitled to be heard in the trial court on both the questions of law and fact as to whether the order of the Public Service Commission of Indiana approving the lease and the Williams case (206 Ind. 448) were res adjudicata and whether the lease was in fact burdensome. To refuse such a hearing is to deny due process of law.

Ohio Water Works Co. v. Ben Avon Borough, 253 U. S. 287, 64 L. ed. 908, 914.

Requirements of due process are satisfied only by a hearing in the trial court.

Second. The Circuit Court of Appeals has decided that in determining the existence of federal jurisdiction, where that jurisdiction is wholly dependent on diversity of citizenship, it is not the duty of the court to realign the parties in accordance with their interests in the dominant controversy where more than one controversy or issue is tendered, unless they are also in accord upon all other and minor issues; a decision which conflicts with the ruling of this Court in *Sutton v. English*, 246 U. S. 199, 62 L. ed. 664.

Third. The Circuit Court of Appeals disregarded the rule laid down by this Court in *Erie Railroad Company v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188, in that:

1. It refused to follow the Indiana decisions set out below on estoppel of a City.

Ross, et al. v. Banta, 140 Ind. 120, 150;

Union School Twp. v. First National Bank, 102 Ind. 464, 476;

Hosford v. Johnson, et al., 74 Ind. 479, 485;

Platter v. Board, 103 Ind. 360, 381.

2. It refused to follow the Indiana decisions on the question of res adjudicata, viz:

Jones v. Vert, et al., 121 Ind. 140, 141;

Maple v. Beach, 43 Ind. 51, 59;

Kitts v. Wilson, 140 Ind. 604, 610.

3. It refused to follow the rule of the Indiana decision set out below that a grant made by a municipality is to be taken most strongly against the grantee and nothing is to be taken by implication against the public and enforced a lease against the City where the right to execute such a lease was based solely on implied power of the initial trustee to execute the same.

Indianapolis Cable R. R. Co. v. Citizens Street R. R. Co., 127 Ind. 369, 390.

And it likewise refused to follow the same rule laid down by this Court in the following cases:

Piedmont Power & Light Co. v. Town of Graham, et al., 253 U. S. 193, 64 L. ed. 855;

Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 L. ed. 355;

Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801;

Mitchell v. Dakota Central Telephone Co., 246 U. S. 396, 62 L. ed. 793.

4. It refused to follow the Indiana decisions that a municipal corporation cannot be bound by a contract made in violation of the Indiana statutes.

Gas, Light, etc. Co. v. City of New Albany, 156 Ind. 406, 415;

City of Indianapolis v. Wann, Receiver, 144 Ind. 175, 187.

The Indiana cases cited above to propositions 1, 2, 3, and 4 are the law of Indiana. There are no Indiana decisions to the contrary. There was thus an *arbitrary refusal* to follow the applicable Indiana law, in violation of the rule established by this Court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188.

Fourth. An important public question is involved, viz: whether a municipal corporation shall have imposed upon it an obligation for 77 years in the future aggregating more than $45,000,000 in amount under a lease without any municipal sanction, where the Court does not limit the payments of the obligation to the revenues arising from the operation of the plant, but presumably imposes the burden on revenues raised by taxation.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Seventh Circuit commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named therein a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 7143, *The Chase National Bank of the City of New York, Trustee, etc. v. Citizens Gas Company of Indianapolis, et al.*, and that the decree of said United States Circuit Court of

Appeals in said cause be reversed by this Court, and that petitioners have such other and further relief in the premises as to this Court may seem just.

WILLIAM H. THOMPSON,
Counsel for Petitioner.

EDWARD H. KNIGHT,
MICHAEL B. REDDINGTON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

CITY OF INDIANAPOLIS, ET AL.,
Petitioners and Appellees below,

v.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., et al.
Respondents and Appellants below.

No. .....

BRIEF IN SUPPORT OF PETITION FOR A WRIT OR CERTIORARI

I

THE OPINIONS OF THE COURTS BELOW

The District Court neither gave nor filed a written opinion in dismissing the bill of complaint for want of jurisdiction (R. 271).

The majority opinion of the Circuit Court of Appeals for the Seventh Circuit (filed April 8, 1938) reversing the District Court on the jurisdictional question appears at pages 285 to 292 of the record and is reported in 96 F. 2d at pages 363 and following. The dissenting opinion of Judge Treanor appears in the record at page 293 and is reported in 96 F. 2d. at page 368.

Petitioners' petition for Writ of Certiorari was denied 305 U. S. 600, 83 L. ed. 381.

The memorandum opinion of the District Court on the merits, filed September 21, 1939, is unreported, but appears

at pages 1122 to 1159 of the record. The decree of the District Court is to be found at pages 1192 and 1193 of the record.

The opinion of the Circuit Court of Appeals, filed June 6, 1940, appears at pages 1281 to 1306 of the record and is as yet unreported. The opinion was amended on July 19, 1940 (R. 1335).

No opinion of the Circuit Court of Appeals was filed in overruling petitioners' petition for a rehearing or in overruling petitioners' second petition for a rehearing addressed to the opinion of the Circuit Court of Appeals as modified (R. 1335, 1405).

II

JURISDICTION

A statement particularly disclosing the basis upon which it is contended that this court has jurisdiction is set out in the petition for the Writ of Certiorari at page 8.

III

STATEMENT OF THE CASE

A full statement of the case having been given in the petition for certiorari for brevity is not here repeated.

IV

ASSIGNMENTS OF ERROR

The Circuit Court of Appeals erred in each of the following particulars:

1. In directing the entry of a judgment against the City, when the City had not had its day in court on the

question of the burdensome character of the lease of September 30, 1913. This was a denial of due process of law in violation of the Fifth Amendment and the Fourteenth Amendment and each of them to the Constitution of the United States.

The requirements of due process are not satisfied unless a party has the right in a trial court to a determination of all issues of fact and law. This requirement has been denied the City.

2. In holding that defendant Indianapolis Gas should not be realigned as a party plaintiff for the reason that Chase and Indianapolis Gas were in accord on the principal controversy, against petitioners, although Chase and Indianapolis Gas (but not the City) were adverse in attitude on other and minor issues.

3. In holding that the attitude of the parties on minor or subsidiary issues prevents their realignment on the major and substantial issue, in order to test the jurisdiction of the court.

4. In refusing to follow the rule announced by this court in *Erie Railroad Company v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188 in that the Circuit Court of Appeals refused to follow the controlling Indiana decisions on (a) the questions of estoppel of a municipal corporation, (b) the doctrine of res adjudicata, (c) the question of the denial of all powers granted by a municipal corporation except those expressly granted and (d) the question of the violation of Sections 85 and 254 of the acts of the Indiana General Assembly of 1905 prohibiting the execution of any such lease as that here involved for a longer period than 25 years and even for such a period without proper municipal sanction.

V

ARGUMENT

A. Complete jurisdiction in the Supreme Court of the United States is shown by the record since this is a civil case in the United States Circuit Court of Appeals for the Seventh Circuit. The petitioners were parties to such case. (R. 1280) Judicial Code Section 240 (a), amended February 13, 1925. C. 229, 43 Stat. 938, 28 U. S. C. A. 347.

B. The Circuit Court of Appeals has denied the City a hearing and trial on the question of the burdensome character of the lease of September 30, 1913, a trial to which the City was entitled in the District Court on all questions of fact and law. Without this hearing the requirements of due process of law are not satisfied.

The question of the burdensomeness of the lease was put in issue by the counter-claim of the City (R. 186).

On January 18, 1939, the District Court without objection or exception by any party, entered an order reserving the issue of the burdensome character of the lease for future trial (R. 321, 322). (The relevant portions of the order are set out on page 5 of the petition for writ of certiorari.)

On March 2, 1939, a trial was commenced (R. 323) on the issues which by the order of January 18, 1939 (R. 321) were to be tried. The District Court on September 21, 1939, filed its written memorandum (R. 1122).

The next to the concluding paragraph of the memorandum recited that:

> "Under the issues presented at this time for determination, the plaintiff is entitled to no money judgment against the City." (R. 1159.)

The Court's Conclusion of law No. 10 recited:

> "That the plaintiff should take nothing in this action as against the defendant, City of Indianapolis, under the issues presented at this time for determination." (R. 1192.)

An appeal was taken to the United States Circuit Court of Appeals for the Seventh Circuit (R. 1194) and on June 6, 1940, the Circuit Court rendered an opinion (R. 1281-1306) which was subsequently modified on July 19, 1940. (R. 1335.)

Among other things, the Circuit Court decided that:

> "In making a long term lease a trustee is under a duty to act with prudence. If a trustee makes a lease which is unreasonable under the circumstances, he thereby commits a breach of trust. For this a trustee incurs liability to the beneficiaries who in addition may have such a lease set aside. This record discloses that the trustee was justified in selecting the mode of acquisition which it did. When the prudence point was urged before the Indiana Supreme Court, that court did not find the lease in question unreasonable as to time or as to its other terms. *Williams v. Citizens Gas, et al.*, 206 Ind. 448, 458, 460." (R. 1300.)

The same Court also decided that:

> "Our conclusions in this case follow: (1) the 99 years lease is valid; (2) the assignment of the lease did not relieve Citizens Gas from its obligations as lessee; (3) the indemnity contract is effective; (4) the lease binds the City as successor trustee and the trust property; (5) the leasehold interest is part of the trust *res*; (6) the City has accepted the trust *res*; (7) Chase has a right to interest;

> (8) Chase has a right to interest on interest; and (9) Chase is entitled to interest at the rate of 5%." (R. 1306.)

It is clear that the issue of burdensomeness on which the City has had no opportunity to be heard, either on the questions of fact or law, and which was expressly reserved by the trial court (R. 321), was decided against the City by the Circuit Court of Appeals.

The petitioners pleaded in their answer specifically the reasons why the several decisions relied upon by plaintiffs were not res adjudicata. (R. 141-187, 149, 150, 151, 152, 153, 159, 160, 172, 173.) Whether the cases relied upon by plaintiff were res adjudicata of the burdensomeness of the lease, was a mixed question of law and fact, and petitioners were entitled to a trial and findings by the Court (Rule 52, Rules of Civil Procedure for the District Courts of the United States) upon which the District Court's decision could be reviewed. No hearing was had on the issue of burdensomeness and no findings were made, and for the reason, as pointed out, that the issue was expressly reserved for future trial.

Due process of law means notice and an opportunity to be heard. In the instant case the requirements of due process are satisfied only by a hearing in the trial court.

In *Hovey v. Elliott*, 167 U. S. 409, 42 L. ed. 215, 221, it was said:

> "Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an

> enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent."

In *Ohio Bell Telephone Co. v. Public Utilities Com.*, 301 U. S. 292, 304-306, 81 L. ed. 1093, 1102, it was said:

> "The right to such a hearing is one of 'the rudiments of fair play' * * * assured to every litigant by the Fourteenth Amendment as a minimal requirement. * * * There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

In *Ohio Water Works v. Ben Avon Borough*, 253 U. S. 287, 289, 64 L. ed. 908, 914, this Court had before it the complaint of the Water Company that it was denied the right to a hearing.

Mr. Justice McReynolds, speaking for the Court, said that:

> "In all such cases, if the owner claims confiscation of his property will result, *the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, 14th Amendment* * * *.

> Plaintiff in error has not had proper opportunity for an adequate judicial hearing as to confiscation; and unless such an opportunity is now available, and can be definitely indicated by the court below in the exercise of its power finally to construe laws of the state * * * the challenged order is invalid." (Our emphasis.)

The prohibitions of the 5th Amendment to the United States Constitution are measured by the settled scope of the 14th Amendment. This Court has said:

> "that the legal import of the phrase 'due process of law' is the same in both amendments."
>
> *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 329, 45 L. ed. 879, 884.

In *Twining v. New Jersey*, 211 U. S. 78, 101, 53 L. ed. 97, 107, it was pointed out that:

> "If any different meaning of the same words as they are used in the 14th Amendment (and in the 5th Amendment) can be conceived, none has as yet appeared in a judicial decision."

To hold that the 99 year lease is valid and binding on the City as trustee, and on the trust property, and thereby to impose upon the City by the Court's decision a liability of $45,000,000, and to hold that the lease is enforceable against the City as successor trustee and the trust property, when the question of the burdensome character of such lease was expressly reserved without objection or exception by any party (R. 321), and the City has had no opportunity to be heard, either on the law or on the facts of this issue, is a denial of due process of law which is guaranteed to all by the 5th Amendment, and by the 14th Amendment.

The denial of due process in this case is a question of gravity and importance. If such power exists in the Circuit Court of Appeals, then the judicial department of the Government which sits to uphold and enforce the Constitution, is the only department possessing the power to deny a hearing to litigants. If such authority exists in the Courts, then in consequence of their establishment to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent. Judicial proceedings cannot be valid unless they proceed upon inquiry and render judgment only after trial. In the instant case there was no inquiry; there was no trial, on the reserved issue of burdensomeness.

An appeal to an appellate tribunal is a matter of grace.

Cobbledick v. U. S., 309 U. S. 323, 84 L. ed. 524.

A hearing in the trial court is a matter of right, the denial of which is prohibited by the 5th and 14th Amendments.

The hearing guaranteed by the due process clauses cannot be in an appellate tribunal.

It is a fundamental rule that in judicial proceedings affecting rights there shall be given an opportunity to be heard before any judgment, decree, order or demand shall be given and established.

Kuntz v. Sumption, Treasu. r, 117 Ind. 1, 5.

C. The Circuit Court of Appeals has decided that in determining the existence of Federal jurisdiction where dependent upon diversity of citizenship, parties need not be realigned in accordance with their interests in the dominant controversy, and before such realignment can occur, must be in accord upon all other and minor issues.

The Court held that Indianapolis Gas was an indispensable party to the controversy. (R. 288.) It then said:

> "The rule seems to be that before such realignment may be required, the parties must be in substantial accord upon all issues presented * * *. It is not sufficient that they merely be in accord upon one issue or some of the issues." (R. 291.)
>
> (*Chase National Bank, etc., et al., v. Citizens Gas, et al.*, 96 F. 2d. 363, 366, 367; certiorari denied: 305 U. S. 600, 83 L. ed. 381.)

This is a Federal question decided in a way probably in conflict with prior decisions of this Court, viz: *Sutton v. English*, 246 U. S. 199, 62 L. ed. 644; *City of Dawson, etc. v. Trust Co.*, 197 U. S. 178, 49 L. ed. 713.

For the first time the Circuit Court of Appeals in its opinion of June 6, 1940, as modified, held that Chase was entitled to a coercive judgment enforceable in the following order:

1. Against the City as successor trustee and the trust property; 2. Against Citizens Gas; 3. Against Indianapolis Gas.

The evidence shows that as of December 31, 1938, the City had deposited with an escrow pursuant to an agreement (R. 205-207) the sum of $1,217,875 derived from the proceeds of the City's operation of the property transferred to it by Citizens Gas, and the property of the Indianapolis Gas covered by the lease with Citizens Gas (R. 638). Each month subsequent to December 31st amounts have been accrued in the escrowed fund. (R. 473, 474). From the fund in escrow and from the funds arising from the operation of the property (R. 542, 543), the City will

be required to and is abundantly able to pay the entire judgment and Indianapolis Gas will be wholly insulated from any liability.

The result of the decision of the Circuit Court of Appeals is that a judgment has been ordered entered which is equally beneficial to Chase and to Indianapolis Gas, and which amounts in substance *not to a judgment against Indianapolis Gas but one in its favor.*

The actual position taken on the record by Chase and Indianapolis Gas is that Chase asserts that the lease is a binding obligation against the City (R. 3, 20, 21). Indianapolis Gas also asserts the lease is binding upon the City. (R. 137, 138, 215, 219.)

The attitude of the respective parties toward the actual and substantial controversy should determine whether realignment shall take place for the purpose of testing the jurisdiction of the Court as the Federal Court; irrespective of the attitude of the parties towards subsidiary or different issues.

In *Sutton v. English*, 246 U. S. 199, 204, this Court said that:

> "It will be apparent that the Court below erred in holding, as it did, that the defendant Cora D. Spencer, should be treated as one of the plaintiffs and aligned with them for the purpose of determining the question of diversity of citizenship. Provided plaintiffs attained their first three objects, her interest would be the same as theirs with respect to the prayer for partition; but before this result could be reached, plaintiffs must prevail as to their third object, and with respect to this her interest was altogether adverse to theirs. *Therefore she was properly made a party defendant, that being her attitude towards the actual and substantial controversy.*" (Our emphasis.)

In the Sutton case the attitude of the parties toward the actual and substantial controversy was determinative as to whether or not there should be a realignment. Had the Circuit Court of Appeals followed that rule in the instant case, it would have held that both plaintiff Chase and defendant Indianapolis Gas in their attitudes towards the actual and substantial controversy were identical, and would have ordered Indianapolis Gas realigned with Chase as a plaintiff, thus destroying diversity of citizenship, the sole basis upon which jurisdiction was predicated. (R. 3.)

D. The Circuit Court of Appeals disregarded the rule laid down by this Court in *Erie Railroad v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188:

> 1. In refusing to follow the Indiana decisions, of which counsel have found none to the contrary, that hold:
>
> *First*, that the doctrine of estoppel has no application where the other party was not influenced by the acts pleaded as an estoppel. *Ross et al. v. Banta*, 140 Ind. 120, 150; *Hosford v. Johnson et al.*, 74 Ind. 479, 485.
>
> There is no proof in the record that any present bondholder of Indianapolis gas bonds knew of, relied on or was influenced by any acts of the City. (R. 340, 344, 355, 357, 361, 362, 397, 568, 584-589.)
>
> *Second*, an estoppel against a municipal corporation cannot be founded upon acts done by municipal officers in excess of their authority. The record shows that no corporate body possessed of the requisite power ever authorized the execution of the lease or ratification of it by the City. (R. 982, 983, 984, 985-986.)

2. In refusing to follow the Indiana decisions on the question of res adjudicata which announce the rule to be that no party may invoke the doctrine of former adjudication unless he has tendered to the party against whom the doctrine is invoked "an issue to which the latter could have demurred or pleaded." *Maple et al. v. Beach*, 43 Ind. 51, 58; *Jones v. Vert, et al.*, 121 Ind. 140, 141; *Kitts v. Wilson*, 140 Ind. 604, 610. (Compare *Pepper v. Litton*, 308 U. S. 295, 84 L. ed. 160, 165.)

3. In refusing to follow the Indiana rule laid down in *Indianapolis Cable R. R. Co. v. Citizens Street R. R. Co.*, 127 Ind. 369, 390, which is to the effect that a grant of right or privilege by a municipality is strictly construed against the grantee, and that whatever is not unequivocably granted is withheld—nothing passes by implication. In *Piedmont Power & Light Co. v. Town of Graham et al.* 253 U. S. 193, 194, 195 this court said:

"Grants of rights and privileges by a state or municipality are strictly construed and whatever is not unequivocably granted is withheld.—nothing posses by implication." (Compare *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 50 L. ed. 355; *Blair v. Chicago*, 201 U. S. 400, 50 L. ed. 801; *Mitchell v. Dakota Central Telephone Co.* 246 U. S. 396, 62 L. ed. 793.)

The Court recognized in its opinion that the grant to the trustee gave no express power, for it said:

> "The terms of the trust neither expressly conferred upon nor expressly denied the trustee the power to acquire a non-freehold interest in property." (R. 1297.)

The lease has thus been held enforceable solely because of implied power of the initial trustee.

4. In refusing to follow the Indiana decisions which hold that a municipal corporation cannot be bound by a contract made in violation of the Indiana statutes. *Gas Light & etc. Co. v. City of New Albany*, 156 Ind. 406, 415; *City of Indianapolis v. Wann*, Receiver, 144 Ind. 175, 187.

Two Indiana statutes prohibit the making of the lease in question by the City. (Text of these two statutes is set out in the appendix.)

The Indiana decisions set out above under 1, 2, 3 and 4 are the law of Indiana. There are none to the contrary. In refusing to abide by those decisions the Circuit Court of Appeals arbitrarily refused to follow the applicable Indiana law in violation of the rules established by this Court in *Erie Railroad v. Tompkins*, 304 U. S. 64.

E. An important public question is here involved. It is whether a municipal corporation shall have imposed upon it an obligation for 77 years in the future aggregating more than $45,000,000 in amount, under a lease *for which there was no municipal sanction*, where the Court does not limit the payments of the obligation to the revenues arising from the operation of the plant, but presumably imposes the burden on revenues raised by taxation.

Wherefore, petitioners pray that the writ be granted.

WILLIAM H. THOMPSON,
Indianapolis, Indiana,
Attorney for Petitioners.

EDWARD H. KNIGHT,
MICHAEL REDDINGTON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
Indianapolis, Indiana,
Of Counsel for Petitioners.

September 9, 1940

APPENDIX

Section 85 of Chapter 129 of the Acts of the Indiana General Assembly 1905, page 271 (48-1507 Burns' Indiana Statutes Annotated, 1933):

> "No executive department, officer or employee thereof shall have power to bind such city to any contract or agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purposes of such department; and all contracts and agreements, express or implied, and all obligations of any and every sort, beyond such existing appropriations are declared to be absolutely void: Provided, That the board of public works shall have power to contract with any individual or corporation for lighting the streets, alleys and other public places or for supplying the city with gas, water, steam, power, heat or electricity, and for the collection, removal and disposal of garbage, ashes or refuse on such terms and for such times, not exceeding the term fixed by section 254 (Sec. 48-7302, Burns') of this act, as may be agreed upon; but any such contract shall be submitted to the common council of such city and approved by ordinance before the same shall take effect, and, if so approved, shall immediately become effective: Provided, further, That nothing herein contained shall prevent any such department from issuing any bond or other obligation expressly authorized by this act and provided for by ordinance."

Section 254 of Chapter 129 of the Acts of 1905, page 396 (48-7302 Burns' Indiana Statutes Annotated, 1933):

> "Any city or town may enter into contract with any person, corporation or association to furnish such city or town and its inhabitants with water,

motive power, heat or light, or drainage or sewerage facilities, or to build or extend railroads, interurban or street-car lines, telegraph or telephone lines, drainage or sewerage system, or other public conveniences, into or through such city or town; and may provide in such contract the terms and conditions on which such water, motive power, heat, light, drainage, sewerage, railroad, interurban, street-car, telegraph or telephone service, or other uses and accommodations of such and other public conveniences may be furnished by such person, corporation or association to such city or town, and to its inhabitants; Provided, That no such contract shall be entered into by any such city or town for furnishing such city or town and its inhabitants with water, motive power, drainage, sewerage, heat or light, upon or along the streets of such city or town for a term longer than twenty-five (25) years: And, provided further. That before any such contract shall be made by any city of the first, second, third, or fourth class such contract shall be first agreed to by the board of public works of such city, after which agreement, such board shall cause a proper ordinance approving and confirming such contract to be presented for adoption by the common council of such city."

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No. 422 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

CITY OF INDIANAPOLIS, et al.,
Petitioners and Appellees below,

v.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AND

BRIEF IN SUPPORT THEREOF

WILLIAM H. THOMPSON,
Indianapolis, Indiana,
Attorney for Petitioner.

EDWARD H. KNIGHT,
MICHAEL B. REDDINGTON,
City Hall, Indianapolis, Indiana,
THOMPSON, O'NEAL & SMITH,
of Counsel for Petitioners.
1350 Consolidated Building,
Indianapolis, Indiana.

C. E. Pauley & Co., Inc., Indianapolis

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ABBREVIATIONS

The following abbreviations will be used in the petition for a writ of certiorari and in the brief:

City of Indianapolis, when referred to alone: "City"

City of Indianapolis and the Individual members of the Board of Trustees and Directors, when referred to collectively: "Petitioners"

Chase National Bank of the City of New York, Trustee, when referred to alone: "Chase"

Citizens Gas Company of Indianapolis, when referred to alone: "Citizens Gas"

The Indianapolis Gas Company, when referred to alone: "Indianapolis Gas"

When Chase, Citizens Gas and Indianapolis Gas are referred to collectively: "Respondents"

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. .....

CITY OF INDIANAPOLIS, a Municipal Corporation of the State of Indiana, A. DALLAS HITZ, EDWARD W. HARRIS, CHARLES RAUH, MERLE SIDENER, AND THOMAS D. SHEERIN, as Members of the Board of Trustees for Utilities for Said City, and HENRY L. DITHMER, BRODEHURST ELSEY, ROY SAHM, DONALD J. ANGUS, ISAAC E. WOODARD, LEROY J. KEACH, AND JOHN E. OHLEYER, as Members of the Board of Directors for Utilities of Said City.

Petitioners and Appellees below,

v.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee; CITIZENS GAS COMPANY OF INDIANAPOLIS, appellees below, THE INDIANAPOLIS GAS COMPANY, appellant below,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AND

BRIEF IN SUPPORT THEREOF

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The City of Indianapolis, a municipal corporation of the State of Indiana, and the members of its Board of

Trustees for Utilities, viz: A. Dallas Hitz, Edward W. Harris, Charles Rauh, Merle Sidener and Thomas A. Sheerin and the members of its Board of Directors for Utilities, viz: Henry L. Dithmer, Brodehurst Elsey, Roy Sahm, Donald J. Angus, Isaac E. Woodard, LeRoy J. Keach and John E. Ohleyer, respectively petitioning show to the Court:

I.

Summary Statement of Matters Involved

A. Nature of the Actions and Decrees Below.

In earlier litigation, the property owned by Citizens Gas was held to be the corpus of a public charitable trust created for the benefit of the gas users of the City.[1]

Todd v. Citizens Gas Co., 46 F. (2d) 855.

This is a suit in equity commenced against petitioners, impleaded with Indianapolis Gas and Citizens Gas by Chase.

Chase, as Trustee (R. 4) under a mortgage to secure bonds executed by Indianapolis Gas (R. 4), sought a decree, the main relief requested being a declaration that a lease for 99 years (R. 5, 6, 21) executed by Indianapolis Gas to Citizens Gas on September 30, 1913, (R. 5) was binding upon and enforceable against the City, as successor trustee of a public charitable trust (R. 20, 21, 22), as a claimed assignee of the lease (R. 16, 17) and allegedly because of estoppel (R. 18, 19) and res adjudicata. (R. 8, 9, 10, 11.)

Chase also sought to obtain an injunction requiring the City to make the payments and perform the covenants con-

[1] A prior attempt to create a public charitable trust had failed because the agreements were held to be insufficient for that purpose. *Consumers Gas Trust Co. v. Quinby*, 137 F. 882.

tained in the lease (R. 21, 306); to obtain judgment for unpaid interest and interest on overdue interest on the bonds (R. 21, 301), together with attorneys' fees and expenses (R. 22).

As relief against Indianapolis Gas, Chase asked that the lease be declared a valid obligation and part of the security which it, as trustee, held for the mortgage bonds of Indianapolis Gas; that pending final hearing Indianapolis Gas be enjoined from attempting to impair the lease; that the court declare Chase's rights as trustee are not altered by the temporary agreement (hereafter referred to) between Indianapolis Gas and the City; that the escrowed moneys (hereafter referred to) be declared the property of the bondholders of Indianapolis Gas; and that Chase have interest on overdue interest, its expenses and attorneys' fees (R. 20-22; 259-260).

The District Court entered a decree that Indianapolis Gas was an indispensable party to the relief sought by Chase and should be realigned with Chase and that when so realigned there was no diversity of citizenship and Chase's bill was dismissed for want of jurisdiction, no federal question being involved (R. 271).

The Circuit Court of Appeals reversed with opinions (R. 285-292, 293) reported in 96 F (2d) 363. The majority opinion held that although Indianapolis Gas was an indispensable party to the essential question as to whether the lease was binding upon the City (R. 288) and although both Chase and Indianapolis Gas were contending that the lease was enforceable against the City, nevertheless there could be no realignment because on other questions tendered by the complaint there were controversies between Chase and Indianapolis Gas (R. 292).

Petitioners' petition for a rehearing was overruled with-

out opinion (R. 295) and this Court denied certiorari. (305 U. S. 600, 83 L. ed. 381.)

After the case was remanded to the District Court, there was a trial by that court of certain issues on the merits (other issues being reserved for future determination) (R. 321, 322). The District Court made special findings of fact (R. 1160-1190), stated its conclusions of law thereon (R. 1190-1193) and entered a decree that the lease was unenforceable against either City or Citizens Gas (R. 1192, 1193). The District Court entered judgment in favor of Chase against Indianapolis Gas for past due interest but denied interest on overdue interest (R. 1193). The District Court's memorandum opinion is unreported but appears at pages 1122 to 1159 of the record.

Both Chase and Indianapolis Gas appealed to the Circuit Court of Appeals, which reversed the decree of the District Court so far as it held the lease to be unenforceable against the City and in denying interest on interest against Indianapolis Gas and affirmed the District Court in entering judgment for past due interest in favor of Chase against Indianapolis Gas (R. 1281-1306, 1307, 1308).

The Circuit Court of Appeals held that while Citizens Gas as initial trustee of a public charitable trust had no express power to execute a lease for 99 years that it had the implied power to do so, provided the lease was not burdensome in character (R. 1300).

Petitioners, in their answer to the bill, included a counter claim (R. 182-187) in which they directly and specifically put in issue the burdensome character of the lease and alleged that for that reason, among others, Citizens Gas had no right as initial trustee to execute the lease (R. 186).

On January 18, 1939, pursuant to Rule 42(b) of the Rules of Civil Procedure the District Judge entered the

"It is ordered that evidence shall be heard upon the issues as to whether the lease dated September 30, 1913, from the Indianapolis Gas Company to the Citizens Gas Company of Indianapolis is binding upon and enforceable against the City of Indianapolis or any of the property acquired by it from the Citizens Gas Company of Indianapolis on September 9, 1935, or against the Indianapolis Gas Company or against Citizens Gas Company of Indianapolis and whether plaintiff is entitled to judgment for the rental under said lease or for the interest on the First Consolidated Mortgage Five Per Cent Gold Bonds of the Indianapolis Gas Company which has accrued since April 1, 1936, against any of said defendants or said property, with the one exception that evidence shall not be heard therewith but shall be deferred on one certain reason assigned by the City of Indianapolis in its answer, for claimed unenforceability of such lease against it or its said property, viz: that the City as successor trustee of a certain public charitable trust in property of the Citizens Gas Company of Indianapolis had the right as such successor trustee *to refuse and reject an assignment of such lease on the ground that such lease was burdensome and not advantageous to such trust;* reserving the right to make such order or decree as may seem just and appropriate to the Court at any stage of this proceeding.

The trial of all other issues in this case is deferred until the further order of the Court with the right reserved to refer any or all issues to a Master." (Our emphasis). (R. 321, 322.)

The District Court, in its memorandum opinion, pointed out that only part of the issues in the case had been presented (R. 1159).

Counsel for Chase stated in resting his case that, "Of course, there are other issues which are to be reserved for later trial." (R. 475.)

In the petitioners' petitions for a rehearing (hereafter more specifically referred to), they made the express point that since the District Court had reserved the issue of the burdensome character of the lease, that it was a denial of due process of law to refuse the petitioners the right to be heard on this reserved issue.

We quote the following portion of petitioners' petition for a rehearing addressed to the opinion of the Circuit Court of Appeals as modified:

> "1. This Court held that a Trustee of a public charitable trust had no right to make a long term burdensome lease; that it incurred liability to the beneficiaries if it did so and that in addition the beneficiaries were entitled to have such a lease set aside. *This Court therefore held that if a showing could be made that the lease was in fact burdensome it could be set aside and yet it has directed a final judgment to be entered against the City which by order of the Court entered without objection or exception by any of the parties was still to have the right to prove the burdensome character of the lease. If every other question raised by this petition for rehearing should be decided adversely to the defendants-appellees we ask that the order of the Court be modified so as to permit the City to have an opportunity to prove the averments of its counterclaim and to have the lower Court determine whether when executed this lease was in fact burdensome.*" (R. 1346.)
>
> "With no opportunity for a hearing on this reserved issue, the defendants-appellees have been denied due process of law as guaranteed by the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States and each of them.
>
> "The right to a hearing extends both to a determination of questions of fact and law by the trial court. The denial of a hearing on either is a denial of due process. The City affirmatively claims

the protection of the Fifth Amendment and the Fourteenth Amendment and each of them." (R. 1346.)

The Circuit Court of Appeals held that Chase was entitled to a coercive judgment for the unpaid and overdue interest represented by the coupons together with five per cent interest thereon from maturity to judgment and five per cent interest on the judgment from entry to satisfaction, which judgment was to be enforceable against the parties in the following order of liability:

(1) The City as successor trustee and the trust property.

(2) Citizens Gas.

(3) Indianapolis Gas. (R. 1306, 1308.)

The Circuit Court of Appeals held that the City was bound by estoppel and res adjudicata by the terms of the lease of September 30, 1913, although admittedly the City never executed the lease (R. 80), was not a party to it; was not named as a party obligated (R. 51-80); was not an assignee (an assignment was tendered and rejected (R. 468)) and no municipal authority having the power to do so ever authorized the execution of the lease, ratified it or agreed to be bound by its terms. (R. 982-986.)

The petitioners filed their petition for a rehearing within the time allowed (R. 1280, 1309) which was denied by the Circuit Court of Appeals without opinion (R. 1336); the Circuit Court of Appeals modified its opinion in unimportant particulars (R. 1335). Petitioners then filed a motion for permission to file a petition for rehearing addressed to the opinion as modified (R. 1340, 1341). The motion was granted (R. 1405). The petition was filed (R. 1341) and denied without an opinion (R. 1405).

All questions here presented were urged on the Circuit Court of Appeals.

II

JURISDICTION.

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, C-229 (43 Stat. 938; 28 U.S.C. Sect. 347). The decree of the Circuit Court of Appeals on the merits was entered, a petition for rehearing was filed within the time allowed by the rules of said court, to-wit: on June 20, 1940, (R. 1280, 1309) and was denied without opinion on July 19, 1940 (R. 1336). On July 19, 1940 the opinion of the Court was modified. A motion for permission to file a petition for rehearing, addressed to the opinion as modified, was filed on August 7, 1940 (R. 1340, 1341). The motion was granted (R. 1405). The petition for rehearing addressed to the opinion as modified filed (R. 1341) and denied (R. 1405). This petition for certiorari was filed before the expiration of three months from July 19, 1940.

III

STATEMENT OF FACTS.

(a) Indianapolis Gas, as lessor, and Citizens Gas, as lessee, entered into a written contract of lease for a term of 99 years (R. 51-80; 55, 77) or for the longest term for which the parties might lawfully contract (R. 80). The lessee was to use and maintain lessor's utility property and to pay as rental the interest upon the lessor's outstanding mortgage indebtedness, being the bonds whereunder Chase is trustee (R. 69-79), also the sum of $120,000 annually for payment to lessor's stockholders as dividends (subject to increase *if the price of gas was decreased*) (R. 70), also certain expenses; in default of which payments the lease was terminable (R. 78).

(b) In 1935 all the property of Citizens Gas, except this lease, was transferred to the city (R. 635) in order to perform the terms of the public charitable trust approved in *Todd v. Citizens Gas Company, et al.*, 46 F. (2d) 855 (C. C. A. 7; certiorari denied 283 U. S. 852).

(c) An assignment of the lease was tendered to the City but was rejected by it (R. 468, 202-204).

(d) The City took temporary possession of the property covered by the lease in order to prevent interruption of service to consumers, without prejudice to its rejection of the lease (R. 200) and Indianapolis Gas consented to such temporary possession and operation without waiving any of its rights (R. 17, 204, 205).

(e) The City and Indianapolis Gas then entered into a separate agreement, distinct from the lease, by the terms of which the City was to continue such temporary operation and meanwhile pay into a bank, to be held in escrow, sums equal to the amounts specified in the lease, as compensation for such temporary use of Indianapolis Gas property, until further arrangements could be made, or until the present controversy was finally adjusted or terminated by a decree of court; all without prejudice to the position taken by each party as to the binding effect of the lease on the city (R. 19, 205-208, 257, 261). Payments were accordingly made to and are held by the escrow (R. 258-260, 638).

(f) Chase claimed in its complaint (R. 3-22) that the City was estopped to deny the validity of the 99 year lease by reason of the following:

> (1) Findings and orders of the Indiana Public Service Commission on an intervening petition of one Frank S. Fishback (R. 8, 9, 18).

(2) Sale of Indianapolis Gas bonds by Citizens Gas (R. 11, 12).

(3) "The City of Indianapolis and the residents and inhabitants thereof have had the full benefit and advantage of such operations, and of the profits produced thereby and of the protection thus given to the public charitable purposes to which the property of the Citizens Gas Company of Indianapolis were dedicated." (R. 12.)

(4) Sale of revenue bonds and alleged representations made by the City (R. 14, 15).

(5) Claimed assignment by Citizens Gas to the City of the 99 year lease.

(6) The following decisions:

Fishback v. Public Service Commission, 193 Ind. 282 (R. 10, 18);
Todd v. Citizens Gas Company, 46 F. (2d) 855 (R. 13, 18);
Williams v. Citizens Gas, 206 Ind. 448 (R. 14, 18).

Chase also claimed that the foregoing decisions were res adjudicata of the question of the enforceability of the 99 year lease against the City (R. 8, 10, 13, 14).

Interest on overdue interest was asked by Chase.

IV

The Questions Presented.

Upon the record and the opinion of the Circuit Court of Appeals, three important Federal questions are presented.

First. Whether the decision of the Circuit Court of Appeals denies to the City due process of law as guaranteed by (a) the Fifth Amendment to the Constitution of the United States; and (b) the Fourteenth Amendment to the Constitution of the United States, in this:

The District Court, by an order entered without objection or exception by any party (the relevant parts of which are set out at page 5 of this petition), reserved for future determination the question of the burdensome character of the lease of September 30, 1913 (R. 321, 322). The Circuit Court of Appeals held (R. 1300) that if the lease were in fact burdensome Citizens Gas, as initial trustee, had no authority to execute the same, but held, without any trial in the lower court, that a certain order (non-judicial in character) of the Public Service Commission of Indiana and a judgment of the Supreme Court of Indiana were res adjudicata.[2]

The City was thus denied a hearing in a trial court on the issue of the burdensome character of the lease. The right to such a hearing by the trial court extends both to a determination of the law and the facts.

Second. The Circuit Court of Appeals held for the first time in its opinion of June 6, 1940, that Chase was entitled to a coercive judgment enforceable in the following order:

(1) Against the City as Successor Trustee and the trust property.

(2) Against Citizens Gas.

(3) Against Indianapolis Gas. (R. 1308.)

The evidence shows that from the funds deposited in escrow (R. 638) and the funds arising from the operation of the property (R. 542, 543) the City will be required and is abundantly able to pay the entire judgment and that Indianapolis Gas has thus been insulated from liability.

The result of the decision is that a judgment has been ordered entered which is equally beneficial to Chase and

[2] *Williams v. Citizens Gas Co.*, 206 Ind. 448.

Indianapolis Gas and which amounts in effect *not to judgment against Indianapolis Gas but one in its favor.*

The decision of the Circuit Court of Appeals is directly in conflict with controlling decisions of this Court to the effect that parties must be realigned in accordance with their relation to the *main controversy* in the case and the fact that there are dependent controversies in respect of which their interest may be adverse is not sufficient to sustain jurisdiction on the ground of diversity of citizenship, viz:

Sutton v. English, 246 U. S. 199, 62 L. ed. 664;
City of Dawson v. Columbia Trust Co., 197 U. S. 178, 49 L. ed. 713.

An examination of the record will show that Chase and Indianapolis Gas are friends attempting to assert hostility only for the purpose of conferring a jurisdiction which would otherwise not exist.

Third. The Circuit Court of Appeals wholly disregarded the applicable Indiana law in four important particulars and thus violated the rule established by this court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188 as follows:

1. It impliedly held that the City was bound by the lease by the doctrine of estoppel, although admittedly there was no effort to prove that any present bondholder of Indianapolis Gas knew of any of the acts asserted as the basis of such estoppel, much less relied upon the same, and under a long line of Indiana cases the unauthorized act of a City official cannot be made the basis of an estoppel.

2. It applied the doctrine of res adjudicata to a decision of the Public Service Commission, to a case in which the City had been dismissed as a party before final judgment, to a case in which Indianapolis Gas and Chase were not

parties and to a case in which Indianapolis Gas, a predecessor trustee of Chase and City were defendants and in which neither of said defendants had tendered any issue against the other, although the City had directed the attention of the Court to the fact that whether the lease was valid or invalid was immaterial.

3. It held a municipal corporation liable (presumably out of revenues raised from taxation) for future payments of more than $45,000,000 under a lease solely because of the implied power of the initial trustee to execute the same although the Indiana law is that all powers granted by a municipal corporation must be strictly construed against the grantee and that nothing passes by implication. Among other things, the holding, in effect, guarantees to the stockholders of Indianapolis Gas 6% interest on their stock for approximately 77 years in the future or until 2013.

It also ordered entered against the City, as first in order of liability, a coercive judgment for interest on overdue interest.

4. Sections 85 and 254 of the Acts of the Indiana General Assembly of 1905 expressly prohibit any such lease for more than 25 years and prohibit its execution without municipal sanction. The Indiana cases hold that any agreement made in violation of these sections is void ab initio and cannot be ratified. The Circuit Court of Appeals held the lease valid for its full term of 99 years, although the lease had no municipal sanction of any kind.

B

Reasons Relied Upon for Allowance of Writ.

The Circuit Court of Appeals for the Seventh Circuit has decided three Federal questions in a manner in conflict with the applicable decisions of this court, towit:

First. It has denied the City a hearing and trial on the question of the burdensome character of the lease of

September 30, 1913. The City was entitled to a trial in the District Court on all questions of *fact and law*. Without such hearing the requirements of due process are not satisfied.

> ***Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio***, 301 U. S. 292, 81 L. ed. 1093;
> *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 74 L. ed. 1107.

(a) An attempt by an appellate tribunal to determine the question of res adjudicata does not satisfy the requirements of due process.

(b) The City was entitled to be heard in the trial court on both the questions of law and fact as to whether the order of the Public Service Commission of Indiana approving the lease and the Williams case (206 Ind. 448) were res adjudicata and whether the lease was in fact burdensome. To refuse such a hearing is to deny due process of law.

> *Ohio Water Works Co. v. Ben Avon Borough*, 253 U. S. 287, 64 L. ed. 908, 914.

Requirements of due process are satisfied only by a hearing in the trial court.

Second. The Circuit Court of Appeals has decided that in determining the existence of federal jurisdiction, where that jurisdiction is wholly dependent on diversity of citizenship, it is not the duty of the court to realign the parties in accordance with their interests in the dominant controversy where more than one controversy or issue is tendered, unless they are also in accord upon all other and minor issues; a decision which conflicts with the ruling of this Court in *Sutton v. English*, 246 U. S. 199, 62 L. ed. 664.

Third. The Circuit Court of Appeals disregarded the rule laid down by this Court in *Erie Railroad Company v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188, in that:

1. It refused to follow the Indiana decisions set out below on estoppel of a City.

Ross, et al. v. Banta, 140 Ind. 120, 150;

Union School Twp. v. First National Bank, 102 Ind. 464, 476;

Hosford v. Johnson, et al., 74 Ind. 479, 485;

Platter v. Board, 103 Ind. 360, 381.

2. It refused to follow the Indiana decisions on the question of res adjudicata, viz:

Jones v. Vert, et al., 121 Ind. 140, 141;

Maple v. Beach, 43 Ind. 51, 59;

Kitts v. Wilson, 140 Ind. 604, 610.

3. It refused to follow the rule of the Indiana decision set out below that a grant made by a municipality is to be taken most strongly against the grantee and nothing is to be taken by implication against the public and enforced a lease against the City where the right to execute such a lease was based solely on implied power of the initial trustee to execute the same.

Indianapolis Cable R. R. Co. v. Citizens Street R. R. Co., 127 Ind. 369, 390.

And it likewise refused to follow the same rule laid down by this Court in the following cases:

Piedmont Power & Light Co. v. Town of Graham, et al., 253 U. S. 193, 64 L. ed. 855;

Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 L. ed. 355;

Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801;

Mitchell v. Dakota Central Telephone Co., 246 U. S. 396, 62 L. ed. 793.

4. It refused to follow the Indiana decisions that a municipal corporation cannot be bound by a contract made in violation of the Indiana statutes.

Gas, Light, etc. Co. v. City of New Albany, 156 Ind. 406, 415;

City of Indianapolis v. Wann, Receiver, 144 Ind. 175, 187.

The Indiana cases cited above to propositions 1, 2, 3, and 4 are the law of Indiana. There are no Indiana decisions to the contrary. There was thus an *arbitrary refusal* to follow the applicable Indiana law, in violation of the rule established by this Court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188.

Fourth. An important public question is involved, viz: whether a municipal corporation shall have imposed upon it an obligation for 77 years in the future aggregating more than $45,000,000 in amount under a lease without any municipal sanction, where the Court does not limit the payments of the obligation to the revenues arising from the operation of the plant, but presumably imposes the burden on revenues raised by taxation. Important too because a coercive judgment is ordered entered against a municipal corporation for interest on overdue interest.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Seventh Circuit commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named therein a

full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 7144. *The Chase National Bank of the City of New York, Trustee, etc. v. The Indianapolis Gas Company, et al.*, and that the decree of said United States Circuit Court of Appeals in said cause be reversed by this Court, and that petitioners have such other and further relief in the premises as to this Court may seem just.

WILLIAM H. THOMPSON,
Counsel for Petitioner.

EDWARD H. KNIGHT,
MICHAEL B. REDDINGTON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1940.

CITY OF INDIANAPOLIS, *et al.*,
Petitioners,
vs.
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., *et al.*,
Respondents.
No. 421.

CITY OF INDIANAPOLIS, *et al.*,
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No. 422.

REPLY BRIEF OF PETITIONERS TO BRIEFS OF RESPONDENTS IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

WILLIAM H. THOMPSON,
Indianapolis, Indiana,
Attorney for Petitioners.

EDWARD H. KNIGHT,
MICHAEL B. REDDINGTON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
1350 Consolidated Building,
Indianapolis, Indiana,
Of Counsel for Petitioners.

October 16, 1940.

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Each of the three respondents has filed a brief in opposition to petitioners' petition for writ of certiorari.

Respondent Citizens Gas Company says that it has fully performed all its duties and obligations as initial trustee of a public charitable trust, and its obligations to Indianapolis Gas have ceased. As to the primary controversy, Citizens Gas has no interest (brief p. 4) and has adopted a completely neutral position in respect thereto.

The petitioners make no further reply to Citizens Gas.

The briefs of respondents The Chase National Bank of the City of New York, Trustee, and Indianapolis Gas Company, assert identical grounds of opposition to petitioners' petitions, stated in the same order and in strikingly similar language, so that petitioners are submitting this one brief in reply.

SUPPLEMENTAL STATEMENT OF FACTS.

Respondents in their statements of facts leave opportunity for drawing incorrect inferences:

1. It is recited that Citizens Gas sold $2,000,000 of Indianapolis Gas Bonds to the public on representations that it had a 99 year lease. (Chase p. 2.)

2. In the sale of revenue bonds the City issued a prospectus to prospective security firms as bidders in which it was stated that the gas system of Citizens Gas was held partly under a 99 year lease. (Indianapolis Gas p. 5.)

Petitioners point out that no bondholder was or is a party to this action. There is no showing that any present bondholder of Indianapolis Gas relied on any statements made by Citizens Gas or the City. The bidders on the City of Indianapolis Gas Plant Revenue Bonds sold in 1935 are not parties to these actions and there is no showing of any reliance having been placed by them on any statements. No party in this case has any concern with the revenue bonds except the Utilities District of the City of Indianapolis.

3. Respondents say the City accepted and recorded the various instruments of transfer (of property from Citizens Gas to City) including an assignment of the lease. (Chase p. 2; Indianapolis Gas p. 5.)

The record shows the four instruments were "all four handed either to Mr. Rabb or to Mr. Dithmer or somebody there representing the City." (R. 467.) The same witness testified that at the same meeting there was delivered to him a rejection of the 99 year lease by the City and a certified copy of a resolution of the Board of Directors for Utilities of the City rejecting the 99 year lease. (R. 468.) Acknowledgment of receipt of the rejection of the lease was made by Henry H. Hornbrook, attorney for and director of Citizens Gas. (City's Ex. 13, R. 1043; offered R. 433.) The Circuit Court of Appeals first held that the City "ac-

cepted" the instruments of transfer but on July 19, 1940, the Court modified its opinion in this particular, among others (R. 1335), and held that "these instruments were *received*, retained and duly recorded by the City. On the same day, September 9, 1935, the Board of Directors passed two resolutions: one rejecting the lease and refusing to assume the lease obligations; the other accepting the property held under the lease temporarily and *solely* to prevent interruption of service." (Our emphasis.) (R. 1292.)

4. Both respondents assert in their briefs that there was no agreement concerning the City's use of the property until March 2, 1936. (Chase p. 3; Indianapolis Gas p. 6.)

On July 23, 1935, the City notified Indianapolis Gas it would acquire the Citizens Gas property but without liability for obligations of Citizens Gas and that it would be willing to negotiate a new lease. (R. 836; offered R. 326, 327, 434, 1057, 1058.) On August 31, 1935, the City in a letter to Indianapolis Gas referred to recent conversations between representatives of the City and Indianapolis Gas, and pointed out that the City wished to know if Indianapolis Gas would permit the City to operate the property for a period of six months after the take-over scheduled for September 9, 1935. (R. 837; offered R. 326, 327, 434, 1057, 1058.)

The City on September 27, 1935, wrote Indianapolis Gas:

> "We have had no response from you to our repeated requests for an opportunity to negotiate a lease for the use of your property by the City of Indianapolis.
>
> "That there may be no misunderstanding of our position, we desire to obtain from you an agreement for the use of your property by the City of Indianapolis in connection with its operation of property acquired from Citizens Gas Company of Indianapolis, and upon terms that are both appropriate and fair. Therefore we have asked, and we now ask, that you inform us

whether you are willing to undertake to negotiate such an agreement.

"This is a matter not merely of private interest, but of public concern. * * *." (City's Stip. Ex. 63, R. 967; offered R. 326, 434.)

On September 30, 1935, the letters of the City were acknowledged and Indianapolis Gas expressed its willingness to agree with the City respecting operation of the property. (R. 838; offered R. 326, 434.) On February 28, 1936, Indianapolis Gas wrote the City referring to "our tentative agreement" which was to expire on March 9, 1936. (R. 839; offered 326, 327, 434.)

On November 6, 1935, the Board of Directors of Indianapolis Gas instructed the corporation secretaary to formally notify Chase "of the refusal of the City of Indianapolis to accept the assignment of the ninety-nine years lease. * * *" (R. 1013; offered R. 428.)

Indianapolis Gas, on November 7, 1935, wrote Chase in accordance with instructions:

"Assuming to act under legislative authority and pursuant to provisions of the city franchise and articles of incorporation of the Citizens Gas Company of Indianapolis, the City of Indianapolis has taken over the property of that Company, and is now operating the same by its Board of Directors for Utilities, and is assuming to enter upon the discharge of the obligations of the Citizens Gas Company to its bondholders and stockholders. The City of Indianapolis, however, has refused to accept an assignment of the ninety-nine year lease. * * *

"Under the circumstances, this Company, through action of its Board of Directors, entered into a stipulation with the said City of Indianapolis, by which it was provided that the City, through its Board of Directors for Utilities, will continue the operations of the property of this Company for a period of six months pending negotiations. * * *" (R. 1013; offered R. 428; R. 926; offered R. 369.)

There is no doubt that Chase understood exactly what the City had done or was trying to do. On September 19, 1935, Chase addressed a letter to William G. Irwin, President of Indianapolis Gas, in which it said:

> "We are receiving numerous inquiries from holders of bonds of the above described issue with respect to newspaper reports that the City Utilities District *is attempting to abrogate the lease* made by your Company with the Citizens Gas Company in 1913. (R. 926; offered R. 367.)

ARGUMENT.

The arguments of respondents Chase and Indianapolis Gas are the same in substance and in order of presentation, thus both will be answered together without reference to each separately.

I.

It is asserted by respondents that the City's claim of a denial of due process of law is "fanciful." It is argued that the Court of Appeals came to the conclusion "as a matter of law that the City's allegation of 'burdensomeness' presented no defense. * * *" What the Court of Appeals actually held in respect of burdensomeness was this:

> "In making a long term lease a trustee is under a duty to act with prudence. If a trustee makes a lease which is unreasonable under the circumstances, he thereby commits a breach of trust. For this a trustee incurs liability to the beneficiaries who in addition may have such a lease set aside. This record discloses that the trustee was justified in selecting the mode of acquisition which it did. When the prudence point was urged before the Indiana Supreme Court, that Court did not find the lease in question unreasonable as to time or as to its terms. *Williams vs. Citizens Gas, et al.*, 206 Ind. 448, 458, 460."[1] (R. 1300.)

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[1] The *Williams* case (206 Ind. 448) is dealt with hereafter to show that it did not adjudicate the questions involved here.

The petitioners had the right to rely on the reservation of the issue of burdensomeness and to believe it would be heard on that issue, both on questions of law and fact, before judgment. The City was not bound to take in advance the precaution of putting in its evidence on this reserved issue; indeed would have had no right to do so because of the reservation.

In *Saunders vs. Shaw, et al.*, 244 U. S. 317, 320, 61 L. ed. 1163, 1165 it was pointed out that the record did not disclose the claim of right under the 14th Amendment until the assignment of errors filed the day before the chief justice of the state granted the writ of error. It was held that ordinarily such assertion of claim of right would not be enough.

> "But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance."

In these cases at bar the issue of the burdensome character of the lease was expressly reserved by the District Court without objection or exception by any party, and no evidence was introduced by petitioners or by anyone else on such issue. (R. 321, 322.) As this Court in the case last cited pointed out, there can be no certainty that the petitioner's rights have been protected without giving it a chance to put its evidence in.

Petitioners were not bound to contemplate a decision by the Circuit Court of Appeals of the reserved issue of burdensomeness before its evidence was heard. It is clear under the decisions of this Court that petitioners are entitled to be heard on the questions of both law and fact

on the reserved issue of burdensomeness before a decision is rendered against them.

Respondents contend that the approval of the lease by the Public Service Commission of Indiana upon the joint petition of Indianapolis Gas and Citizens Gas and its determination "that the lease was in the public interest, hence not burdensome—is binding upon all the world. * * *."[2] (Chase p. 7; Indianapolis Gas p. 7.)

The Public Service Commission was created by Chapter 76, Acts of Indiana General Assembly 1913 (p. 167) as an instrument of the executive department of the state.

The approval of the lease by the Commission could not operate in any way as an adjudication of the enforceability of the lease against the City. The order of approval was wholly administrative in character and was not judicial.

It is firmly settled in Indiana that the Public Service Commission is "purely an administrative or legislative body without judicial power."

Public Service Commission of Indiana, et al. vs. City of LaPorte, et al., 207 Ind. 462, 465;
New York etc. R. R. Co. vs. Singleton, et al., 207 Ind. 449, 458.

The authority given to the Commission to fix rates and approve leases of public utility property was given for the sole purpose of enabling the Commission to protect the public interest. It was never intended that by conferring such jurisdiction on the Commission it should be vested with authority to make a judicial declaration which would determine private rights of persons not parties to the lease, especially where such private rights depend upon the decision of justiciable questions.

The entire purpose of the statute is to safeguard the public interest and to see that leases or sales are not made

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[2] Chase in its complaint as amended does not allege that the lease is valid but seeks to bind the City to the 99 year lease on the grounds of estoppel and res adjudicata.

by one utility to another unless in the opinion of the Commission they are in the public interest.

Any assertion that the Commission's approval of the lease determined the liability of the City in respect of the obligations contained in the lease is made in disregard not only of the obvious purpose of the statute and the scope of the Commission's authority thereunder, but also in complete disregard of the repeated decisions of the Indiana Supreme Court.

In referring to Section 95 of the Act creating the Public Service Commission, the Indiana Supreme Court said:

> "By this enactment the Legislature has vested it (Public Service Commission) with authority subject to review by the courts, to supervise or regulate the terms of sale *insofar only as they affect the public.*" (Our emphasis.)
>
> *In re: Northwestern Telephone Co., et al.*, 201 Ind. 667, 680.

Petitioners are cognizant of the rule that where the Commission has jurisdiction to decide questions of fact and enter an order thereon, and acts within its jurisdiction, its decision is conclusive on the courts in a collateral action. But the order of the Commission approving the lease went no further, and could go no further, than to determine upon the facts adduced, whether it was advisable and in the public interest that the property of Indianapolis Gas be leased to Citizens Gas on the terms stated in the Commission's order.

The Commission had no power to decide either the liability of the City[3] under the terms of a lease not executed or ratified by it, or the length of the term of the lease for which the parties might lawfully contract.

---

[3] At the time of the Commission's approval of the lease (October 1, 1913, R. 122) no claim had been asserted that a public charitable trust had been created and it was still seventeen years before a transfer of the property was to be made to the City.

The Commission could not and did not determine whether the 99 year lease would be burdensome on the City as successor trustee of a public charitable trust seventeen years in advance of the time the City assumed the trusteeship.

The case of *Williams vs. Citizens Gas* (206 Ind. 448) did not decide as against the City any of the issues presented here. The case was decided on a demurrer to the complaint and no evidence was introduced.

The following language of the Indiana Supreme Court shows clearly the scope of the decision (pp. 458-459):

> "If *the lease was improvident* from the standpoint of the lessee in that the consideration was excessive in view of the value of the use of the assets acquired under the terms of the lease, *no facts are alleged to support such a conclusion.* And if such a conclusion were justified, the complaint does not make out a case for equitable relief of cancellation and 'recapture' of the rentals paid over a period of seventeen years during which the Citizens Gas Company had the use of the physical equipment and the benefit of the income derived from this use. Further it was within the jurisdiction of the Public Service Commission to consider and approve the lease and the complaint discloses that the Public Service Commission did approve it. The complaint does not make out a case for any relief on the basis of invalidity of the lease or of the action of the Commission in approving the same." (Our emphasis.)

The case of *Williams vs. Citizens Gas* (206 Ind. 448) is not res adjudicata because:

> 1. The issues in the *Williams* case were essentially different from the issues in this case. The enforceability of the lease against the City and the right of the initial trustee (Citizens Gas) to bind the City to the terms of the lease were not actually litigated and could not have been litigated under the issues in the *Williams* case.

In *Troxall vs. Delaware R. Co.*, 227 U. S. 434, 440, the leading case on estoppel of a judgment when different issues are presented is cited, viz.: *Cromwell vs. Sac County* 94 U. S. 353, 24 L. ed. 195, 198, 199. In *Sac County* case an action was brought on four bonds of Sac County and four interest coupons. To defeat the action the defendant relied upon the estoppel of a judgment rendered in favor of the county in a prior action brought by another person but prosecuted for the sole benefit of the plaintiff in the last case. The issue of whether the plaintiff was a good faith purchaser of the bonds had not been but could have been litigated in the prior action.

In holding the judgment not res adjudicata, this Court said:

> "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

2. The Transfer to the City of the trust res on September 9, 1935, creates a situation which so alters the rights of the parties as to prevent a successful assertion of res adjudicata. When the *Williams* case was finally decided (December 22, 1933) the City had not taken over the trust res and until that was done the question of the burdensomeness of the lease to the City was not in issue. No attempt was made to obtain a declaratory judgment against the City in

respect of any *obligation* supposed to be imposed upon it under the terms of the lease.

In *Third National Bank of Louisville vs. Stone*, 174 U. S. 423, 434, 43 L. ed. 1035, 1036, this Court said:

> "A question cannot be held to have been adjudged before an issue on the subject could possibly have arisen."

3. Although Indianapolis Gas and its mortgage trustees and the City were co-defendants, neither Indianapolis Gas nor its mortgage trustees tendered any issue to their co-defendant, City, in respect of the burdensome or non-burdensome character of the 99-year lease.

In *Whitesell, et al. vs. Strickler, et al.*, 167 Ind. 602, 616, it was held that:

> "Where two or more defendants make issue with the plaintiff, a judgment determining those issues in favor of the defendants settles between them no fact that might have been, but was not, put in issue by a proper pleading."

The above rule of law is still the rule in Indiana.

In *Pepper vs. Litton*, 308 U. S. 295, 84 L. ed. 196, 205, this Court had before it the question of whether or not a judgment of a Virginia court was res adjudicata. A trustee with permission of the bankruptcy court moved in the state court to set a judgment aside. The judgment was held void but the trustee was estopped to challenge it. Thereafter the question of allowance of the judgment came before the bankruptcy court. The bankruptcy court concluded that the decision of the state court that the trustee was estopped to attack the judgment did not prevent the bankruptcy court from considering its validity. The District Court disallowed the trustee to recover the proceeds impressed at the execution sale had on the judgment.

In sustaining the District Court, Justice Douglas, speaking for this Court, said:

> "In the first place, res judicata did not prevent the District Court from examining into the Litton judgment, and disallowing or subordinating it as a claim. When that claim was attacked in the bankruptcy court Litton did not show that the proceeding in the state court was anything more than a proceeding under Virginia practice to set aside the judgment in his favor on the ground that it was irregular or void upon its face. He failed to show that the judgment in the state court was conclusive in his favor on the validity or priority of the underlying claim, as respects the other creditors of the bankrupt corporation—a duty which was incumbent on him. On the pleadings in the state court the validity of the underlying claim was not in issue. Nor was there presented to the state court the question of whether or not the Litton judgment might be subordinated to the claims of other creditors upon equitable principles. The motion on which that proceeding was based challenged the Litton judgment on one ground only, viz.: that it was void *ab ignitio* because it was not confessed by Dixie Splint Coal Company in the manner required by the Virginia statute and because P. H. Smith did not have either an implied or express power to confess it. In other words, in the state court, under the pleadings and practice, the only decree which was asked or could be given in the plaintiff's favor was for cancellation of the judgment as a record obligation of the bankrupt. It is therefore plain that the issue which the bankruptcy court later considered was not an issue in the trial of the cause in the state court and could not be adjudicated there."

It is quite apparent that since the burdensomeness of the lease to the City as successor trustee was not decided in the *Williams* case, it could not operate as res adjudicata. The Circuit Court of Appeals in directing judgment to be entered against the City with no opportunity to be heard on the reserved issue of burdensomeness denied to the City due process of law.

II.

Respondents contend that Indianapolis Gas should not be realigned with Chase and thus destroy diversity of citizenship, the sole ground of jurisdiction, for the reason that a coercive judgment was entered in favor of Chase against Indianapolis Gas. As Chase admits Indianapolis Gas is only "tertiarily liable." As pointed out in petitioner's original brief (pp. 27, 28) Indianapolis Gas is completely insulated from liability.

Perhaps no stronger evidence appears in this record of the complete unanimity of interest of Indianapolis Gas and Chase than the brief of Indianapolis Gas filed in opposition to petitioner's petition for writ of certiorari.

If the interests of respondents were not in accord it is difficult to understand why Indianapolis Gas wishes to oppose the review by this Court of a judgment allegedly against it of more than $1,000,000.

III.

Chase points out (p. 11) the Court of Appeals made no decision on the question of estoppel; its decision was based primarily upon its independent conclusion that the lease is valid; and that it is not clear whether the court regarded the cases referred to as determinative on the ground of res adjudicata.

As pointed out, the complaint did not allege that the lease was valid but asserted that the City was bound by estoppel and res adjudicata. (R. 12, 13, 14, 15, 18, 19.) Thus the Court of Appeals decided the case on an issue never presented to the trial court by the complaint and on a theory never litigated on the complaint.

IV.

Respondents say the judgment ordered entered imposes no burden on revenues raised by taxation by the City.

If the Court of Appeals meant that the judgment when entered was not payable from taxation revenues, it would

presumably have said so since the City expressly called the Court's attention to the point. (R. 1312, 1313, 1350, 1382.) The insertion in the opinion of the words "as successor trustee" by way of amendment (R. 1335) does not remove the need for payment of the judgment, when entered, by the City from revenues raised by taxation if the income from the property and the property itself are inadequate to make the required payment.

CONCLUSION.

If the decision of the Circuit Court of Appeals is to stand, the City will be liable for rental payments of approximately $45,000,000 under the terms of a 99 year lease which the City did not sign or execute, to which it was not a party, in which it is not named as a party, of which it is not an assignee, which it has neither confirmed, adopted, approved or ratified, but which the City has expressly rejected by proper action of the only municipal body having any power to deal with the lease.

The questions presented by petitioner's petitions are fundamental and important ones: denial of due process of law, refusal to realign parties in accordance with their relation to the main controversy, disregard of the rule of this Court in *Erie Railroad vs. Tompkins* (305 U. S. 64).

Wherefore, petitioners pray that the writ be granted.

Respectfully submitted,

WILLIAM H. THOMPSON,
Indianapolis, Indiana,
Attorney for Petitioners.

EDWARD H. KNIGHT,
MICHAEL B. REDDINGTON,
PERRY E. O'NEAL,
PATRICK J. SMITH
1350 Consolidated Building,
Indianapolis, Indiana,
Of Counsel for Petitioners.

October 16, 1940.

FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1940.

Supreme Court, U. S.
FILED
DEC 27 1940
CHARLES ELMORE CROPLEY
CLERK

CITY OF INDIANAPOLIS, *et al.*,
Petitioners,
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THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., *et al.*,
Respondents.

10-11
Nos. ~~421-422~~.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC.,
Petitioner,
vs.
CITIZENS GAS COMPANY OF INDIANAPOLIS, *et al.*,
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12-13
Nos. ~~423-424~~.

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WILLIAM H. THOMPSON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
Attorneys for City of Indianapolis, et al.,
1350 Consolidated Building,
Indianapolis, Indiana.

EDWARD KNIGHT,
Corporation Counsel,

MICHAEL B. REDDINGTON,
City Attorney,
City Hall,
Indianapolis, Indiana,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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PERRY E. O'NEAL,
PATRICK J. SMITH,
Attorneys for City of Indianapolis, et al.,
1350 Consolidated Building,
Indianapolis, Indiana.

EDWARD KNIGHT,
Corporation Counsel,

MICHAEL B. REDDINGTON,
City Attorney,
City Hall,
Indianapolis, Indiana,
Of Counsel.

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ABBREVIATIONS.

The following abbreviations (except quotation marks) will be used by the City of Indianapolis and the individual members of the Boards of Trustees and Directors in their brief:

City of Indianapolis when referred to alone:	"City"
City of Indianapolis and the individual members of the Boards of Trustees and Directors when referred to collectively:	"Petitioners"
The Chase National Bank of the City of New York, Trustee, when referred to alone:	"Chase"
Citizens Gas Company of Indianapolis when referred to alone:	"Citizens Gas"
The Indianapolis Gas Company when referred to alone:	"Indianapolis Gas"
When Chase, Citizens Gas and Indianapolis Gas are referred to collectively:	"Respondents"
The Ninety-nine year lease of September 30, 1913, between The Indianapolis Gas Company, Lessor, and Citizens Gas Company, Lessee:	"99 year lease"
Circuit Court of Appeals for the Seventh Circuit:	"Circuit Court of of Appeals."

NOTE: This brief of City of Indianapolis, *et al.*, is submitted for all four cases, viz: 421 and 422, in which writs of certiorari were granted petitioners, and 423 and 424 in which writs of certiorari were granted Chase on its cross-petition.

In the Supreme Court of the United States

OCTOBER TERM, 1940.

CITY OF INDIANAPOLIS, *et al.*,
Petitioners,
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THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., *et al.*,
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Nos. 421-422.

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CITIZENS GAS COMPANY OF INDIANAPOLIS, *et al.*,
Respondents.
Nos. 423-424.

BRIEF OF CITY OF INDIANAPOLIS, ET AL. PETITIONERS AND CROSS-RESPONDENTS.

THE OPINIONS BELOW.

The District Court in 1937 dismissed Chase's bill of complaint for want of jurisdiction. No written opinion was filed or given. (R. 271.) An appeal from this ruling was taken by Chase. The majority opinion of the Circuit Court of Appeals which reversed the lower court is reported in 96 F. 2d 363-368. (R. 285-292.) The dissenting opinion appears in 96 F. 2d 368. (R. 293.)

A petition for rehearing was overruled without opinion, and this Court denied certiorari. (305 U. S. 600, 83 L. ed. 381.)

A trial was then had in the District Court on the merits in respect of a portion of the case.

The District Court ordered that evidence should be heard upon the issues as to whether the lease is binding upon and enforceable against the City "with the one exception that evidence shall not be heard therewith but shall be deferred on one certain reason assigned by the City of Indianapolis by its answer, for claimed unenforceability of such lease against it or its said property, viz: that the City as successor trustee of a certain public charitable trust in property of the Citizens Gas Company of Indianapolis had the right as such successor trustee to refuse and reject an assignment of such lease on the ground that such lease was burdensome and not advantageous to such trust * * *." (II R. 321, 322.) No objection or exception was made or taken by any party. The memorandum opinion of the District Court on that portion of the merits determined is unreported, but appears in the record at pages 1122 to 1159. Chase appealed; Indianapolis Gas cross-appealed. The opinion of the Circuit Court of Appeals reversing the lower court is reported in 113 F. 2d 217-232. (IV R. 1281-1306.) The Circuit Court of Appeals amended its opinion in certain particulars after the opinion was first filed. (IV R. 1335.) No written opinion was given or filed in denying petitioners' petition for rehearing addressed to the opinion of the Circuit Court of Appeals as modified. (IV R. 1405.) Certiorari was granted by this Court on October 28, 1940.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229. (43 Stat. 938; 23 U. S. C. A. Sec. 347.)

Writs of certiorari were granted in each of the cases by this Court on October 28, 1940.

STATEMENT OF THE CASE.

This is a suit in equity commenced by Chase against the City and the individual members of its Board of Trustees and Directors for Utilities impleaded with Indianapolis Gas and Citizens Gas.

Chase as trustee (I R. 4) under a mortgage to secure bonds executed (I R. 4) sought as its main relief a declaration that a lease for 99 years (I R. 5, 6, 21) executed by Indianapolis Gas, lessor, to Citizens Gas, lessee, was binding upon and enforceable against the City, as successor trustee of a public charitable trust (I R. 20, 21, 22), as a claimed assignee of the lease (I R. 16, 17) and allegedly because of laches (I R. 12), estoppel (I R. 18, 19) and *res adjudicata*. (I R. 8, 9, 10, 11.)

Chase also sought an injunction requiring the City to make payments and perform covenants under the lease (I R. 21, 306); judgment for unpaid interest and interest on overdue interest on the bonds (I R. 21, 301), together with attorney's fees and expenses. (I R. 27.)

Among other things, Chase asked as relief against Indianapolis Gas, that the lease be declared valid, and that pending final hearing, Indianapolis Gas be enjoined from attempting to impair the lease as security. No action in respect of the injunction was taken by Chase except the request made in its complaint. (I R. 21.)

In earlier litigation, the property owned by Citizens Gas was held to be the corpus of a public charitable trust created for the benefit of the gas users of the City.[1]

The historical background of the public charitable trust which is involved in this litigation is as follows:[1]

In 1886 certain public spirited citizens of Indianapolis organized Consumers Gas Trust Company to furnish natural gas to the City and its inhabitants.

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[1] *Todd v. Citizens Gas Company*, 46 F. 2d 855.

The articles of association of the company provided that after the certificate-holders[2] had been paid the amount of their stock subscriptions with interest at 8% per annum and after payment of all the company's indebtedness "it shall be the duty of the directors * * * to reduce the price of gas so that * * * (it) shall thereafter be supplied to consumers at cost."

The Consumers' Company conducted its business until 1904 when natural gas failed. Certificate-holders had then received 95% of the amount of their subscriptions plus 8% dividends per annum. The officers then proposed to pay the certificate-holders the remaining 5% and thereafter engage in the manufacture of *artificial gas and distribute it at cost.*

Byron C. Quinby, a stockholder, brought suit in the Federal Court at Indianapolis (February 1904) which was appealed to and decided by the Circuit Court of Appeals.[3]

The direct result of the *Quinby* decision was that the gas users of the City could not obtain from the Consumers' Company a supply of gas at cost, the City lost any beneficial interest in the property, and the stockholders of the Consumers' Company who had received a return of 95% of their investment owned the entire beneficial interest in the property.

This situation led directly to the creation of the public charitable trust known as Citizens Gas Company, one of the

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[2] The stock was issued to voting trustees and certificates of beneficial ownership issued by the trustees to the subscribers.

[3] *Consumers Gas Trust Company vs. Quinby* (C. C. A. 7) 137 Fed. 882. The Court held: (1) the company was organized for the sole purpose of furnishing natural gas to the city and its inhabitants; (2) no public charitable trust had been created in the property; (3) the manufacture and sale of artificial gas was *ultra vires* the corporation; and (4) that since the supply of natural gas had failed, the stockholders were entitled to have the corporate business wound up and the net assets distributed to them.

purposes of which was to furnish competition to the then existing privately owned property of Indianapolis Gas.[4]

The plan of the public charitable trust for the benefit of the gas users of the city was carried forward in two steps. The first was the franchise contract of August 25, 1905. (I R. 81-116.) This franchise contract was the basis of the public charitable trust and outlined the plan of its creation.

The individuals named in the franchise were not authorized to exercise any rights in the city streets. There was no grant of franchise, license or permit to them. It was required that before a gram should become effective, that a corporation be organized which, by declaration in its charter, should fix the rights of its stockholders and of the city in the property to be acquired to carry out the purpose of the grant. (I R. 82.)

There was no grant of rights in the city streets except to a corporation which, by voluntary act of all its stockholders, should declare, in advance, that the property acquired with the money contributed by them should be held under the obligation of the corporation to convey it to the city when the contributions with interest had been returned and thereupon the rights of the stockholders would be extinguished. (I R. 84, 99).

This led to the next step in the plan: the incorporation of the Citizens Gas Company.

It was a quasi-public corporation. Its sole purpose was to act as trustee of a public charitable trust. It had no power or authority to act otherwise. (I R. 82-85, 93.)

The Articles of Incorporation provided that all of the capital stock of the company should be held by trustees (I R. 96, 113), one of whom should be named by the mayor

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[4] The purpose of all parties in the negotiation leading up to the passage of the franchise ordinance (I R. 81-116) of August 25, 1905, by the Board of Public Works and its ratification by the City Council and the organization of Citizens Gas was to avoid the mistakes which had resulted in the *Quinby* decision.

of Indianapolis. (I R. 96, 113.) They were given full, complete and irrevocable power during the life of the corporation to hold and vote the stock as though they were the owners of it. (I R. 96.) They were to name and select members of the board of directors. (I R. 98.)

Certificates of beneficial interest were issued to the owners of the stock for their shares. These certificates were assignable and entitled the holders to all dividends paid on the shares. (I R. 97.) Upon the expiration of 25 years, and when the certificate-holders had received an amount equal to the par value of their shares with certain specified interest, the certificates were to be deemed fully paid and canceled and the trustees and directors were then to convey the physical property to the City to be held and operated by it for the benefit of its gas users. (I R. 98.)

All the rights, property and assets acquired by Citizens Gas were acquired for the benefit of the gas users subject only to a charge in favor of the stockholders, creditors and others having valid claims against the corporation or its property. (I R. 98, 99.)

At all times from its creation in 1906, Citizens Gas was the initial trustee of a public charitable trust for the benefit of the gas users of the City.

On September 30, 1913, a lease was executed by Indianapolis Gas, lessor, to Citizens Gas, lessee for a term of 99 years (I R. 51-80, 55, 77), or if for any reason the lease should be held invalid because of the length of the term then for the longest term for which the parties might lawfully contract. (I R. 80.)

As rental Citizens Gas was to pay until 2012, the end of the term, sums equal to (1) 5% interest on the outstanding bonds (being the bonds for which Chase is trustee (I R. 69, 79)) which now amount to $6,881,000; (2) 6% on the par value of the common stock of which there is outstanding $2,000,000; (3) all taxes for which Indianapolis Gas would become liable; and (4) certain additional miscellaneous expenditures.

The payments so made by Citizens Gas from 1913 to September 9, 1935, aggregated more than $11,500,000 and were at the average annual rate of more than $520,000. (II R. 669, offered II R. 327.)

Shortly prior to the execution of the lease in September, 1913, the Shively-Spencer Act which created the Public Service Commission of Indiana was enacted and became effective.[5]

This act required that leases, such as that between Indianapolis Gas and Citizens Gas, be submitted to the Commission for its approval. This was done upon a joint petition of both lessor and lessee, and the lease was approved.

Frank S. Fishback, a stockholder of Citizens Gas, intervened before the Public Service Commission and later commenced an action in the Marion Superior Court to set aside the Commission's order approving the lease. From an adverse judgment Fishback appealed to the Supreme Court of Indiana which dismissed the case because the appeal had not been perfected in time.[6]

On March 20, 1929,[7] the City, by resolution of its Board of Public Works (II R. 670, offered II R. 327) declared its intention to take over the right, title, interest and ownership which was then held by Citizens Gas, and to

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[5] Chapter 76, Acts of Indiana General Assembly, 1913, p. 167.

[6] *Fishback vs. Public Service Commission*, 193 Ind. 282. Chase bases in part its claim of *res adjudicata* on the Commission's action approving the lease and on the *Fishback* case. Both are dealt with more fully in this brief in the argument. (*Infra*, pp. 67, 72.)

[7] This was nine days after Chapter 77, Acts of the Indiana General Assembly 1929, p. 252, became effective by which the Department of Utilities of the City of Indianapolis was created and by which the Board of Directors for Utilities was given *exclusive* control over the gas plant and property of the department.

exercise its rights as successor trustee of the public charitable trust.

Newton Todd, a stockholder of Citizens Gas, on April 30, 1929, commenced an action in the Federal District Court at Indianapolis. (Clause 13, II R. 628, 629, offered II R. 327.) Citizens Gas, the City, and the members of its Board of Public Works were among the defendants. Todd sought to enjoin Citizens Gas and its co-defendants from carrying into effect the resolutions theretofore adopted in which the existence of the public charitable trust had been recognized and the right of the City acknowledged to take over the property of Citizens Gas as trustee, pursuant to the terms of the franchise.[8]

While the *Todd* case was still pending, Allen G. Williams, on March 12, 1930, filed suit in the Superior Court of Marion County. (Clause 14, II R. 630, 631, offered II R. 327.) Having been decided against plaintiff the case was appealed.[9]

The Indiana Supreme Court said respecting the nature of this suit that it was:

"a suit by appellant Williams to establish a trust; to quiet title to property of the trust estate; to recover di-

---

[8] There was in issue in the *Todd* case for the first time the question of whether or not a public charitable trust was created by the franchise and related instruments executed in 1905. A public charitable trust was held to exist. *Todd v. Citizens Gas*, 46 F. 2d 855. Chase also relies on the *Todd* case as being *res adjudicata*. (I R. 13.) Further reference to this case is made hereafter in this brief. (*Infra*, p. 75.)

About two weeks after the *Todd* case was filed, one Cotter and others commenced an action in the Federal District Court. Chase apparently places some reliance on the *Cotter* case as *res adjudicata* (Br. pp. 12, 13, 14) but Chase did not plead the *Cotter* case.

Chase also places reliance on the City's answer in the *Cotter* case. (Br. pp. 103, 124, 125.) The validity of the lease was not in issue there and the answer was unverified and signed only by counsel. (*Infra*, p. 79.)

[9] *Williams v. Citizens Gas Co.*, 206 Ind. 448. By agreement the *Williams* case was not tried until final decision of the *Todd* case. (Clause 13 f II R. 629, 630, offered II R. 327.)

verted assets of the trust estate; to recapture the trust and its property from delinquent and insolvent trustees and sequester the same with receiverships; to administer the trust during an emergency and at the end of the emergency turn over the trust and its property to its lawful beneficiaries."[10]

On July 23, 1935, the City, through its attorneys, notified Indianapolis Gas that various provisions of the lease were inappropriate and burdensome, that it was not binding on the City but that the City would be willing to enter into negotiations looking towards a revision of the lease. (P X 58, III R. 836, offered II R. 329.) See also City's Stip. X 68, III R. 970.

No answer having been received to the July 23 letter, counsel for the City wrote Indianapolis Gas again on August 31, asking if the City was to be permitted temporarily to use the Indianapolis Gas property for six months after the take-over. (P X 59, III R. 836, offered II R. 329.)

On September 30, 1935 Indianapolis Gas agreed to make an arrangement for temporary use. (P X 66, III R. 838, offered II R. 329.) (Stip. X 65, III R. 969, offered II R. 434.)

On August 27, 1935, Mr. William Sparks, one of the attorneys for Citizens Gas, was advised that the City would not accept an assignment of the lease between Indianapolis Gas and Citizens Gas. On September 9, 1935, Citizens Gas tendered to the City four instruments of conveyance:

1. Deed of conveyance of real estate. (P X Stip. 55, III R. 833, offered II R. 327.)

2. Assignment of a lease of office space in the Majestic Building wherein Citizens Gas maintained offices. (P X Stip. 56, III R. 835, offered II R. 327.)

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[10] 206 Ind. 448, 450. The *Williams* case is relied upon by Chase as *res adjudicata*. (I R. 14.) (Br. pp. 74-90. A full discussion of the *Williams* case appears in the argument in this brief.

3. A conveyance of the personal property owned by Citizens Gas. (Ex. E to complaint, I R. 122, 126, offered II R. 327.)

4. An instrument purporting to assign the ninety-nine year lease between Indianapolis Gas, Lessor, and Citizens Gas, Lessee. (Exhibit F to complaint, I R. 127, 129, offered II R. 327.)

At the time of the delivery of the four instruments to a representative of the City (II R. 467), there was delivered to Mr. Sparks, as the attorney for Citizens Gas, a rejection of the ninety-nine year lease signed by Mr. Dithmer as President of the Board of Directors, for the Department of Utilities, together with a certified copy of a resolution of the Board of Directors rejecting the lease. (II R. 468.)[11] Also on September 9, 1935, the rejection of the lease was served on William J. Yule, Secretary of Indianapolis Gas, together with a copy of the resolution of the Board of Directors rejecting the assignment of the lease, and a resolution for the temporary use of the property of Indianapolis Gas. (II R. 423, 463; III R. 965.)

There was at the same time served on Mr. Sparks a resolution for the temporary use of the property of Indianapolis Gas which was adopted by the Board of Directors on September 9, 1935. (Exhibit C to City's answer and counterclaim. I R. 200-204.)

The action of the Board of Directors rejecting the lease was ratified by an ordinance of the common council of the City. (III R. 1017, 1018, offered II R. 429.)

On March 2, 1936, a letter from the Department of Utilities signed by the president of the Board of Directors and accepted by Indianapolis Gas, extended the temporary use agreement of September 9, 1935. (I R. 205, 206, 207.)

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[11] The resolution for rejection of the lease is Exhibit G to the bill of complaint and has, as a part thereof, the rejection handed to Citizens Gas. (I R. 130.) The tendered assignment of the lease was recorded at the instance of Citizens Gas. (III R. 1041, offered II R. 432.)

The March 2, 1936, agreement provided that the City would pay into escrow a sum of money equal to the semi-annual instalment of interest due on Indianapolis Gas bonds and charges of the trustee for disbursements. Also that all Federal income taxes on money paid by Citizens Gas to Indianapolis Gas in 1935 and the State Gross Income Tax due in April 1936 would be paid by the City.

During the life of the agreement the City agreed to deposit in escrow, and has so deposited, a sum of money equal to each semi-annual instalment of interest on Indianapolis Gas bonds and dividends on its stock.

The agreement then provided:

> "It is understood that the payments referred to, including the deposits made with the escrow, *are made without prejudice to our position or rights and that we may continue to operate the plant and equipment covered by said lease of September 30, 1913, until the present controversy is adjusted or finally terminated by a decree of Court, without such operation or such payments or the execution of this agreement constituting an admission on our part that said lease of September 30, 1913, is valid or binding on the City of Indianapolis or said Department of Utilities of said City of Indianapolis, or any of its or their property.*" (Our emphasis.) (I R. 207.)

At a meeting held on March 11, 1936, Chase was advised that the agreement of March 2, 1936, had been made between the Indianapolis Gas and the City. (III R. 992, offered II R. 426.) To December 31, 1938, the City had deposited $1,217,875 in the escrow fund for the benefit of the bondholders and stockholders of Indianapolis Gas if the lease should be held valid. (City's X 10, III R. 1020, 1031, offered II R. 430.)

On June 8, 1936, Chase as Trustee under a mortgage to secure bonds executed by Indianapolis Gas (I R. 4), filed its complaint in the United States District Court for the Southern District of Indiana, Indianapolis Division. The main relief asked for by Chase was a request by it for a

declaration that the ninety-nine year lease (I R. 5, 6, 21) executed by Indianapolis Gas, Lessor, to Citizens Gas, Lessee, on September 30, 1913 (I R. 5) was binding upon and enforceable against the City as successor trustee of a public charitable trust (I R. 20, 21, 22) as a claimed assignee of the lease. (I R. 16, 17.) The bill does not allege that the lease is valid, but seeks a declaration of the binding effect on the City of such lease on the grounds of laches (I R. 12), of estoppel (I R. 18, 19) and *res adjudicata.* (I R. 8, 9, 10 and 11.)

Chase also sought to obtain an injunction requiring the City to make the payments and perform the covenants contained in the lease (I R. 21, 306); that Indianapolis Gas be enjoined from doing anything to impair or rescind the lease (I R. 21); that the City be made to pay direct to Chase or Clerk of the Court all interest payments as they become due (I R. 21); that a judgment be entered for all unpaid interest and interest on interest (I R. 21); that reasonable expenses and attorney's fees of Chase be determined and judgment given therefor. (I R. 21, 22.) By amendment to its bill Chase asked that the standby agreement of March 2, 1936 (I R. 295, 261, offered II R. 327), between the City and Indianapolis Gas be held not binding on Chase and that the escrowed fund, or so much as represents unpaid interest with interest on interest, is the property of the Indianapolis Gas bondholders. (I R. 260.) By a second amendment and supplement (II R. 296-306) Chase asked judgment for all unpaid interest, damages and expenses resulting from the alleged failure to make replacements (II R. 301); for all rents, issues and profits from September 9, 1935; that Indianapolis Gas and Citizens Gas apply to all payments of any judgments entered against them all property, debts, equitable rights, etc. which either had (II R. 302-306); that the order of liability among the defendants be determined and that Indianapolis Gas and Citizens Gas be enjoined from selling Indianapolis Gas bonds which each held. (II R. 306.)

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

The United States Circuit Court of Appeals for the Seventh Circuit erred in each of the following particulars:

1. In holding that defendant Indianapolis Gas should not be realigned as a party plaintiff with Chase for the reason that Chase and Indianapolis Gas were in accord on the principal controversy, against the City, although Chase and Indianapolis Gas (but not the City) were adverse in attitude on subsidiary and dependent issues.

2. In holding that the attitude of the parties on subsidiary and dependent issues prevents their realignment on the major and substantial issue, in order to test the jurisdiction of the court.

3. In directing the entry of a judgment against the City, when the City had not had its day in court on the question of the burdensome character of the lease of September 30, 1913. This was a denial of due process of law in violation of the Fifth Amendment and the Fourteenth Amendment and each of them to the Constitution of the United States.

The requirements of due process are not satisfied unless a party has the right in a trial court to a determination of all issues of fact and law. This requirement has been denied the City.

4. In refusing to follow the rule announced by this Court in *Erie Railroad Company v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188, in that the Circuit Court of Appeals refused to follow the controlling Indiana decisions on (a) the question of estoppel of a municipal corporation, (b) the doctrine of *res adjudicata*, (c) the question of the denial of all powers granted by a municipal corporation except those expressly granted and (d) the question of the violation of Sections 85 and 254

of the acts of the Indiana General Assembly of 1905 prohibiting the execution of any such lease as that here involved for a longer period than 25 years and even for such a period without proper municipal sanction.

5. In holding a municipal corporation liable for 77 years for future payments of more than $45,000,000 under a lease solely because of the implied power of the initial trustee to execute the same although the Indiana law is that all powers granted by a municipal corporation must be strictly construed against the grantee and nothing passes by implication. When the lease was originally executed, the City was not a party to it, did not sign or execute it, is not named as a party obligated, is not an assignee although an assignment was tendered, but was rejected, and no municipal authority has ever affirmed, ratified or approved the lease. Therefore the lease is invalid and unenforceable against the City.

SUMMARY OF ARGUMENT.

I.

REALIGNMENT TO DETERMINE JURISDICTION.

Indianapolis Gas should have been realigned as a party plaintiff with Chase for the reason that Chase and Indianapolis Gas were in accord on the principal controversy against the City although Chase and Indianapolis Gas (but not the City) were adverse in attitude on subsidiary and dependent issues.

The Circuit Court of Appeals also erred in holding that before such realignment may be required, the parties must be in substantial accord upon all issues presented, and that it is not sufficient that they merely be in accord upon the main issue or some of the issues.

In its opinion of June 6, 1940, as modified, the Circuit Court of Appeals held for the first time that Chase was entitled to a coercive judgment enforceable in the following order:

> (1) Against the City as successor trustee and the trust property; (2) against Citizens Gas; (3) against Indianapolis Gas.

Under the judgment ordered entered, the City will be required to, and the evidence shows that the City is abundantly able to, pay the entire judgment. Indianapolis Gas will therefore be wholly insulated from any liability.

The result of the decision of the Circuit Court of Appeals is that a judgment has been ordered entered which is equally beneficial to Chase and to Indianapolis Gas and which amounts in substance not to a judgment against Indianapolis Gas but one in its favor. The actual position taken on the record by the parties is:

Chase asserts that the lease is binding against the City. Indianapolis Gas likewise asserts the lease is binding against the City. The City denies the lease is enforceable against it.

The attitude of the respective parties toward the actual and substantial controversy should determine whether realignment shall take place for the purpose of testing the jurisdiction of the Court, irrespective of the attitude of the parties toward subsidiary and minor issues.

The arrangement of the parties is merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist. (Br. p. 22.)

II.

DUE PROCESS OF LAW.

The Circuit Court of Appeals erred in directing the entry of a judgment against the City when the City had not had its day in court on the question of the burdensome character of the lease of September 30, 1913. This was a denial to the City of due process of law in violation of the Fifth Amendment to the Constitution of the United States.

In its counterclaim the City alleged that the lease was burdensome upon the City and the property of the public charitable trust, and for that reason was a lease which the initial trustee had no power to make, especially in view of the fact that there was a definitely fixed date for the termination of its trusteeship.

The City alleged that among the burdensome provisions of the lease were the following:

(a) The payment of annual rent in a sum largely exceeding a fair return on the fair value of the property of Indianapolis Gas;

(b) The requirement of the lease that the lessee should, during the entire term of the lease, refinance the bond issue of Indianapolis Gas in the principal amount of $6,881,000, and that if the bonds were to sell below par, to pay the difference to Indianapolis Gas;

(c) A requirement in the lease penalizing the lessee in the event that it reduce the price of gas. The agreement provided for the increase in the annual rent of $10,000 a

year when gas was sold at more than 45¢ and less than 50¢ a thousand cubic feet, and an additional increase of $5,000 a year when gas was sold at 45¢ or less per thousand cubic feet. (I R. 186.)

Chase after having unsuccessfully moved to strike out the averments of burdensomeness, then denied them. (I R. 214.) The issue of the burdensome character of the lease was tendered by the City and denied by Chase, and thus was presented for determination.

The District Court entered an order reserving the burdensome character of the lease for future trial, and at the time the order was entered there was no objection or exception made or taken by any party. The Circuit Court of Appeals, among other things, decided that "in making a long term lease a trustee is under a duty to act with prudence. If a trustee makes a lease which is unreasonable under the circumstances, he thereby commits a breach of trust. For this a trustee incurs liability to the beneficiaries who, in addition, may have such lease set aside * * *."

The court also decided, among other things, that the ninety-nine year lease is valid; that the lease binds the City as successor trustee and the trust property; that the leasehold interest is a part of the trust res, and that the City has accepted the trust res.

It is clear from the opinion of the Circuit Court of Appeals that the issue of burdensomeness on which the City has had no opportunity to be heard either on the question of fact or law, and which was expressly reserved by the trial court for future determination, was decided against the City by the Circuit Court of Appeals.

Whether the cases relied upon by Chase were *res adjudicata* of the burdensomeness of the lease was under the Indiana decisions a question of fact,[12] and the City was entitled to a trial and findings by the District Court upon which the District Court's decision could be reviewed. No

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[12] There are decisions in other jurisdictions which hold that the question of *res adjudicata* is a mixed question of law and fact.

hearing was had on the issue of burdensomeness, and no findings were made by the District Court.

In the instant case the requirements of due process are satisfied only by a notice, an opportunity to be heard and a hearing in the trial court on every question of law and fact including the reserved issue of burdensomeness.

If the power exists in the Circuit Court of Appeals to deny to the City due process of law, as it has done, then the judicial department of the Government, which sits to uphold the Constitution, is the only department possessing the power to deny a hearing to litigants. If such authority exists in the courts, then in consequence of their establishment to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent. Judicial proceedings cannot be valid unless they proceed upon inquiry and render judgment only after trial. In the instant case there was no inquiry. There was no trial on the reserved issue of burdensomeness.

A hearing in the trial court is a matter of right. The hearing guaranteed by the due process clause cannot be in an appellate tribunal. (Br. p. 32.)

III.

LEASE UNENFORCEABLE AGAINST THE CITY.

The facts of this case lend no support to any of Chase's contentions that the City is bound by the terms of the lease. The City is not a party to the lease; it did not sign nor execute it; it is not named as a party obligated; it was not an assignee of the lease, an assignment having been tendered and rejected; and no competent authority having the right to deal with the subject-matter ever authorized its execution, agreed to it, affirmed it or ratified it.

The lease in question here was executed in violation of Sections 85 and 254 of Chapter 129 of the Acts of the

General Assembly of Indiana, 1905. These Sections expressly limit the making of such a contract for the furnishing to a City or its inhabitants heat or light for a term longer than twenty-five years.

These same statutes also require that any contract for heat and light shall be first agreed to by the Board of Public Works and thereafter there must be an ordinance of the Common Council approving it and affirming it. The lease in question here is for a term of ninety-nine years and it was neither agreed to by the Board of Public Works nor approved nor affirmed by an ordinance of the Common Council.

These two sections of the Indiana statutes indicate and define the public policy of the State to be against such contracts, such as is the lease in question here. Such contracts in violation of the public policy of the State are void and cannot be ratified.

There was neither express nor implied power in the initial trustee to execute a lease which would be binding upon the successor trustee.

The Circuit Court of Appeals held that the City was liable for 77 years for future payments aggregating more than $45,000,000 under a lease solely because of the implied power of the initial trustee to execute the same.

When the lease was originally executed, the City was not a party to it; did not sign or execute it; is not named as a party obligated; is not an assignee although an assignment was tendered but was rejected; and there was no municipal authority affirming, ratifying or approving the lease. The rejection of the lease by the Department of Utilities was ratified by an ordinance of the Common Council of the City. (III R. 1017, offered II R. 429.) The lease is clearly invalid and unenforceable against the City.

The Circuit Court of Appeals said:

> "The power to execute this 99 years lease was authorized by the Commission in 1913." (113 F. 2d 217, 221, IV R. 1285.)

The Public Service Commission, to which the Court refers, had no power to determine the validity of the lease and could bind no one on that proposition.

The Circuit Court of Appeals also held that (p. 227) (IV R. 1297):

> "The terms of the trust neither expressly conferred upon nor expressly denied the trustee the power to acquire a non-freehold interest in property. In truth the terms of the trust remain silent on the subject of trustee's powers. The only applicable language relates to duties and not to powers."

Thus if the terms of the trust remain silent on the trustee's powers, as is the fact, the power to make the lease cannot be implied. This is true because this Court has so held and the Indiana Supreme Court has so held. Both courts have said that grants of rights and privileges by a state or a municipality are strictly construed, and whatever is not unequivocally granted, is withheld; nothing is taken by implication against the public except what necessarily flows from the nature of the terms of the grant.

The trust instruments contain detailed instructions respecting many matters of lesser importance than the power to make this lease, such as the retirement of stock; the power to purchase Consumers Gas Trust mains; the laying of pipes; the materials to be used; the quality of the gas; the refilling of excavations; and provided in detail the order in which the earnings should be used and the duties of the officers. (I R. 84-103.) It was also provided that any member of the board of trustees could be removed upon a showing that he was an employee of any company organized for the purpose of manufacturing or delivering gas to consumers in Indianapolis, or that he held any securities or capital stock of such company.

Trustees such as was Citizens Gas, are required to act with great fidelity toward those who are the beneficiaries of the trust.

To assume implied power is inconsistent with the obligations of Citizens Gas under its contract with the City.

IV.

RULE OF ERIE RAILROAD v. TOMPKINS.

The Circuit Court of Appeals has erred in refusing to follow the rule announced by this Court in *Erie Railroad v. Tompkins*, in the following particulars:

1. In refusing to follow the Indiana decisions which hold

(a) That the doctrine of estoppel has no application where the other party was not influenced by the acts pleaded as an estoppel.

There is no proof in the record that any present bondholder of Indianapolis Gas bonds (of which bonds Chase is Trustee) knew of, relied on, or was influenced by any acts of the City.

(b) An estoppel against a municipal corporation cannot be founded upon acts done by municipal officers in excess of their authority.

2. In refusing to follow the Indiana decisions on the question of *res adjudicata* which announced the Indiana rule to be that the doctrine of former adjudication may not be invoked by any party unless he has tendered to the party against whom the doctrine is invoked, an issue to which the latter could have demurred or pleaded. It must also appear that the thing demanded was the same. It must also appear that the cause of action is between the same parties and found for one of them in the same quality and, where, as here, the causes of action are different it must appear that the question was actually litigated between the parties. The benefit derived from a verdict or decision must be mutual.

ARGUMENT.

I.

JURISDICTION.

The first question presented is one of Federal jurisdiction. Jurisdiction is asserted by Chase to exist on the sole ground of diversity of citizenship.

This suit was brought by Chase as mortgagee i.e. trustee under a deed of trust securing an issue of bonds of Indianapolis Gas, one of the defendants below. Chase sought a decree declaring that the ninety-nine year lease between Indianapolis Gas, lessor, and Citizens Gas, lessee, was binding upon and enforceable against the City and the individual members of the Boards of Trustees and Directors for Utilities on the grounds of alleged laches, estoppel and *res adjudicata* and as a claimed assignee of Citizens Gas. The bill asked a temporary injunction requiring the City to make the payments and perform the covenants contained in the lease, and also sought a judgment for amounts alleged to be unpaid under the lease; that certain escrowed money be declared the property of the bondholders; a judgment for damages and that all rents and profits from September 9, 1935 be given Chase.

The City answered that Indianapolis Gas was an indispensable party to the controversy, and should be aligned in interest with Chase; an alignment which would destroy the diversity of citizenship and require dismissal of the bill.[13]

It is clear that if Indianapolis Gas were not a party to this litigation, it would be free to relitigate against the City and the other parties the questions involved here. The

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[13] A hearing was had pursuant to the request of the City under Equity Rule No. 29. The District Court dismissed the bill for want of jurisdiction. The majority opinion of the Circuit Court of Appeals reversed the District Court and certiorari was denied. 305 U. S. 606.

Circuit Court of Appeals held, and correctly, that Indianapolis Gas was an indispensable party.

Chase National Bank vs. Citizens Gas Company, 96 F. 2d, 363.

The real and controlling controversy in this case is whether the pleaded lease has become enforceable against the City. No other cause of action is alleged against the City except claims for damages which are dependent upon the determination of the validity of the lease. By taking the most favorable view to Chase of its complaint as amended and supplemented, the subsidiary controversies between it and Indianapolis Gas, which Chase claims to exist, are as follows:

Chase asks an injunction to preserve and protect the property (I R. 4); that the lease be declared the property of Chase and part of the security for the performance of the obligations of Indianapolis Gas under the mortgage; that Indianapolis Gas be enjoined from making any contract or agreement or doing any act which will impair, rescind, or modify the lease to Citizens Gas or to alter the obligations of the lessee thereunder. (I R. 21.)

By its amendment and supplement Chase asked that the agreement between the City and Indianapolis Gas, dated March 2, 1936, whereby the City agreed to temporarily operate the property of Indianapolis Gas and to pay therefor a sum equal to the rental payments agreed to be paid by Citizens Gas but without prejudice to the City's rights to claim that the lease was invalid, did not bind Chase (I R. 259); that the fund deposited with the Indiana National Bank in escrow under the agreement of March 2, 1936, or that part thereof that represented the interest payable under the deed of trust, together with interest on interest, be declared the property of the bondholders of Indianapolis Gas. (I R. 260.)

By its second amendment and supplement to its bill, Chase asked that the Indianapolis Gas bonds in the amount

of $120,000 held by Indianapolis Gas, should not be permitted to participate in any distribution of funds recovered in the case until all other bondholders were paid in full and all claims of Chase paid, satisfied and discharged; that Indianapolis Gas and the other defendants are liable to Chase for all losses, damages, costs, charges and expenses resulting from the alleged failure to make renewals, repairs, replacements and extensions necessary to keep the leased premises in good order and repair (II R. 300); that the Court give judgment to Chase against Indianapolis Gas and the other defendants for all the unpaid interest, together with interest thereon (I R. 391); that Indianapolis Gas apply to the payment of any and all judgments entered against it in this cause all of its property, debts, choses in action, and equitable interests which belong to it or held in trust for it, which property was to include, but not be limited to, the $120,000 Indianapolis Gas bonds; any rights of Indianapolis Gas under the lease; any rights of Indianapolis Gas growing out of the transfer of all the property of Citizens Gas to the City; all the rights of Indianapolis Gas growing out of a certain indemnity agreement (Exhibit J to second amendment and supplement II R. 306) between the City and Citizens Gas; any rights of Indianapolis Gas growing out of use of its property by the City; and any right of Indianapolis Gas to the rents, proceeds, etc. from the leased property. (II R. 302, 303.) Chase also asked that Indianapolis Gas and the City be enjoined from selling or in any way disposing of or encumbering the Indianapolis Gas bonds held by each of them.

In respect of the main controversy, the parties by the record contend as follows:

Citizens Gas says in its answer (I R. 230) that whether or not the City is subject to the lease, it has fully and completely carried out its duties and obligations. (I R. 221, 222.)

City contends that the lease is invalid and unenforceable against it. (I R. 141-208, 209-212, 266-269.)

Chase maintains that the lease is valid and binding against the City. (I R. 3, 20-21.)

Indianapolis Gas maintains that the lease is valid and binding against the City. (I R. 137, 138, 215, 219.)

Chase and Indianapolis Gas have a similar and identical interest against the City on the question of the validity of the lease.

Chase says (br. p. 40):

> "The plaintiff has a bona fide claim for unpaid interest against Indianapolis Gas, Citizens Gas and the City * * *."

If the lease is invalid, it has no such claim against the City. If the lease is valid, Indianapolis Gas would have a claim against the City under the lease and could have such claim satisfied out of the escrowed fund.[11]

It is of interest to both Chase and Indianapolis Gas that the lease be declared binding and enforceable against the City. It is against the interest of each that such lease be declared invalid and unenforceable against the City.

The Circuit Court of Appeals held in its majority opinion that Indianapolis Gas was an indispensable party to the controversy. (II R. 288.) The Court then said:

> "The rule seems to be that before such realignment may be required, the parties must be in substantial accord upon *all issues* presented * * *. It is not sufficient that they merely be in accord upon one issue or some of the issues." (Our emphasis.) (II R. 291.)
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> *Chase National Bank, etc., et al. vs. Citizens Gas et al.*, 96 F. 2d 363, 366, 367, certiorari denied 305 U. S. 600.

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[11] An amount equal to the interest on the bonds, the dividends on the stock, and an amount equal to other payments to be made under the lease have been deposited in escrow, and on December 31, 1938, there was in such escrowed fund $1,217,875. (III R. 1020-1023; offered II R. 430.) Each month subsequent to December 31, 1938, amounts equal to 1/12 of the annual sum agreed to be paid by Citizens Gas under the lease have been accrued in the escrowed fund. (II R. 473, 474.)

For the first time the Circuit Court of Appeals in its opinion of June 6, 1940, as modified, held that Chase was entitled to a coercive judgment enforceable in the following order: (1) Against the City as successor trustee and the trust property; (2) against Citizens Gas; (3) against Indianapolis Gas. As pointed out in Foot Note 14, sums of money equal to the amounts charged as rental under the terms of the lease have been put in escrow pursuant to agreement. (I R. 205, 207, II R. 473, 474.) From the escrowed fund, together with funds arising from the operation of the property (II R. 542, 543), the City will be required to and is abundantly able to pay the entire judgment, and Indianapolis Gas will be wholly insulated from any liability.

The result of the decision of the Circuit Court of Appeals is that a judgment has been ordered entered which is equally beneficial to Chase and to Indianapolis Gas, and which amounts in substance *not to a judgment against Indianapolis Gas, but one in its favor.*

Where federal jurisdiction is wholly dependent upon diversity of citizenship, it is the duty of the court to align the parties in accordance with their interests regardless of whether they are named as plaintiffs or defendants.

In reality there is no pretense of seeking final relief against Indianapolis Gas alone in this case. Subdivision 4 (I R. 21) of the prayer of plaintiff's bill does ask that pending the hearing and final judgment, Indianapolis Gas be restrained from entering into any contract or doing any other act to rescind or modify the lease of September 30, 1913. Chase has not attempted to procure any preliminary injunction against Indianapolis Gas, and apparently is satisfied that no danger exists that Indianapolis Gas will attempt to affect any rights which it may have in the premises.

Other subsidiary relief asked by Chase against Indianapolis Gas is either dependent upon the decision of the main question, viz: the enforceability of the 99 year lease against

the City, or is such relief that by reason of the agreement of March 2, 1936, between the City and Indianapolis Gas, and by reason of the fund now held in escrow, Indianapolis Gas being third in order of liability will not be called upon to respond.

Looking at the judgment which the Circuit Court of Appeals has ordered entered (IV R. 1306), we see that the City is named as first in liability. It is not necessary to inquire if the taxing power of the City is available to pay the judgment ordered entered because the escrowed fund and the revenues of the City from the operation of the plant are available and sufficient to discharge the judgment.

The Circuit Court of Appeals has not restricted the judgment which it has ordered entered so that it may be contended that the coercive judgment is payable out of the general revenues of the City.[15] After the opinion was filed on June 6, 1940, by the Circuit Court of Appeals, the petitioners, in their petition for rehearing, pointed out to the Court that it had erred "in directing that a coercive judgment, presumably payable out of the general revenues of the City, be entered in favor of Chase, thus requiring municipal revenues raised by taxation to be applied, if necessary, in payment of rentals under a lease which had no municipal sanction and which was executed in direct violation of applicable Indiana statutes." It was also pointed out that there was no limitation in the opinion that the unpaid coupons and the interest on them, as well as the interest on the judgment, should be collectible only out of the revenues arising from the operation of the Indianapolis Gas property. (IV R. 1312.) On July 19, 1940, an amendment to the original opinion of the Circuit Court of Appeals was filed by it. (IV R. 1335.) A petition for rehearing was addressed to the opinion as amended, and again petitioners pointed out to the Court that it had erred in directing that a coercive

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[15] Clause 29 of the lease (I R. 78) provides that the parties will look solely to the corporate assets and franchises of the other for the carrying out of the obligations of the lease.

judgment presumably payable out of the general revenues of the City be entered in favor of Chase. (IV R. 1350.) No further change was made in the opinion.

With the money in the escrowed fund and the revenues from operation available all to be levied on first, it is crystal clear that Indianapolis Gas being third in order of liability, is more thoroughly insulated against execution than ever before. The Circuit Court of Appeals' opinion shows clearly that Chase and Indianapolis Gas have interests which are identical in respect of the validity of the lease, which is the main controversy.

If Indianapolis Gas be realigned according to its real interest in the dispute involved in this controversy, it is inevitably realigned with Chase. This is true because the City has now been held to be bound by the lease and required to pay the obligations of Indianapolis Gas under the mortgage. No matter what the form of the judgment may be, no one can realistically suppose that Indianapolis Gas has been harmed by the entry of this judgment or that it will be required to pay a single penny as a result of it. On the contrary, it will have obtained as a result of the decision of the Circuit Court of Appeals exactly what it sought from the commencement of this litigation: a decree requiring the City to make the payments under the lease, and as a practical proposition, exempting it from all the responsibility to Chase. The result is that Chase and Indianapolis Gas together, have maintained an action in the Federal Court where Indianapolis Gas is an indispensable party, and where the interest of Chase and Indianapolis Gas on the main controversy is a joint one.

The other subsidiary relief asked against Indianapolis Gas by Chase has either not been prosecuted beyond the allegation in the complaint and prayers, is dependent upon a decision respecting the validity of the lease, or is relief against which Indianapolis Gas is completely insulated.

The one reported decision that appears directly to involve and discuss the principle of realignment where the

parties have identical interests on the principal controversy, is *Sutton v. English*, 246 U. S. 199-204, 62 L. ed. 664. The bill of complaint in that case alleged that Moses and Mary Jane Hubbard had executed a joint will purporting to dispose of certain community property after it became the separate property of Mary Jane Hubbard; that Moses Hubbard was then insane; that certain of the defendants had procured a decree of a Texas court that a trust created under that will was valid; that Mary Jane Hubbard had purported to make a separate will disposing of the residue of her separate property to defendant Cora D. Spencer; that Mary Jane Hubbard was then insane; and the bill prayed for this relief: (1) That the joint will be declared invalid; (2) that the judgment of the Texas court with respect to said will be set aside; (3) that the will of Mary Jane Hubbard be annulled, at least with respect to Cora D. Spencer; and (4) that the community property, having thus been established to be the separate estate of Mary Jane Hubbard, and not devised by her, be partitioned among her heirs at law. Plaintiffs were all of the heirs at law of Mary Jane Hubbard except Cora D. Spencer; and though she was an heir at law of Mary Jane Hubbard, she was made a party defendant. All plaintiffs were nonresidents of Texas; and all defendants were residents of Texas. If defendant Cora D. Spencer had been made a party plaintiff, then all of the heirs at law of Mary Jane Hubbard would have been plaintiffs, but diversity of citizenship would have been destroyed. The lower court held that defendant Cora D. Spencer was united in interest with and should be aligned with plaintiffs because she was an heir at law as they were. This Court, however, Mr. Justice Pitney delivering the opinion, held that while Cora D. Spencer was interested equally with plaintiffs in the partition of the Mary Jane Hubbard property, yet such interest did not control the alignment, because before there could be any partition, there would have to be a determination that the devise to Cora D. Spencer was invalid and that the

joint will did not pass any property, and in that substantial issue, which had to be decided first, she was adversely interested to plaintiffs. The Court said (p. 204):

> "Upon this statement, it will be apparent that the court below erred in holding, as it did, that the defendant Cora D. Spencer should be treated as one of the plaintiffs and aligned with them for the purpose of determining the question of diversity of citizenship. Provided plaintiffs attained their first three objects, her interest would be the same as theirs with respect to the prayer for partition; but before this result could be reached plaintiffs must prevail as to their third object, and with respect to this her interest was altogether adverse to theirs. Therefore she was properly made a party defendant, that being her attitude towards the actual and substantial controversy."

(The bill was ultimately dismissed for want of jurisdiction on the ground that it involved a probate matter).

In the *Sutton* case the attitude of the parties toward what this Court characterized as the actual and substantial controversy determined whether there should be realignment irrespective of the attitude of the parties toward the subsidiary and dependent controversies averred in the bill.

Had the Circuit Court of Appeals followed the rule in *Sutton v. English*, it would have declared that Indianapolis Gas and Chase had an identity of interest on the main controversy respecting the enforceability of the 99 year lease against the City, and that Indianapolis Gas, being an indispensable party, and despite the existence of subsidiary and dependent controversies, should be realigned with Chase. Diversity of citizenship would thereby have been destroyed and the District Court would have had no jurisdiction.

Judge Treanor in the first appeal of this case, in a dissenting opinion (96 F. (2d) 368), pointed out that:

> "In my opinion the only substantial, and the dominating question, presented in this suit is whether the

lease is a valid and enforcible obligation against the city of Indianapolis. And as respects that question the interests of the plaintiff, as trustees of owners of bonds of the Indianapolis Gas Company, and the Indianapolis Gas Company are identical. I find nothing in the agreement of March 2, 1936, between the city and the Indianapolis Gas Company to create an adversity of interest between the plaintiff and the Indianapolis Gas Company. The terms of that agreement provided for payments by the city pending a determination of the controversy between the city and the Indianapolis Gas Company as to the enforceability of the lease against the city, and expressly provides against prejudice to the rights of the Indianapolis Gas Company respecting the lease; and in general had as its objective to safeguard against any interruption in the gas utility service and to insure the ultimate payment to the Indianapolis Gas Company of all amounts due under the lease in case the lease finally should be determined to be valid and enforceable against the city."

Perhaps no stronger evidence appears in this record of the complete unanimity of interest of Indianapolis Gas and Chase than the fact that Indianapolis Gas opposed the granting of petitioners' writs and filed a brief in opposition. Presumably Indianapolis Gas will oppose the City in seeking a reversal of the Circuit Court of Appeals.

If the interests of Chase and Indianapolis Gas were not in accord, it is difficult to understand why Indianapolis Gas wished to oppose the review by this Court of a judgment allegedly against it for more than $1,000,000 or why it would seek, if it does, to have that judgment affirmed.

After the Circuit Court of Appeals had filed its opinion of June 6, 1940, as modified, the City urged in its petition for a rehearing that Indianapolis Gas should be realigned with Chase. (IV R. 1311; IV R. 1347-1349.) Realignment of Indianapolis Gas with Chase was also urged by the City in its brief in support of its petition for rehearing before the Circuit Court of Appeals. (IV R. 1377-1381.)

Viewing the case in its entirety, we see that Chase was not mistaken when it made Indianapolis Gas a party to the suit. But making Indianapolis Gas a party defendant was not insurance that the District Court thereby acquired jurisdiction on the ground of diversity of citizenship; the sole ground on which jurisdiction was asserted by Chase to exist. By arranging the parties according to their real interest in the case, viz.: the enforceability of the 99 year lease against the City, it is clear that the interest of Indianapolis Gas is identical with the interest of Chase. Indianapolis Gas and Chase thus should be realigned as parties plaintiff. Diversity of citizenship would thus be destroyed, and the sole ground of jurisdiction of the Federal District Court would thereby be lost: Compare *City of Dawson vs. Columbia, etc. Trust Co.*, 197 U. S. 178, 181, 49 L. ed. 713, 716; *Niles-Bement-Pond Company vs. Iron Moulders Union*, 254 U. S. 77, 81, 65 L. ed. 145, 148.

II.

DUE PROCESS OF LAW.

As we shall hereafter show, (*infra* p. 43) the lease was unenforceable against the City irrespective of whether it was of a burdensome character. But in no event could the initial trustee of a public charitable trust have power or authority to execute a burdensome 99 year lease.

The Circuit Court of Appeals erred in directing the entry of a judgment against the City when the City had not had its day in court on the question of the burdensome character of the lease of September 30, 1913. This was a denial of due process of law in violation of the Fifth Amendment to the Constitution of the United States.

In its counterclaim the City alleged that the lease was burdensome upon the City and the property of the public charitable trust, and for that reason was a lease which the initial trustee had no power to make. The City alleged that among the burdensome provisions of the lease there were the following:

(a) The payment of annual rent in a sum largely exceeding a fair return on the fair value of the property of Indianapolis Gas;

(b) The requirement of the lease that the lessee should, during the entire term of the lease, refinance the bond issue of Indianapolis Gas in the principal amount of $6,881,000, and that if the bonds were to sell below par, to pay the difference to Indianapolis Gas;

(c) A requirement in the lease penalizing the lessee in the event that it reduce the price of gas. The agreement provided for the increase in the annual rent of $10,000 a year when gas was sold at more than 45c and less than 50c a thousand cubic feet, and an additional increase of $5,000 a year when gas was sold at 45c or less per thousand cubic feet. (I R. 186.)

Chase after unsuccessfully moving to strike these allegations of burdensomeness, then denied them. (I R. 214.) Thus the issue of the burdensome character of the lease was tendered by the City and denied by Chase, and thus was presented for determination.

While Chase initially contended that the burdensomeness of the lease was no defense and sought to have stricken from the answer and counterclaim of the City the allegations respecting the burdensomeness of the lease (II R. 317-319), ultimately when the order reserving the issue of burdensomeness for future trial was made, there was no objection or exception made to the reservation by any party. (II R. 321, 322.)

At a pre-trial conference on the 14th day of January, 1939 (IV R. 1320) counsel for the City presented a proposed form of order respecting the trial of certain issues. On January 16, 1939, counsel for Chase wrote a letter to the Honorable Robert C. Baltzell, Judge of the United States District Court, enclosing a proposed form of order directing a separate trial of certain claims and

causes of action. (IV R. 1320.) In the letter counsel for Chase said that:

> "With respect to the burdensomeness of the lease, we have in large part adopted Mr. Thompson's language in his form of order as presented on Saturday."

On January 18, 1939, the District Court, without objection or exception by any party, entered an order reserving the issue of the burdensome character of the lease for future trial. The relevant portions of the order provide:

> "It is ordered that evidence shall be heard upon the issues as to whether the lease dated September 30, 1913, from the Indianapolis Gas Company to the Citizens Gas Company of Indianapolis is binding upon and enforceable against the City of Indianapolis, or any of the property acquired by it from the Citizens Gas Company of Indianapolis, on September 9, 1935, or against the Indianapolis Gas Company or against Citizens Gas Company of Indianapolis and whether plaintiff is entitled to judgment for the rental under said lease or for the interest on the First Consolidated Mortgage Five Per Cent Gold Bonds of the Indianapolis Gas Company which has accrued since April 1, 1936, against any of said defendants or said property, with the one exception that evidence shall not be heard therewith but shall be deferred on one certain reason assigned by the City of Indianapolis in its answer, for claimed unenforceability of such lease against it or its said property viz., that the City as successor trustee of a certain public charitable trust in property of the Citizens Gas Company of Indianapolis had the right as such successor trustee to refuse and reject an assignment of such lease on the ground that such lease was burdensome and not advantageous to such trust; reserving the right to make such order or decree as may seem just and appropriate to the Court at any stage of this proceeding.
>
> The trial of all other issues in this case is deferred until the further order of the Court with the right reserved to refer any or all issues to a Master." (II R. 321, 322.)

The District Court, in its memorandum opinion, pointed out that only a part of the issues had been tried. It said:

> "Under the issues presented at this time for determination, the plaintiff is entitled to no money judgment against the City." (III R. 1159.)

The District Court's conclusion of law Number 10 recited

> "that the plaintiff should take nothing in this action as against the defendant City of Indianapolis under the issues presented at this time for determination." (III R. 1192.)

Counsel for Chase understood that certain issues were reserved. At the time of resting his case, Chase's counsel said:

> "Of course there are other issues to be reserved for later trial." (II R. 475.)

The Circuit Court of Appeals, in its opinion as modified, held that:

> "In making a long-term lease, a trustee is under a duty to act with prudence. If a trustee makes a lease which is unreasonable under the circumstances, he thereby commits a breach of trust. For this a trustee incurs liability to the beneficiaries who, in addition, may have such a lease set aside. This record discloses that the trustee was justified in selecting the mode of acquisition which it did. When the prudence point was urged before the Indiana Supreme Court, that Court did not find the lease in question unreasonable as to time or as to its other terms. *Williams vs. Citizens Gas, et al.*, 206 Ind. 448, 458, 460." (III R. 1300.)

The Circuit Court of Appeals also decided that:

> "Our conclusions in this case follow: (1) The ninety-nine years lease is valid; (2) the assignment of the lease did not relieve Citizens Gas from its obligations as lessee; (3) the indemnity contract is effective; (4) the lease binds the City as successor trustee and the

trust property; (5) the leasehold interest is part of the trust res; (6) the City has accepted the trust res; (7) Chase has a right to interest; (8) Chase has a right to interest on interest; and (9) Chase is entitled to interest at the rate of 5%." (III R. 1306.)

It is clear that the Circuit Court of Appeals decided the reserved issue of burdensomeness.

The City had the right to rely on the reservation of the issue of burdensomeness and to believe it would be heard on that issue, both on questions of law and fact, before judgment. The City was not bound to take in advance the precaution of putting in its evidence on this reserved issue; indeed it would have had no right to do so because of the reservation.

In *Saunders vs. Shaw, et al.*, 244 U. S. 317, 320, 61 L. ed. 1163, 1165, it was pointed out that the record did not disclose the claim of right under the 14th Amendment until the assignment of errors filed the day before the chief justice of the state granted the writ of error. It was held that ordinarily such assertion of claim of right would not be enough.

> "But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance."

In the cases at bar the issue of the burdensome character of the lease was expressly reserved and no evidence was introduced by the City or by anyone else on such issue. (II R. 321, 322.)

The City was not bound to contemplate a decision by the Circuit Court of Appeals of the reserved issue of burdensomeness before its evidence was heard. It is clear

under the decisions of this Court that the City is entitled to be heard on the questions of both law and fact on the reserved issue of burdensomeness before a decision is rendered against it.

Due process of law means notice and an opportunity to be heard, and requires that a hearing be given to a party before conclusive effect is given to a prior judgment.

In *Hovey v. Elliott*, 167 U. S. 409, 417, 418, 42 L. ed. 215, 221, it was said:

> "Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent."

In *Ohio Bell Telephone Co. v. Public Utilities Com.*, 301 U. S. 292, 304-306, 81 L. ed. 1093, 1102, it was said:

> "The right to such a hearing is one of 'the rudiments of fair play' * * * assured to every litigant by the Fourteenth Amendment as a minimal requirement. * * * There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

In *Ohio Water Works v. Ben Avon Borough*, 253 U. S. 287, 289, 64 L. ed. 908, 914, this Court had before it the com-

plaint of the Water Company that it was denied the right to a hearing.

Mr. Justice McReynolds, speaking for the Court, said that:

> "In all such cases, if the owner claims confiscation of his property will result, *the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, 14th Amendment* * *.
>
> "Plaintiff in error has not had proper opportunity for an adequate judicial hearing as to confiscation; and unless such an opportunity is now available, and can be definitely indicated by the court below in the exercise of its power finally to construe laws of the state * * * the challenged order is invalid." (Our emphasis.)

The prohibitions of the 5th Amendment to the United States Constitution are measured by the settled scope of the 14th Amendment. This Court has said:

> "that the legal import of the phrase 'due process of law' is the same in both amendments."
>
> *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 329, 45 L. ed. 879, 884.

In *Twining v. New Jersey*, 211 U. S. 78, 101, 53 L. ed. 97, 107, it was pointed out that:

> "If any different meaning of the same words as they are used in the 14th Amendment (and in the 5th Amendment), can be conceived, none has as yet appeared in a judicial decision."

That the Circuit Court of Appeals could not, commensurate with due process of law to the City, have decided the question of burdensomeness as a matter of law, is true for at least two reasons:

1. The question of *res adjudicata* is a question of fact.[16]

2. The nisi prius courts are the only courts in which litigants have a *right* to be heard.

As to the first of the above reasons, the City was entitled to make its proof at the proper time in support of its allegations that neither the order of the Public Service Commission nor the cases relied upon by Chase were *res adjudicata*.

In *Bluefield Water Works & Improvement Co. v. Public Service Commission of the State of West Virginia*, 262 U. S. 688, 692, 67 L. ed. 1176, 1181, the United States Supreme Court said that:

> "Plaintiff in error is entitled under the due process clause of the Fourteenth Amendment to the independent judgment of the Court as to *both law and facts*." (Our emphasis.)

It is settled law in Indiana by which this Court is bound, that whether matters adjudicated in a former action are one and the same as those alleged to have been decided in a former action, *is a question of fact*.

In *McSweeney v. Carney*, 72 Ind. 430, 433, an answer set up a former judgment. In passing on the answer, the Court said:

> "Whether said judgment was a full, final and complete adjudication of the matters set forth in the complaint was a question of fact."

In *Bottorff v. Wise*, 53 Ind. 32, 35, it was said:

> "In the third paragraph of the reply, it was averred that on the trial of the ejectment action between the parties to the present action, no evidence was offered or heard by the Court in relation to damages resulting from trespass or waste, and that the Court did not

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[16] There are decisions of other jurisdictions which hold that the question of *res adjudicata* is a mixed question of law and fact.

consider or determine any question with reference thereto. To this paragraph a demurrer was sustained, and this ruling is claimed to have been erroneous.

"The presumption is, that whatever matters were embraced by the issues were determined, but this presumption is not conclusive. Where a question of former adjudication is relied upon, it is competent for the other party to allege and prove by parol what questions were considered and determined by the Court or jury."

A long line of decisions by the Supreme and Appellate Courts of Indiana from which counsel have found no departure hold, first, that a judgment in a former suit is binding as *res adjudicata* in a subsequent action *only between the same parties*; second, that a former judgment is not *res adjudicata* in a subsequent action even between the same parties except when *the issues in the two cases are the same, unless* the exact point involved in the second case was actually litigated in the first suit and the facts have not changed; and third, that any judgment in a prior action cannot be successfully pleaded as a bar unless it is *mutually binding on the parties.*

In respect of the second of the above reasons it must be borne in mind that a hearing is a matter of right, and as pointed out by Mr. Justice Frankfurter in *Cobbledick v. United States*, 309 U. S. 323, 325, an appeal is a matter of grace. As also pointed out in the *Cobbledick* case (p. 325) it was not until 1889 that there was a review as of right in a criminal case. Since an appeal is a matter of grace, a decision by an appellate tribunal alone is not a satisfaction of due process of law as contemplated by the Fifth Amendment when the privilege of appeal may be taken away at any time.

A hearing in a trial court is a matter of right which is guaranteed and protected by the Fifth Amendment to the Constitution of the United States, and such hearing cannot be in an appellate tribunal.

It is a fundamental rule that in judicial proceedings affecting rights there shall be given an opportunity to be heard before any judgment, decree, order or demand shall be given and established.

Kuntz v. Sumption, Treasurer, 117 Ind. 1, 5.

For the Circuit Court of Appeals to hold that the lease is valid and binding on the City as trustee and on the trust property, and thereby to impose upon the City a liability of $45,000,000, and to hold that the lease is enforceable against the City as successor trustee and the trust property, when the question of the burdensome character of such lease was expressly reserved without objection or exception of any party made at the time (I R. 321), and when the City has had no opportunity to be heard either upon the law or the facts of this issue, is a denial to it of due process of law which is guaranteed to all by the Fifth Amendment to the Constitution of the United States.

If the Circuit Court of Appeals has this power, then the judicial department of the Government is the only department possessing the power to deny a hearing to litigants. If such power exists in the courts, then in consequence of their establishment to compel obedience to law and to enforce justice they possess the power to inflict the very wrongs which they were created to prevent. Judicial proceedings cannot be valid unless they proceed upon inquiry and render judgment only after trial. On the reserved issue of burdensomeness in the instant case there was no inquiry; there was no trial.

If the Circuit Court of Appeals were thus permitted to decide questions reserved by the District Courts for future trial, the whole purpose of the Rules of Civil Procedure could be abrogated. Rule 42 (b) grants to District Courts the right to reserve issues as was done in this case. The purpose of the trial court in reserving an issue is to simplify procedure and to minimize the cost of litigation. The rules in those respects are beneficial to liti-

gants. They are beneficial, however, only if litigants' rights are protected, but if a Circuit Court of Appeals can finally determine a question which was reserved as was done in this case without an opportunity to be heard, then the rights of litigants may be seriously imperiled by reliance on the reservation. Compare: *Montgomery Ward Co. vs. Duncan*, — U. S. — (decided Dec. 9, 1940).

Nothing short of a hearing to the City on the reserved issue of burdensomeness will satisfy the requirement of due process of law. No party should have its cause determined against it as has the City in this case without its day in court.

It is no answer to the argument of the City that it was denied due process to assert as does Chase (br. p. 51) that the decision of the Indiana Public Service Commission forecloses the question of burdensomeness. The Circuit Court of Appeals did not decide and could not have decided, as we point out hereafter (*infra*, p. 67), that the Public Service Commission possesses or could exercise judicial power. It expressly recognized that proceedings before the Public Service Commission were administrative in character. (IV R. 1286.)

Nor is it an answer to the City's argument that it was denied due process to contend as does Chase (br. p. 52) that the *Williams* case (206 Ind. 448) forecloses the question of burdensomeness. The scope and effect of the issues in the *Williams* case could not be passed on initially by the appellate court. In passing, we point out three of these reasons. First, Chase's predecessor trustee and the City were co-defendants in the *Williams* case and no issue was raised between them. Thus neither could plead *res adjudicata*. Second, since the decision in the *Williams* case the facts have changed decisively in that the City as successor trustee of a public charitable trust has taken over the trust property. Third, the causes of action in the two cases were different and the questions here involved were not actually litigated. These questions were either questions of fact or

mixed questions of law and fact. The City had a right to be heard upon these issues.

It is not an answer to the City's argument that it was denied due process to say that the motion of Chase to strike from the City's answer and counterclaim the allegations of burdensomeness (Chase br. p. 47) was a hearing on such issue of burdensomeness. As pointed out while Chase initially contended that burdensomeness was no defense, when the order of reservation of that issue was reserved, no objection or exception was made. Furthermore, no evidence was introduced respecting the burdensome character of the lease. The Circuit Court of Appeals did not pass on the denial by the District Court of the motion to strike. The ruling of the District Court was obviously not reversible error because the issue of burdensomeness was reserved.

In the initial briefs of both Chase and the City, it was pointed out to the Circuit Court of Appeals that the question of burdensomeness was reserved by the District Court for future trial. In the brief of the City in support of its petition for a rehearing, it was again pointed out that the issue of burdensomeness had been reserved by the District Court, and appropriate excerpts from the initial briefs of Chase and the City were set out wherein the reservation of the issue had been called to the Court's attention. (IV R. 1374, 1375, 1376.)

It is clear the City was denied due process of law by the Circuit Court of Appeals.

III.

LEASE UNENFORCEABLE AGAINST CITY.

The facts of this case lend no support to the contention of Chase that the City is bound by the terms of the lease for any reason.

Some of these facts are:

(1) A valid and enforceable trust was created by the franchise contract of 1905 and the other relevant trust instruments.

(2) The Settlors of the trust were the public spirited citizens of the City who subscribed for the stock of Citizens Gas.

(3) The beneficiaries of the trust were the gas users of the City.

(4) The trust res was the property and plant of Citizens Gas formerly owned by Consumers Gas Trust Company.

(5) Citizens Gas was the initial trustee of such trust with a fixed date for the expiration of its trusteeship, viz: 1939, or as soon thereafter as the transfer of the trust res to the City could be made.

(6) The City, a municipal corporation, was the successor trustee.

Todd v. Citizens Gas Co., 46 Fed. (2d) 855.

(7) No part of the property of Indianapolis Gas and no lease on any part of that property was a part of the trust res. Indeed, one of the underlying purposes of the organization of Citizens Gas was to provide a competitor for Indianapolis Gas.

(8) The trust instruments contain no authorization to lease or acquire the property of a competitor.

(9) The City did not sign or execute the lease of September 30, 1913. *The only parties to the lease are the lessor, Indianapolis Gas, and the lessee, Citizens Gas.*

(10) The City is not named as a party obligated by the lease.

(11) The City is not an assignee of the lease. An assignment was tendered and rejected. The evidence shows that this assignment was made in a separate written instrument, because the City had advised Citizens Gas prior

to September 9, 1935, the date of the transfer to the City as successor trustee, that it would not accept an assignment of the lease. (II R. 464.)

(12) No ordinance was ever adopted by the Common Council nor any resolution ever adopted by the Board of Public Works of the City authorizing the execution of the lease, or ratifying it or agreeing to be bound by its terms. No action was ever taken by the Board of Trustees or the Board of Directors of the Department of Utilities accepting the lease or agreeing to be bound by its terms. (City Stip. X 1, 2, 3, 4, III R. 982, 986, offered, II R. 424, 425.)

(13) The action of the Board of Directors of the Department of Utilities of the City rejecting the lease was ratified by an ordinance of the Common Council of the City. (III R. 1017, 1018, offered II R. 429.)

(14) The City has not accepted a part of a trust res and refused to accept another part. *It has accepted the entire trust res and rejected a lease which it claims the initial trustee had no power to impose upon the City.*

(15) *The complaint in this case will be searched in vain for an averment that the lease is valid. The theory of Chase is that the City is estopped to deny the enforceability against it of the lease and is bound by the principle of res adjudicata, which theory necessarily implies that the lease initially was unenforceable against the City.*

The Circuit Court of Appeals also erred in refusing to follow the Indiana decisions which hold that *a municipal corporation cannot be bound by a contract made in violation of the Indiana statutes.*

The lease was for a term of ninety-nine years. The Indiana statutes limit the making of such contracts to a term of not longer than twenty-five years.[17]

Section 254 of Chapter 129 of the Acts of 1905 provides that:

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[17] The relevant portions of Sections 85 and 254 of Chapter 129 of the Acts of 1905 appear as an appendix to this brief.

> "Any city * * * may enter into a contract with * * * any corporation * * * to furnish *such city* * * * *and its inhabitants* with * * * heat or light * * * provided that no such contract shall be entered into by any such city * * * for furnishing such *city* * * * *and its inhabitants* with * * * heat or light * * * for a term longer than twenty-five years." (Our emphasis.)

The same section also provides that any such contract by a city of the first-class, to which Indianapolis belongs, shall be first agreed to by the Board of Public Works, and thereafter there must be an ordinance of the common council approving and affirming it.

On September 30, 1913, when the lease between Indianapolis Gas and Citizens Gas was executed, Indianapolis Gas owned a complete by-product coke plant which was then producing artificial gas and a complete system of distribution mains, several hundred miles in length, and was furnishing gas to more than 41,000 consumers in Indianapolis. Its property was twice the size of that of Citizens Gas. (II R. 621, offered II R. 327.) When operations commenced under the lease all of these facilities were immediately used in supplying gas to the consumers residing on the lines of the Indianapolis Gas. It will thus be seen that through the medium of the lease there was an agreement to supply these 41,000 consumers in Indianapolis, or such of them as continued to take gas through the lines of Indianapolis Gas, with a supply of heat for the length of the term of the lease.

The ninety-nine year lease in question here was clearly within the terms of the statutes referred to, because the lease was a contract for supplying the city and its inhabitants with gas, heat, and light. *It was not authorized or approved by the Board of Public Works or by an ordinance of the common council.* (III R. 982, 983, offered II R. 424.)

By Chapter 190 of the Acts of the Indiana General Assembly of 1933 (page 928), it was provided that any mu-

nicipality within the State of Indiana shall have the power to operate and/or manage any utility without the approval or consent of the Public Service Commission or the intervention of such Commission in any way whatsoever. Thus the rates which any municipally owned utility may charge its consumers is not subject to the control of the Public Service Commission such as the rates to be charged by privately owned utilities; nor would a municipality be limited to a reasonable return upon its investment. The only check upon the rates charged by a municipality for its utility facilities is the weight of public opinion. Thus, both Sections 85 and 254 of Chapter 129 of the Acts of 1905 serve as a protective shield against unreasonable contracts. The lease in question here has no provisions for modification of the lease rental in accordance with any economic change and no remedy is open to the beneficiaries of the public charitable trust, if they are bound by the terms of this lease, for any adjustment as to rentals paid lessor Indianapolis Gas irrespective of what the economic conditions may be between now and the year 2012, when the lease expires. Even though artificial gas were to be displaced by some other fuel, the lease rentals would go on.

Sections 85 and 254 of Chapter 129 of the Acts of 1925 clearly indicate and define the public policy of the State of Indiana to be against contracts by municipal corporations for supplying the City or its inhabitants with gas and other utility commodities for a term longer than 25 years. The lease in question here is such a contract, is against public policy and is void.

A contract or lease by which a municipal corporation is sought to be bound, which has been made in violation of the Indiana statutes, is void and cannot be ratified.

Gaslight etc. Co. v. City of New Albany, 156 Ind. 406, 415;

City of Indianapolis v. Wann, Receiver, 144 Ind. 175, 187;

Hamer vs. City of Huntington, 215 Ind. 594, 600, 601.

In the first above cited case, the Indiana Supreme Court said:

> "It is elementary that municipal officers have no powers beyond those expressly conferred by statute or necessarily implied to enable them to make effective the powers granted or to protect the public welfare. Therefore, when they attempt an act that is beyond the limit of their power, the act has no official sanction and is no more effectual than if performed by non-official persons. As a municipal act it is wholly void and being void, nothing of substance may flow from it. * * * 'When a municipal council is authorized by statute to contract for a period not exceeding ten years, its contract for twenty years or for an indefinite time cannot be sustained as a contract for ten years but is entirely void * * *.'
>
> * * * * *
>
> Our conclusion is that appellee's ordinance of March 19, 1888 so far as it was attempted thereby to contract with appellant for lighting the streets and other public places of the city for a term of twenty-three years, was in violation of the Act of 1883 and was therefore *ultra vires* and void."

The lease being for a term of ninety-nine years, was absolutely void because the Indiana statutes limited the power of the City to contract, even with the approval of the Board of Public Works and the Common Council, to a term not longer than twenty-five years.

In leasing property, trustees are required to act with as great fidelity toward the remainderman in whom the title vests at the termination of the trust as towards those entitled to rents and profits during its continuance. Any other rule would jeopardize every estate so held and give countenance to the disregard by those in whom confidence has been reposed of the very object had in creating a trust.

In re: Hubbell, 135 Ia. 637, 113 N. W. 512;
21 *Ruling Case Law*, Sec. 153, p. 1301.

In the *Hubbell* case it was said that:

> "It will be noted that in no case to be found in the books after *Denagree v. Walker* (Ill. 1905), 73 N. E. 409, *has a lease by trustees for ninety-nine years unless expressly authorized been approved.*" (Our emphasis.)

The Circuit Court of Appeals was also in error in refusing to follow the Indiana decisions and the decisions of this Court which hold that a grant of right or privilege by a municipality is strictly construed against the grantee, and that whatever is not unequivocally granted is withheld —nothing passes by implication. The Circuit Court of Appeals said that:

> "The power to execute this ninety-nine years lease was authorized by the Commission in 1913." (113 F. 2d 217, 221.)

The Court refers to the Public Service Commission of Indiana. Thus it apparently holds that the act creating the Public Service Commission gave to it the power to abrogate the contract between the City and Citizens Gas as expressed in the trust instruments, including the corporate charter of Citizens Gas.

The Citizens Gas charter was neither legally abrogated nor legally altered by the enactment of the statute creating the Commission. (Chap. 76, Acts 1913.) In *Todd v. Citizens Gas*, 46 F. 2d 855, 868, the Circuit Court of Appeals said:

> "We find nothing in the language of the statute (Chapter 76, Acts 1913) or in the decisions of Wisconsin prior to its enactment which would indicate an intention on the part of the Legislature that a public utility, by surrendering its franchise, might *thereby destroy vested property rights which it had voluntarily created, and release itself from obligations respecting those rights which it had voluntarily undertaken before the existence of the franchise and as an inducement to the municipality to make the grant of the privilege.*" (Our emphasis.)

The proposition that the charter of a corporation such as Citizens Gas cannot be changed by subsequently enacted laws unless there is reserve power so to do, is settled by the case of *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629.

As pointed out before in this brief, the Public Service Commission had no power to determine the validity of the lease and could bind no one on that proposition.

The Circuit Court of Appeals held in its opinion (p. 225) that:

> "The terms of the trust (the franchise contract and the articles of incorporation) referred generally to the duties of the trustee and the rights of the beneficiaries * * *."

On page 227 the Court said:

> "The terms of the trust neither expressly conferred upon nor expressly denied the trustee the power to acquire a non-freehold interest in property. In truth the terms of the trust remain silent on the subject of trustee's powers. The only applicable language relates to duties and not to powers."

The trust instruments were the franchise contracts with the City and Citizens Gas, and the articles of incorporation of Citizens Gas. Since part of the trust instruments were the franchise contract from the City which was a grant of right for the use of the streets and alleys for the laying of gas mains, and the other part of the trust instruments was the corporate charter of Citizens Gas carrying out the directions of the franchise contract respecting rights, powers and duties, the rule announced by this Court in *Piedmont Power & Light Co. vs. Town of Graham, et al.*, 253 U. S. 193, 194, 195, 64 L. ed. 855, 857, and the rule announced by the Indiana Supreme Court in *Indianapolis Cable Railroad Co. v. Citizens Street Railroad Co.*, 127 Ind. 369, 390, are controlling. In the latter case the Indiana Supreme Court said (p. 390):

"A grant made by the commonwealth or by a municipal corporation under authority from the commonwealth is to be taken most strongly against the grantee and nothing is to be taken by implication against the public except what necessarily flows from the nature of the terms of the grant."

In the *Piedmont Power* case, this Court said that:

"Grants of rights and privileges by a state or municipality are strictly construed, and whatever is not unequivocally granted, is withheld—nothing passes by implication."[18]

Thus, if the terms of the trust remain silent on a trustee's powers, as the Circuit Court of Appeals said, and which is the fact, the power to make the lease cannot be implied.

It is not without significance that the trust instruments contain detailed instructions respecting many matters but failed to grant the power, either expressly or by reasonable implication, for the making of a ninety-nine year lease. The instruments contained detailed instructions respecting the retirement of the stock (I R. 84); the power to purchase gas mains of Consumers Gas Trust Company (I R. 85); the manner in which work could be done in the streets, service pipes laid, mains laid (I R. 87); the materials which were to be used; the quality of the gas; the price of the gas (I R. 88); the refilling of excavations; the maintenance of an emergency fund (I R. 89); the type of meters to be used; the tests for meters. (I R. 92.) The articles of incorporation of Citizens Gas provided in detail the order in which the earnings should be used (I R. 98); and the duties of the officers. (I R. 103.)

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[18] See also

Knoxville Water Co. v. Knoxville, 200 U. S. 22, 34, 50 L. ed. 353, 359;

Blair v. Chicago, 201 U. S. 400, 471; 50 L. ed. 801, 830;

Mitchell v. Dakota Central Telegraph Co., 246 U. S. 396, 412, 62 L. ed. 793, 801.

It is also quite significant that both the franchise (I R. 83) and the articles of incorporation (I R. 97) provided that any member of the Board of Trustees may be removed by the Marion Circuit Court upon the showing that the trustee is an employee or holder of any of the securities or capital stock of any other company organized for the purpose of manufacturing or delivering gas to consumers in the vicinity of the City of Indianapolis.

Citizens Gas, in its franchise contract, bound itself to extend its lines and mains so that "all the inhabitants of said city may be supplied with gas for fuel and lighting purposes when they may reasonably require the same." (I R. 89, 90.)

It seems wholly unreasonable to assume, as the Circuit Court of Appeals has done, that there was implied power in Citizens Gas to execute a ninety-nine year lease when no word appears in the trust instruments granting it that power, either expressly or by necessary implication, and that when the trust instruments themselves so completely circumscribe the authority of the grantees in respect of other matters less important to the welfare of the corporation and beneficiaries of the trust than the power to harness the trust estate with a ninety-nine year lease. Such implied power in the trust instruments is also wholly inconsistent with the obligation of Citizens Gas to extend its lines to all citizens of Indianapolis. The answer to all of this is that there was no power, either express or implied, to enter into a ninety-nine year lease.

IV.

RULE OF ERIE RAILROAD CO. vs. TOMPKINS.

The Circuit Court of Appeals erred in refusing to follow the rule announced by this Court in *Erie Railroad Co. vs. Tompkins*, 304 U. S. 64, 78, 82 L. ed. 1188, 1194, in that it refused to follow the controlling Indiana decisions which reach back in an unbroken line to early statehood

and extend to the latest decision of the state's highest appellate tribunal.[19]

1. Doctrine of Estoppel sought to be asserted by Chase.

Chase alleged in its complaint and asserts in its brief that the City is estopped by its conduct from denying the enforceability of the 99 year lease against it. The conduct upon which Chase relies is as follows:

(a) Chase contends that Citizens Gas is estopped, thereby through privity of estate it alleges the City also to be estopped. The chief reasons relied upon by Chase for estoppel against Citizens Gas is the authentication of bonds of Indianapolis Gas by the trustee and their sale by Citizens Gas to reimburse it up to 90% of expenditures for extensions and improvements made to the property, the operation by Citizens Gas of the Indianapolis Gas property, and the acceptance and enjoyments of the profits from such operation. (I R. 11, 12.)

(b) The resolution of the Board of Public Works of the City dated March 20, 1929. (I R. 12, 18.)

(c) The payment by the City of the bondholders and the common and preferred stockholders of Citizens Gas. (I R. 15, 19.)

(d) The issuance and sale by the City of its revenue bonds. (I R. 14, 15, 19.)

(e) The transfer to the City by Citizens Gas of the trust property on September 9, 1935. (I R. 16, 19, 298.)

(f) The resolution and agreement for temporary use by the City of Indianapolis Gas property. (I R. 17, 297.)

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[19] The Circuit Court of Appeals made no express holding on the question of estoppel *in pais* but apparently relied upon such estoppel and Chase, in its brief, attempts to assert estoppel against Citizens Gas and the City. (Brief pp. 10, 11, 118-132.)

(g) The City's performance under the lease. (In reality this is the same as (f) above.)

(h) The execution by the City of an agreement to Citizens Gas, indemnifying it against certain liability.

(i) The alleged approval by the attorneys for the City of a bond circular issued in connection with the sale of the City's revenue bonds.

(j) The laches of the City in denying the validity of the lease and its binding effect for the full term.

Attention is directed to the fact that all claimed acts of estoppel except (a) and (b) occurred after 1931.

Reference will be made to the various alleged acts claimed to estop the City in the same order as presented above.

(a) Citizens Gas is not estopped by its conduct and therefore the City is not estopped through privity of estate.

By the terms of the mortgage Indianapolis Gas could reimburse itself up to ninety per cent of the amounts expended for the property by authentication and sale of its bonds. By the terms of the lease Citizens Gas was permitted to do likewise. Chase contends that certain representations made in connection with the sale of these bonds by Citizens Gas and that certain statements appearing in Poor & Moody's Manuals estop it.

The representations spoken of were made to Blodgett & Company by J. D. Forrest, who was General Manager and Secretary of Citizens Gas. The bonds were sold to Blodgett & Company as investment brokers and not to the public.

There is absolutely no showing *and not even an attempt to show that any present bondholder of Indianapolis Gas knew of or relied upon any of such statements made* by For[illegible]st or those which appear in Poor & Moody's Manuals, nor is there any proof in the record that any officer or director of Citizens Gas knew of or ratified the statements made by Forrest.

The circulars issued by Blodgett & Company do not support Chase's contention that Citizens Gas is estopped.

Mr. Chester M. Clark, who was associated with Stone & Webster and Blodgett, Inc. (II R. 555), said that those two corporations had the custody of the files of the old partnership of Blodgett & Company. Mr. Clark testified that all he knew about Exhibits 3 to 12 (II R. 593-615) which consisted of certain circulars and other material, was that he found them in the files of Stone & Webster and Blodgett, Inc., and that they had been turned over by Blodgett & Company in about 1926; that he had no personal knowledge of who prepared them, and that the only information in connection with those papers that he had was that which he could gather from the face of the papers themselves. (II R. 568.)

Mr. Baker, who became associated with Blodgett & Company in 1919 and subsequently became an officer, director and shareholder of Stone & Webster and Blodgett, Inc. (II R. 569), testified on cross examination that he assumed that the lease was available to the counsel of his firm at the time that his firm bought bonds of Indianapolis Gas. (II R. 584.) Subdivision 32 of the lease was read to Mr. Baker. (II R. 584.) Subdivision 32 provided that:

> "In event it should be determined by a court of final jurisdiction that this contract is *ultra vires* or void because of the length of term created and that such term is in excess of the authority of either party hereto to contract, then this lease shall nevertheless be binding upon the parties hereto for the longest term for which the parties hereto might lawfully contract." (II R. 584.)

He was then asked if that was not a red flag of warning as to the question of whether the lease was valid for a term of ninety-nine years, and he answered: "It would seem so to me." (II R. 484.)

In connection with the purchase by his company of Citizens Gas bonds, he said that he remembered discussing

the franchise between the City and Citizens Gas on various occasions (II R. 585); he knew that the franchise required the Citizens Gas Company to be wound up twelve years before the bonds became due in 1952. (II R. 586.)

When asked on direct examination whether or not purchasers of bonds relied upon statements contained in the circular, Mr. Baker said: "I cannot tell you the working of the minds of the buyers." (II R. 575.)

(b) The resolution of the Board of Public Works does not estop the City. (II R. 327.) The resolution makes no mention of the lease. The demand of the City made by the resolution is limited to the right, title, interest and ownership to the gas plant, mains and property of Citizens Gas which it acquired through the medium of the instruments creating the public charitable trust. The resolution of Citizens Gas (II R. 673, offered II R. 237) recognized the trust created by the franchise and the articles of association of Citizens Gas and the right of the City to take over the property and the assets of Citizens Gas.

Citizens Gas recognized the limited scope of the resolution of the Board of Works of the City. It is a fair inference to be drawn from the two resolutions, that there was no intention to include the lease.

(c) The paying off by the City of the bondholders and the common and preferred shareholders of Citizens Gas is of no aid in asserting estoppel against the City. In the exercise by the City of its right to take over the trust res and its discharge of the obligations of the corporation to the bondholders and stockholders of Citizens Gas, the City did no more than to accept the property of a public charitable trust and to perform the conditions precedent to the acquisition of that trust property as such conditions were laid down in the case of *Todd v. Citizens Gas* (46 F. 2d 855).

(d) In the sale of its revenue bonds the City did nothing which affords a basis for an estoppel against it. The

revenue bonds were not sold to the public. No revenue bondholder is a party to this action. Chase seeks to base its estoppel on statements appearing in an advertising circular issued by the brokers who sold the revenue bonds.

The Boards of Trustees and Directors of the Utility District are the only agencies having any power to deal with the trust res. Such agencies never authorized anyone to make any representations in connection with the bond circular or in the bond circular itself, but expressly advised a representative of the bond purchasers that the City had no authority to do anything in connection with the issuance of the bonds except to sell them. (II R. 510-512, offered II R. 420; II R. 436-440.)

No bondholder of the revenue bonds is a party to this action.

(e) The transfer of the trust res to the City by Citizens Gas on September 9, 1935, neither amounted to an acceptance by the City of the leased property nor does it form the basis of an estoppel. Chase contends that the City's acceptance of the trust property included acceptance of the leasehold estate and the consequent obligations under the lease, and that the City accepted an assignment of the lease. The City accepted the trust property and expressly rejected an assignment of the lease. The Circuit Court of Appeals, in speaking of the assignment of the 99 year lease tendered to the City (together with three other instruments of transfer), said:

> "These instruments were received, retained and duly recorded by the City."

On August 27, 1935, Mr. Sparks, one of the attorneys for Citizens Gas, was advised that the City would reject the lease. (II R. 464.) This knowledge was one of the inducing reasons why four separate instruments were executed, one of which was the assignment of the 99 year lease. The City rejected the lease on September 9, 1935, on the very day that the assignment was tendered (II R.

468), and on the same day that the assignment was tendered, the Board of Directors for Utilities adopted a resolution rejecting it. (I R. 139.)

When the City served on Indianapolis Gas a rejection of the lease there was no doubt in the minds of Indianapolis Gas and its counsel that the City had in fact rejected the lease.

The claim by Chase that the City accepted an assignment of the lease is an afterthought of Chase's counsel.

This fact is conclusively established by action taken at a special meeting of the Board of Directors of Indianapolis Gas held on November 6, 1935. (City Exhibit 7C, III R. 1013 Offered II R. 428.)

That meeting was attended by both Mr. Ewbank and Mr. Higgins, counsel for Indianapolis Gas in this case, who were members of the Board. The following motion was unanimously adopted:

> "Resolved, That the Secretary of the Company be instructed to formally notify The Chase National Bank of New York, as Trustee of the First Mortgage Bonds of The Indianapolis Gas Company, *of the refusal of the City of Indianapolis to accept the assignment of the ninety-nine years lease made and executed in 1913 between this Company and the Citizens Gas Company of Indianapolis*, and to further advise said Bank, Trustee, of the formal development and situations surrounding the present operation of the Company's property, by sending them a letter stating substantially as follows:
>
> The Chase National Bank,
> 11 Broad Street,
> New York, N. Y.
>
> In Re: The Indianapolis Gas Company
> Deed of Trust dated Oct. 1, 1902.
>
> Gentlemen:
>
> Pursuant to a resolution adopted by the Board of Directors of The Indianapolis Gas Company, the following facts relative to the property and business of

the Company are sent to you as Trustee of our First Mortgage 5% Bonds.

Assuming to act under legislative authority and pursuant to provisions of the city franchise and articles of incorporation of the Citizens Gas Company of Indianapolis, the City of Indianapolis has taken over the property of that Company, and is now operating the same by its Board of Directors for Utilities, and is assuming to enter upon the discharge of the obligations of the Citizens Gas Company to its bondholders and stockholders. The City of Indianapolis, however, has refused to accept an assignment of the ninety-nine year lease, executed on September 30, 1913, by this Company to the Citizens Gas Company, by which all the property of this Company was leased to the Citizens Gas Company.

Under the circumstances, this Company, through action of its Board of Directors, entered into a stipulation with the said City of Indianapolis, by which it was provided that the City, through its Board of Directors for Utilities, will continue the operation of the property of this Company for a period of six months pending negotiations, and that they will pay an amount for rental for said period equal to the amount of rental payable according to the terms of the lease. Preliminary meetings between representatives of this Company and representatives of the City have resulted in nothing definite.

Our Board of Directors is attempting to safeguard the legal position of both the bondholders and stockholders of the Company and have retained Hon. Newton D. Baker of Cleveland, Ohio, as additional counsel. The Indianapolis Gas Company will be pleased to receive any suggestion you desire to make in the premises.

Very truly yours,

THE INDIANAPOLIS GAS COMPANY,

By .....*Secretary.*"

(III R. 1013 offered II R. 428.)

There is also no doubt that Chase understood exactly what the City had done or was trying to do. In a letter dated September 19, 1935, addressed to William G. Irwin, President of Indianapolis Gas, and signed by Mr. Beardslee, Assistant Trust Officer of Chase, the following statements are made:

> "Indianapolis Gas Company First Consolidated 5% Bonds due October 1, 1932.
>
> Dear Sir:
>
> We are receiving numerous inquiries from holders of bonds of the above described issue with respect to newspaper reports that the City Utilities District *is attempting to abrogate the lease* made by your Company with the Citizens Gas Company in 1913. Bondholders state that such action would materially affect the security of their bonds and we would be obliged if you will be good enough to write us such information as we can pass on to bondholders with respect to this situation.
>
> We will also be obliged if you will forward us a copy of the above mentioned lease and also advise us what action is being taken to protect the interests of the bondholders." (Our emphasis.) (III R. 926 offered II R. 369.)

At the trial of the cause, it was admitted that the instruments, which included the assignment of the lease, "were presented to the Recorder of Marion County, Indiana for recordation * * * on the 9th day of September, 1935." (II R. 330.)

When the entire transaction is viewed, there was not then and cannot be now, any doubt in the minds of anyone that the City intended to and did reject the lease.

(f) Neither the resolution nor the agreement for temporary use by the City of the property of Indianapolis Gas affords a basis for an estoppel against the City.

The reason for the operation by the City of the property of Indianapolis Gas was solely to prevent the inter-

ruption of service to the gas consumers in Indianapolis. (I R. 200.) It was expressly provided that the City was not acting under the lease or to be considered as acting under it, or as having adopted it in any respect or as having recognized said lease as an obligation in any manner. The resolution also provided that if Indianapolis Gas would not permit such temporary use, that the City would at once discontinue such use and relinquish such temporary possession to Indianapolis Gas as the City may have temporarily exercised over the property. The City and Indianapolis Gas on March 2, 1936, extended the temporary use agreement of September 9, 1935. (I R. 205, 206, 207.)

By the March 2d agreement the City agreed to deposit in escrow and has deposited since said time, a sum of money equal to each semi-annual installment of interest on the Indianapolis Gas bonds and dividends on said stock. The agreement also provided that the payments made thereunder were made without prejudice to the City's possession respecting the invalidity of the lease, and that the operation of the property or the payments made pursuant to the agreement were not to constitute an admission that the lease was valid or binding on the City or its Department of Utilities. (I R. 207.) Chase was advised on March 11, 1936, of this agreement.

(g) The City's performance under the lease is no ground for estoppel. The City's operation of the property as pointed out under (f) above was under an agreement with Indianapolis Gas whereby the City did not admit nor was it to be considered as having admitted the validity of the lease. Chase cannot sit by after knowing of the agreement and permit the City to deposit money for the ultimate benefit of its bondholders, and at the same time read out of the agreement for temporary use the provision that performance under the agreement is not to affect the rights of the City.

Indeed Chase is seeking, on the one hand, to reach that fund for the payment of interest and interest on interest on its bonds and at the same time is seeking to repudiate the agreement through its counsel by asserting that the operation of the property of Indianapolis Gas pursuant to the terms of that agreement estops the City from denying the invalidity of the lease although in the agreement it was contracted otherwise.

(h) The City is not estopped, as Chase contends, by the execution of the indemnity agreement to Citizens Gas. A reading of this agreement clearly demonstrates that it was not intended in any sense to impose any liability on the City in respect of the lease. What it did bind the City to do was to protect Citizens Gas from any liability on account of pending actions at law or equity and "on account of any actions or suits which may hereafter be brought against said Company arising from any or all acts or actions or omissions to act on the part of said Company (Citizens Gas) of any nature whatever."

Citizens Gas attempted to assign the lease to the City. There was therefore no omission to act on its part which would even fall within the literal meaning of the language of the indemnifying agreement.

The conclusive answer to Chase's contention is that the indemnifying agreement was not intended to bind the City to the lease *because it was a part of an entire transaction of acts done on the same day (September 9, 1935), and one of those acts was a rejection of the lease.*

(i) Chase also seeks to predicate an estoppel on an alleged approval by the attorneys for the City of a bond circular issued by brokers in connection with the sale of the City's revenue bonds.

The testimony of Robert E. Simond, Vice-President of Halsey, Stuart & Company (II R. 510-512 offered II R. 420), and the testimony of Brodehurst Elsey, Vice-President of the Board of Directors for Utilities (II R. 436-440,

shows that Halsey, Stuart & Company and Otis & Company requested the City to approve a bond circular and that both brokers were advised by Mr. Elsey, in the presence of one of the attorneys for the City and its Department of Utilities, that the City had no power to do anything in connection with the sale of revenue bonds except to advertise and sell such bonds and that the City would not approve any bond circular whatever.

Mr. Simond sent a copy of a proposed bond circular to Mr. Albert L. Rabb, one of the attorneys for the City and its Department of Utilities. On cross examination Mr. Simond said that the circular was mailed to Mr. Rabb individually and that this was done because of the prior conference in which he had been advised that the City would not approve the circular. (II R. 511-512.)

(j) Chase also contends that the City is precluded by its laches from asserting the invalidity against it of the lease. As pointed out hereinabove, as early as August in 1935, the City advised Citizens Gas that it would reject an assignment of the lease. Also, as pointed out above, at the time of the transfer of the property comprising the trust res that the City by resolution of its Board of Directors rejected the assignment of the lease and served such rejection on both Citizens Gas and Indianapolis Gas. It is difficult to understand how the City could be guilty of laches when nearly a month prior to the time it exercised its right to take over the trust property it notified Citizens Gas that it would reject an assignment of the lease and when on the very day that the property was transferred to the City it rejected the assignment of the lease and notified both Citizens Gas and Indianapolis Gas of such rejection and that it would not be bound by the terms thereof.

The rule in Indiana is that the doctrine of estoppel has no application where the other party was not influenced by the acts pleaded as an estoppel.

Ross, et al. v. Banta, 140 Ind. 120, 150;
Hosford v. Johnson, et al., 74 Ind. 479, 485.

In the case first above cited, the Indiana Supreme Court had before it the question of estoppel by conduct. It said:

> "The doctrine of estoppel *in pais* has no application * * * where the other party was not influenced by the acts pleaded as an estoppel * * *.
>
> Persons who set up acts of another as an estoppel must show that they acted upon the same and were influenced thereby to do some act which would work injury if such other party is allowed to deny the truth of what he did."

In the *Hosford* case the Indiana Supreme Court said:

> "To constitute an estoppel by conduct there must be: (1) A representation or concealment of material facts; (2) the representation must have been made with knowledge of the facts; (3) the party to whom it was made must have been ignorant of the truth of the matter; (4) it must have been made with the intention that the other party should act upon it; (5) the other party must have been induced to act upon it."

It is also well settled in Indiana that an estoppel against a municipal corporation cannot be founded upon acts done by municipal officers in excess of their authority. Anyone who deals with public officers is charged with notice that such officers possess only limited, naked statutory powers, and must at his peril ascertain the scope of their lawful authority. No person dealing with officers of a municipal corporation can found a claim against the municipal corporation on the basis of an estoppel where that estoppel necessarily rests on acts done by officers in excess of their statutory authority.

In *Platter v. The Board of Commissioners of Elkhart County*, 103 Ind. 360, 381, the Board of County Commissioners wished to relocate the county poor farm. They sold the old and purchased a new one. Upon change of membership of the Board, a proper offer and demand of

rescission of the contract was made. After refusal of the Board's offer and demand of rescission the Board sued. Among the answers made, estoppel was urged.

The Court said:

> "The appellant can not successfully build upon the doctrine of estoppel. For this conclusion there are at least two satisfactory reasons: *First.* He dealt with public officers with limited, naked statutory powers; he was bound, at his peril, to ascertain the scope of their authority, and can not found any claim upon acts done by those officers in excess of their statutory authority. This general rule is thus stated by the Supreme Court of the United States: 'Individuals as well as courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity.' The rule is well established by our own decisions. *Union School Tp. v. First Nat'l Bank*, 102 Ind. 464; *Reeve School Tp. v. Dodson*, 98 Ind. 497; *Art v. Jackson School Tp.*, 90 Ind. 101; *Pine Civil Tp. v. Huber, etc., Co.*, 83 Ind. 121.
>
> "The disobedience of a statute by a public officer creates an incurable difficulty. It can not be remedied or removed by subsequent confirmation of the original acts, whatever the form the confirmation assumes. There is well defined distinction between public and private corporations, and the general doctrine of estoppel does not apply to the former class of corporations. *Union School Tp. v. First Nat'l Bank, supra*; *Cummins v. City of Seymour*, 79 Ind. 491; *Driftwood, etc., T. P. Co. v. Board, etc.*, 72 Ind. 226.
>
> "A public corporation, such as a county or city, is composed of the inhabitants of the locality, and the officers are not agents in the strict sense of the term, but are persons acting in an official capacity."

In *Cummins v. City of Seymour*, 79 Ind. 491, 496, in speaking of the liability of a municipal corporation, the Court said:

> "'If the act done is committed outside of the authority and power of the corporation as conferred by

statute, the corporation is not liable whether its officers directed its performance or it was done without any express direction or command.' "[20]

The power of a city in Indiana to sell property devoted to any public use is restricted, and to enable the city to make a sale of such property, special authority must be granted to it by the Legislature. Property so held is held upon a trust for the benefit of the inhabitants of the city. The city, as trustee for such use, cannot by an unauthorized act destroy that trust.

Lake County Water & Light Co. v. Walsh, 160 Ind. 32, 39.

This same wholesome principle is applicable when an attempt is made to impose upon a trust a large annual obligation for 99 years without statutory authorization. There was no power conferred by legislative act upon the initial trustee of this public charitable trust to execute a 99 year lease.

It is apparent from the foregoing that there can be no estoppel against the City to deny the enforceability against it of the lease. There is no proof in this case that any act or representation made by either Citizens Gas or the City was relied upon by any bondholder of Indianapolis Gas nor is there any proof that any such bondholder purchased his bonds on the faith of such acts or representations. (II R. 340, 344, 355, 357, 361, 362, 397, 568, 584, 589.) There is no proof that any act of Chase was based on any representation made by either Citizens Gas or the City.

So far as the evidence in this case shows, the last purchase made of Indianapolis Gas bonds was made in 1951 except those purchased by Citizens Gas in 1952. (Stip. 9, II R. 618, 620; Stip. 10, II R. 627.)

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[20] See also *Union School Township vs. First National Bank of Connersville*, 102 Ind. 464, 476; *Citizens Bank of Anderson vs. Town of Barnetteville*, 98 Ind. App. 92, 102.

2. Order of the Public Service Commission of Indiana.

It is the contention of Chase in its complaint (I R. 8, 9, 10) that the order of the Public Service Commission entered on the 1st day of October, 1913, approving the lease (I R. 116-122) determined the validity of the lease and is therefore binding on everyone, including the City.

Chase contends in its brief not that the order is conclusive as to all of the issues but that "the order is a conclusive determination of two matters of fundamental importance, (1) that the lease is in the public interest and consequently in the interest of the beneficiaries of the trust, and (2) that the lease is in fulfillment of the duties of Citizens Gas as a public utility."

To find that the lease is in the public interest is not a finding against the beneficiaries of a public charitable trust. The Commission has only administrative and ministerial powers. The Public Service Commission is purely a regulatory body having jurisdiction over public utilities. It has no judicial power to decide private questions between public utilities and individuals such as the beneficiaries of the Public Charitable Trust.

When Chase says (br. p. 91) that the order of the Commission conclusively determined "that the lease is in fulfillment of the duties of Citizens Gas as a public utility," it is mistaken if it means thereby that the Commission had the right to determine that the lease was in fulfillment of the duties of Citizens Gas to either the beneficiaries of the public charitable trust or to its successor trustee. As pointed out in the preceding paragraph, the Commission has no such power.

Continuing then, Chase argues (br. p. 92) "the Commission's order, plus the statute, are conclusive as to the power of Citizens Gas to enter into the lease."

This in reality is simply saying that the order of the Public Service Commission determined that the lease was within the power of Citizens Gas to execute and the

as successor trustee is thereby bound by the act of the initial trustee.

The Public Service Commission which was created by Chapter 76, Acts of the General Assembly 1913 (p. 167), is an instrument of the executive department of the State. It is neither legislative nor judicial in character.

The approval of the lease by the Public Service Commission could not operate in any way as an adjudication of the enforceability of the lease against the City.

Such an order is not judicial, but wholly administrative, in character.

The authority given to the Public Service Commission to fix rates and approve leases of public utility property was given for the sole purpose of enabling the Commission to protect the public interest. It was never intended that by conferring such jurisdiction on the Commission it should be vested with authority to make a judicial declaration which would determine private rights of persons not parties to the lease, especially where such private rights depend upon the decision of justiciable questions.

The entire purpose of the statute is to safeguard the public interest and to see that leases or sales are not made by one utility to another unless in the opinion of the Commission they are in the public interest.

Any assertion directly or indirectly that the Commission's approval of the lease determined the liability of the City in respect of the obligations contained in the lease is made in disregard not only of the obvious purpose of the statute and the scope of the Commission's authority thereunder, but also in complete disregard of the repeated decisions of the Supreme Court of Indiana.

In referring to Section 95 of the Shively-Spencer Act, the Indiana Supreme Court said:

> "But by this enactment, the Legislature has vested it (Public Service Commission) with authority subject to review by the courts, to supervise or regulate the

terms of sale *insofar only as they affect the public.*" (Our emphasis.)

In re: Northwestern Telephone Co., 201 Ind. 667, 680, 685.

In *Stratton v. Railroad Commission* (1921), 186 Calif. 119, 198 Pac. 1051, 1054, 1055, in speaking of a decision of the California Railroad Commission, the Court said:

> "The Commission decided that the company was a public utility, but denied the relief asked for. The claim now is that this decision as to the character of the company is *res judicata*. There is more than one answer to this, but one alone need be given. It is that the Commission is not a judicial tribunal in the strict sense, although many of its functions are quasi judicial, so that its orders are not judgments, and in particular its findings of fact are not adjudications, *and facts found by it are not res judicata and as such finally and conclusively established between the parties for all purposes.*
>
> • • • • •
>
> The peculiar effect of a determination of fact operating to conclude the question for other purposes than those of the very proceeding in which the determination is made is confined to strictly judicial determinations alone, and an order of the Commission is not of that character." (Our emphasis.)

In Section 32 of the lease (I R. 79, 80) it is provided in substance that in the event that a court of final jurisdiction should determine the lease to be *ultra vires* and void because of the length of the term created, and that the term is in excess of the authority of either party to contract, then the lease shall be binding upon the parties, viz: Indianapolis Gas and Citizens Gas, for the longest term for which the parties might lawfully contract.

In view of this provision of the lease, even if the order of the Public Service Commission could be treated as a determination of the validity of the lease for the period

during which Citizens Gas was trustee, which we deny, it is clear that the order merely approving the lease could not operate to determine the validity of the lease beyond that term.

The parties themselves had serious question as to the binding effect of the lease after termination of the franchise period. All that their petition to the Commission could amount to legally was a request that the lease be approved for such term as was thereafter determined to be legally binding, not by the Commission but by some court having power to decide a justiciable controversy.

It is well settled that the Public Service Commission is "purely an administrative or legislative body without judicial power."

Public Service Commission of Indiana et al. v. City of LaPorte et al., 207 Ind. 462, 465;

New York etc. R. R. Co. v. Singleton et al., 207 Ind. 449, 458;

In re Northwestern Indiana Telephone Co. et al., 201 Ind. 667, 171 N. E. 65.

Under the terms of the Indiana Constitution (Article III, Section 1) the powers of the State Government are divided into three separate departments, legislative, the executive, including the administrative, and the judicial and it is provided that:

> "No person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."

Under the above quoted provision of the Indiana Constitution the General Assembly could not have conferred any judicial power upon the Public Service Commission.

We have not overlooked the well established rule that where the Public Service Commission has jurisdiction conferred upon it to decide questions of fact and enter

an order thereon, that so long as it acts within its jurisdiction, its decision is conclusive upon the courts in a collateral action.

Public Service Commission et al. v. City of Indianapolis et al., 193 Ind. 37, 43.

The order of the Public Service Commission approving the lease went no further, and could go no further, than a determination that upon the facts adduced, it was advisable *and in the public interest* (but not necessarily in the interest of the beneficiaries of the trust) that the property of Indianapolis Gas be leased to the Citizens Gas on the terms stated in the Commission's order. The Commission had no power to decide either the liability of the City under the terms of a lease not executed by it, or the length of the term of the lease for which the parties might lawfully contract.

The Commission could not and did not determine the legal questions now arising in these cases.

It is interesting to note that Chase cites in support of its proposition (p. 90) the case of *Batesville Telephone Co. v. Public Service Commission*, 38 Fed. 2d 511 at 515. This case is hardly authority for the proposition since it was reversed in *Batesville Telephone Co. v. Public Service Commission of Indiana* (1931) (46 Fed. 2d 226, 228.)

At the date when the Public Service Commission (October 1, 1913, I R. 122) approved the lease, no claim had been asserted that the franchise contract of 1905 and the other related papers resulted in the creation of a public charitable trust, and at that time (1913) it was still seventeen years before the date when a transfer was to be made to the City.

It is difficult to understand how an order by the Public Service Commission made 17 years before the City took over the trust property could determine the validity of the lease against the City.

3. Doctrine of res adjudicata.

Chase in its bill alleges that certain cases were *res adjudicata* of the validity and enforceability of the lease against the City, viz.:

(a) *Fishback v. Public Service Commission, et al.*, 193 Ind. 282. (I R. 10.)

(b) *Todd v. Citizens Gas*, 46 F. (2d) 855. (I R. 13.)

(c) *Williams v. Citizens Gas, et al.*, 206 Ind. 448. (I R. 14.)

The Circuit Court of Appeals apparently relied on these decisions as *res adjudicata* of the validity of the ninety-nine year lease against the City, for it said:

> "In passing, it might be said that the few cases discussed in the opinion above are determinative of the immediate issue here, i.e. as to the validity of the ninety-nine years lease."
>
> It then cited the above cases. (I R. 1300.)

In holding that the above cited cases were *res adjudicata* of the validity of the ninety-nine year lease against the City, the Circuit Court of Appeals erred in that it refused to follow the rule announced by this Court in *Erie Railroad v. Tompkins*, 304 U. S. 64, 78 because under the Indiana law as expressed by a long line of decisions to which counsel have found no exception, none of the above cases is *res adjudicata* of the issue respecting the validity of the lease against the city.

(a) The Fishback Case.

Chase now contends not that the *Fishback* case is *res adjudicata* as it alleged in its complaint (I R. 10) but that its importance lies in the conduct of Citizens Gas and the City in upholding the validity of the lease for eight years. (Br. p. 92.)

On November 28, 1913, Fishback, who had appeared before the Public Service Commission and opposed the

approval by the Commission of the lease of September 30, 1913, commenced an action in the Superior Court of Marion County against Public Service Commission of Indiana, Citizens Gas Company, Indianapolis Gas and the City to vacate and set aside the order approving the execution of said lease.

Fishback sued as a stockholder of the Citizens Gas and a resident freeholder of Indianapolis and not as the beneficiary of a public charitable trust. (II R. 650.) The defendant Citizens Gas and the City were not made parties defendant as the trustees of a public charitable trust There was no averment in any of the ten paragraphs of complaint that a public charitable trust had been created by the franchise contract of 1905. (II R. 648-668, offered II R. 327.)

Fishback sought to set aside the Commission's order on the following grounds:

(a) That the rentals fixed in the lease were excessive and that their payment by the Citizens Gas would result in a waste and misapplication of its funds and its inability to pay dividends due its stockholders. (II R. 651, 664.)

(b) That the Citizens Gas was without power to enter into the lease without the consent of the owners of three-fourths ($^3/_4$) in amount of its capital stock, which consents had not been obtained. (II R. 668.)

(c) That the City had not given its consent to such lease, had not joined in the execution thereof, and had granted to that Company no right to operate the property of the Indianapolis Gas. (II R. 665.)

(d) That the findings and order of the Public Service Commission were not sustained by sufficient evidence and were contrary to law.

(e) That Citizens Gas had no power to enter into the agreement contained in the lease permitting the Public

Service Commission to fix rates at which it should sell gas. (II R. 656.)

(f) That the obligation assumed by Citizens Gas under the terms of said lease to pay interest on the bonds and dividends on the stock of Indianapolis Gas impaired the obligation of the contract existing between Citizens Gas and plaintiff and other stockholders of that company in that it prevented Citizens Gas from executing a mortgage at the end of the franchise term in order to pay the stockholders of that company the par value of their stock and accumulated dividends thereon.

The defendants Public Service Commission, Indianapolis Gas and the Citizens Gas demurred to each paragraph of the complaint, which demurrers were sustained by the Court. The City did not file a demurrer but filed an answer in general denial.

Prior to the entry of final judgment, plaintiff dismissed as to the City as a party defendant and the following order book entry was made in connection with such dismissal:

> "Come now the parties and the plaintiff now dismisses the action as against the defendant, City of Indianapolis, upon which dismissal the court now renders judgment for costs against the plaintiff." (Stip. II R. 616, 625, 626, offered II R. 327.)

The plaintiff elected to stand upon its complaint and to abide the ruling of the court upon such demurrers and judgment was rendered against him. *The City was not a party to the judgment rendered in the case.*

Neither Chase, any other trustee under the Mortgage Deed of Trust executed by Indianapolis Gas, nor any bondholder of Indianapolis Gas was a party plaintiff, defendant or intervenor in said *Fishback* case. (Stip. II R. 626, offered II R. 327.)

Fishback prayed an appeal from the decree of the Marion Superior Court to the Supreme Court of Indiana which dismissed the appeal because not perfected in time

(*Fishback v. Public Service Commission of Indiana, et al.*, 193 Ind. 282.)

The *Fishback* judgment is not *res adjudicata* because:

1. Neither the City, any trustee under Indianapolis Gas Mortgage nor any bondholder of Indianapolis Gas was a party to the final judgment. There is, therefore, a total lack of mutuality of estoppel.

2. The issues in the *Fishback* case were wholly different from the issues in this case and the question of the validity and enforceability of the lease against the City was not and could not have been decided in that case.

3. The capacity in which the parties sued and were sued negatives any claim of estoppel by judgment. No claim was asserted in the *Fishback* case that any public charitable trust existed.

4. The transfer of the trust res to the City on September 9, 1935, has so altered the rights of the parties as to prevent the judgment in that case being an adjudication in this.

(b) The Williams Case (206 Ind. 448).

The *Williams* judgment is not *res adjudicata*, because:

1. The issues in the *Williams* case were essentially different from the issues in this case.[3] The enforceability

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[3] The case of *Troxell v. Delaware R. Co.*, 227 U. S. 434, 440, cites the leading case on the question discussed above, viz.: *Cromwell v. Sac County*, 94 U. S. 351, 353, 24 L. ed. 195, 198, 199. In that case an action was brought on four bonds of Sac County and four interest coupons. In order to defeat the action the defendant relied upon the estoppel of a judgment rendered in favor of the county in a prior action brought by another person but prosecuted for the sole benefit of the plaintiff in the last case. The issue of whether the plaintiff was a good faith purchaser of the bonds had not been but could have been litigated in the prior action. The United States Supreme Court in holding that the judgment in the first case was not *res adjudicata* said:

of the lease against the City and the right of the initial trustee to bind the City to the terms of the lease were not actually litigated and could not have been litigated under the issues in the *Williams* case.

2. The transfer to the City of the trust res on September 9, 1935, creates a situation which so alters the rights of the parties as to prevent a successful assertion of *res adjudicata*. When the *Williams* case was finally decided, the City had not taken over the trust res and until that was done the questions here involved were not in issue. No attempt was made to obtain a declaratory judgment against the City in respect of any *obligation* supposed to be imposed on it under the terms of the lease.

3. Although Indianapolis Gas and its mortgage trustees the predecessor of Chase and the City were co-defendants, and although the City formally asserted in a pleading filed that the validity of the public charitable trust was in no wise affected by the question of whether the lease was valid or invalid, Indianapolis Gas and its mortgage trustees tendered no issue to their co-defendant, the City, in respect of the enforceability of the lease against it. Under settled rules of law, the judgment cannot adjudicate the issues here presented as between such co-defendants.

There is nothing in the language of the Supreme Court in the case of *Williams v. Citizens Gas Co.*, 206 Ind. 448, which sustains the theory of Chase's counsel that that case disposed of the questions here involved.

(Continued from p. 75)

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

The following language of the Supreme Court shows clearly that the issues now presented were not involved or disposed of in that case.

> "If the lease was improvident from the standpoint of the lessee in that the consideration was excessive in view of the value of the use of the assets acquired under the terms of the lease, no facts are alleged to support such a conclusion. And if such a conclusion were justified, the complaint does not make out a case for equitable relief of cancellation and 'recapture' of the rentals paid over a period of seventeen years during which the Citizens Gas Company had the use of the physical equipment and the benefit of the income derived from this use. Further it was within the jurisdiction of the Public Service Commission to consider and approve the lease and the complaint discloses that the Public Service Commission did approve it. *The complaint does not make out a case for any relief on the basis of invalidity of the lease or of the action of the Commission in approving the same.*" (Our emphasis.)

The suit was brought by Williams suing as an inhabitant and taxpayer on behalf of himself and other beneficiaries of the public charitable trust. The complaint proceeds upon the theory:

(a) That a public charitable trust exists in the property of the Citizens Gas and that the plaintiff is entitled to a determination that such a trust exists.

(b) That a conspiracy was formed in 1913 to destroy this public charitable trust and it is alleged that among the overt acts of this conspiracy were procuring the enactment of the Public Service Commission Act of Indiana, the approval by that Commission of the lease between the Indianapolis Gas and the Citizens Gas, the surrender by the Citizens Gas of its franchise and the acceptance of an indeterminate permit, the obtaining of a decree from the United States District Court at Indianapolis enjoining the enforcement of confiscatory rates and the like.

(c) It is alleged that the lease between the two companies was void because:

1st. It was in contravention of the contract clause of the Federal Constitution.

2nd. That inasmuch as the Public Service Commission Act was invalid it had no authority to approve the lease and that its approval was a denial of due process in violation of the Fourteenth Amendment.

3rd. That the lease was the result of a conspiracy, the object and purpose of which was to destroy the Citizens Gas for the benefit of the Indianapolis Gas.

The relief sought was a determination that a public charitable trust existed in the property of the Citizens Gas; that receivers be appointed for the property of that company and of the Indianapolis Gas and that all rentals paid to the Indianapolis Gas be recovered from it.

There was not presented in the complaint any issue whatever on the question of the validity of the lease after the transfer to the City or was there any issue presented that because of the length of the term involved the lease was invalid. Phrased in another way, the court was not asked to pass upon the question presented in subdivision 32 of the lease (I R. 79, 80) wherein it is provided:

> "In the event it should be determined by a court of final jurisdiction that this contract is *ultra vires* or void because of the length of the term created, and that such term is in excess of the authority of either party hereto to contract, then this lease shall nevertheless be binding upon the parties hereto for the lengthiest term which the parties hereto might lawfully contract."

The Supreme Court of Indiana had before it only the allegations of the complaint. This is evidenced by some of the language from the opinion, a few excerpts of which we quote:

1. "In respect of the *alleged* invalidity of the lease * * *

2. *It appears from the complaint* * * *

3. The *complaint discloses*

4. The *complaint* does not make out a case."

The decision is the law of Indiana only so far as it goes in view of the facts before the court on which the decision is based.

(c) The Cotter Case (46 F. 2d 855).[22]

The *Cotter* case was not pleaded as *res adjudicata*. Apparently some weight was given by the Circuit Court of Appeals to the admission made by former counsel for the City in the answer in that case that the lease in question was valid. (113 F. 2d 217, 223.)

In the first place, the validity of the lease was not at issue in the *Cotter* case. In the second place, the answer was signed only by counsel, was unverified, and there was no attempt to show that the information contained in the answer could have been furnished solely by the City.

Under such circumstances it is settled law that the answer could not bind the City.

Habirshaw etc. Cable Co. v. Cable Co., 296 Fed. 875.

(d) The Todd Case.

The Todd judgment is not *res adjudicata* because:

1. Neither Indianapolis Gas, its mortgage trustee, nor any of its bondholders were parties in any capacity. There is a total lack of mutuality of estoppel. Had the enforceability of the lease against the City been in issue and had the Court decided that the lease was unenforceable, none of these plaintiffs would have been bound by the judgment. How then can they successfully claim the benefit of it?

---

[22] The *Cotter* case and the *Todd* case were heard together on appeal and only one opinion written in both cases.

2. The cause of action in the *Todd* case, and the cause of action in this case, are essentially different and the question of the enforceability of the lease against the City was not litigated, and could not have been litigated, under the issues presented in the *Todd* case.

3. The estoppel of a judgment extends only to the facts in question as they existed at the time the judgment was rendered and does not prevent an examination of the same questions even between the same parties, where at a later time the facts have changed or new facts have occurred which may alter the legal rights or relations of the parties. At the time of the entry of the decree in the *Todd* case there was no existing controversy in respect of the enforceability of the lease between Indianapolis Gas and its bondholders on the one side and the City on the other. The *Todd* case was finally disposed of on May 29, 1930. The facts and circumstances have altered and changed since the date of the decree in the *Todd* case by reason of the transfer of the trust property on September 9, 1935, to the City as successor trustee and because of the fact that shortly before the time of such transfer and in July, 1935, the first indication of a controversy arose as to the binding effect of the lease on the City.

4. The issues tendered by the bill of complaint in the *Todd* case were (Stip. 30 II R. 677-717, offered II R. 327):

(a) That the original agreement between the City and the Citizens Gas contained in the franchise contract of 1905 was abrogated and annulled when the Citizens Gas surrendered that franchise and accepted an indeterminate permit from the Public Service Commission.

(b) That the surrender of the franchise and the acceptance of a permit created a new contract between the State and the Citizens Gas, one of the terms of which was that the City should have the right to acquire the property of the defendant company at a value to be determined by the Public Service Commission in a proper proceeding.

(c) That an Act of the Indiana General Assembly of 1929, purporting to legalize all of the provisions of the Articles of Incorporation of the Citizens Gas and particularly those in respect of the mode of acquiring the plant and property of the Citizens Gas by the City, resulted in an impairment of the obligations of the new contract above referred to, in violation of the Constitution of Indiana and of the United States.

(d) That the franchise contract of 1905 merely gave an option to the City to purchase the property of the Citizens Gas Company which option violated the rule against perpetuities.

5. No pleading was filed in the *Todd* case asserting either the validity or invalidity of said lease. There was only one reference to said lease in the bill of complaint, which is found in Subdivision IV thereof (which subdivision describes the property of the company). (Stip. 30 II R. 677, 680, offered II R. 327.)

On the question of *res adjudicata* the rule in Indiana is that no party may invoke the doctrine of former adjudication unless he has tendered to the party against whom the doctrine is invoked, an issue against which the latter could have demurred or pleaded.

Maple et al. v. Beach, 43 Ind. 51, 58;
Jones v. Vert et al., 121 Ind. 140, 141;
Kitts v. Willson, 140 Ind. 604, 610.

After the decisions on which the Circuit Court of Appeals and Chase rely as being *res adjudicata* were rendered, the City took over the property. Prior to the date the property was taken over, September 9, 1935, the rights of the City had not accrued and thus its rights were not and could not have been adjudicated.

In *Kitts v. Willson*, 140 Ind. 604, 610, one Duncan in 1874 brought an action against Cravens, Willson and the administrator of John Mullan, deceased, to set aside as

fraudulent the conveyance of Kitts to Cravens. He succeeded, and Willson paid the judgment. In 1887 Duncan quitclaimed to Sarah, widow of David Kitts. Sarah then brought an action for partition which was decided against her. She then brought this action in ejectment. Appellees contended that the questions in the second case were adjudicated in the partition suit. The Court said:

> "With this contention we can not agree. In that case the issues were not the same as in this, nor was appellant a party in the same right as she is here. There appellant sued for partition as widow of David H. Kitts and heir of her own children; here she sues for possession as grantee of Harden Duncan. Her rights in this case, if any there be, had not accrued at the time of bringing the suit in partition, and would have been hostile to her rights in that case. In this case she steps into the shoes of Duncan, who was not a party to the former suit; whatever rights he would have, if appellant here, such rights, and no other, she has. The fact that she is the widow of David H. Kitts neither adds to nor takes from her right to recover in the case at bar.
>
> There is no doubt that the decree in the partition suit was conclusive against appellant as to any interest she might claim in the land at the bringing of that suit; and by it the property was 'freed from all claims (of hers) of whatsoever nature existing at the time of the institution of the suit.'
>
> But before the rule of former adjudication can be invoked it must appear that the thing demanded was the same; that the demand was founded upon the same cause of action; that it was between the same parties, and found for one of them against the other in the same quality. The party must not only be the same person, but he must also be suing in the same right."

The benefit to be derived from a judgment must be mutual before it can operate as an estoppel.

In *Maple et al. v. Beach*, 43 Ind. 51, 58, the Court said:

> "Another principle which governs in the admissibility and effect of judgments as evidence is, that the

binding force and effect of the judgment must be mutual. Prof. Greenleaf, speaking of judgments as evidence, says: 'But to prevent this rule from working injustice, it is held essential that its operation be mutual.' Vol. 1, Sec. 524. Mr. Starkie says: 'It is a general rule, that a verdict shall not be used as evidence against a man where the opposite verdict would not have been evidence for him; in other words, the benefit to be derived from the verdict must be mutual. This seems to be no more than a branch of the former rule, that to make the judgment conclusive evidence, the parties must be the same, for then the benefit and prejudice would be mutual and reciprocal. Where the parties are not the same, one who would not have been prejudiced by the verdict can not afterward make use of it, for between him and a party to such verdict the matter is *res nova*, although his title turn upon the same point.'"

Measured by these rules none of the cases relied on by the Circuit Court of Appeals (IV R. 1300) and by Chase is *res adjudicata*.

Furthermore in none of the cases relied upon by Chase did it or its predecessor Trustee make an issue with its co-defendant Citizens Gas as initial trustee or with the City as successor trustee either directly or through its mortgagee, Indianapolis Gas. Under the Indiana law, for that reason alone, none of the judgments could be *res adjudicata*.

In *Whitesell, et al. v. Strickler, et al.*, 167 Ind. 602, 615, 616, the above rule is announced. The Court said:

"The facts pleaded in the answers last above described fall far short of being sufficient as answers of former adjudication. The general rule is that the judgment in the former action settles all matters of controversy involved in the issues between the parties to the action; that is, all matters litigated, or which might have been litigated within the issues as they were made, or tendered by the pleadings in the case, but not matters which might have been litigated under such issues formed by additional pleading. *Findley v. Cathcart* [1905], 164 Ind. 470, [illegible] *Duncan v. Hedekin*

(1866) 26 Ind. 378. 'The party who invokes the doctrine of former adjudication must be one who tendered to the other an issue to which the latter could have answered or pleaded.' *Jones v. Vert* (1889), 121 Ind. 140, 16 Am. St. 379."

Since no issue was made among the co-defendants in any of the cases none of them is *res adjudicata.*

None of the cases is *res adjudicata* under the rules announced by *this* Court.

In the recent case of *Pepper v. Litton*, 308 U. S. 295, 302, 84 L. ed. 281, 287, this Court had before it the question of whether or not a judgment of a Virginia court was *res adjudicata.*

Litton, who headed a one man corporation, had caused Dixie Splint Coal Company to confess a judgment in his favor in the amount of more than $33,000 representing accumulated salary claims. Pepper, in 1931, had brought suit in the State Court against the Dixie Splint Coal Company and Litton for an accounting. In 1934, Pepper obtained a judgment against the Company for $9,000.00. Execution was stayed pending an appeal, but the defendant never appealed and while the execution was not stayed Litton caused an execution to issue on his confessed judgment. The property was advertised and sold to him for $3,200.00. Litton caused a new corporation to be formed to which he transferred the property he had acquired at the execution sale. On September the 14th, 1934, Dixie Splint Coal Company filed a voluntary petition in bankruptcy. On June 13th, 1934, Pepper had instituted a suit in the Virginia State Court to have a written judgment declared void. On June the 15th, the day following the sale under the Litton execution, the Sheriff instituted an interpleader action joining Litton, Pepper and the Coal Corporation and alleged that that corporation had a prior lien on all the property sold for one of its debts. Litton and Pepper admitted this. An order was entered directing payment of the corporation's claim.

Thereafter, the Trustee, with the permission of the Bankruptcy Court, moved in the State court to set aside the judgment and to quash the execution thereof on the ground that the judgment was void since it had not been confessed in the manner required by the Virginia statute. The court concluded that the Litton judgment was void, but denied the motion on the grounds that the Trustee was estopped to challenge it. It was also held that Pepper had admitted the validity of the judgment and that since Litton had acquired all the remaining claims against the estate the Trustee was in reality representing only Pepper. Therefore, since Pepper was estopped so was the Trustee. The judgment was affirmed by the State supreme court.

The question of the allowance of the Litton judgment came before the bankruptcy court on exceptions previously made by Pepper. "That court concluded that the decision by the state court that the Trustee was estopped to attack the Litton judgment there, did not prevent the Bankruptcy Court from considering its validity." The district court disallowed the Litton claim and directed the Trustee to recover for the benefit of the estate the property or its value which Litton had purchased at the execution sale on June 14, 1934. The Circuit Court of Appeals reversed the District Court and held that the decision in the State Court was *res adjudicata* in the bankruptcy proceedings.

In reversing the judgment of the Circuit Court of Appeals and affirming that of the District Court, Mr. Justice Douglass said:

> "In the first place, *res judicata* did not prevent the District Court from examining into the Litton judgment and disallowing or subordinating it as a claim. When that claim was attacked in the bankruptcy court Litton did not show that the proceeding in the state court was anything more than a proceeding under Virginia practice to set aside the judgment in his favor on the ground that it was irregular or void upon its face.

He failed to show that the judgment in the state court was conclusive in his favor on the validity or priority of the underlying claim, as respects the other creditors of the bankrupt corporation—a duty which was incumbent on him. On the pleadings in the state court the validity of the underlying claim was not in issue. Nor was there presented to the state court the question of whether or not the Litton judgment might be subordinated to the claims of other creditors upon equitable principles. The motion on which that proceeding was based challenged the Litton judgment on one ground only, viz., that it was void *ab initio* because it was not confessed by Dixie Splint Coal Company in the manner required by the Virginia statute and because P. H. Smith did not have either an implied or express power to confess it. In other words, in the state court, under the pleadings and practice, the only decree which was asked or could be given in the plaintiff's favor was for cancellation of the judgment as a record obligation of the bankrupt. It is therefore plain that the issue which the bankruptcy court later considered was not an issue in the trial of the cause in the state court and could not be adjudicated there."

It is apparent under this recent decision of this Court that since the precise point of the validity of the 99-year lease against the City as successor trustee was not decided in either the *Fishback*, *Williams*, *Cotter* or *Todd* cases, none is *res adjudicata* of the issues here in question.

CONCLUSION.

The City submits that the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

WILLIAM H. THOMPSON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
Counsel for City et al., Petitioners and Cross Respondents,
Consolidated Building,
Indianapolis, Indiana.

EDWARD H. KNIGHT,
Corporation Counsel,

MICHAEL B. REDDINGTON,
City Attorney of Indianapolis,
City Hall,
Indianapolis, Indiana,
Of Counsel.

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APPENDIX.

Section 85 of Chapter 129 of the Acts of the Indiana General Assembly 1905, page 271 (48-1507 Burns' Indiana Statutes Annotated, 1933):

"No executive department, officer or employee thereof shall have power to bind such city to any contract or agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purposes of such department; and all contracts and agreements, express or implied, and all obligations of any and every sort, beyond such existing appropriations are declared to be absolutely void: Provided, That the board of public works shall have power to contract with any individual or corporation for lighting the streets, alleys and other public places or for supplying the city with gas, water, steam, power, heat or electricity, and for the collection, removal and disposal of garbage, ashes or refuse on such terms and for such times, not exceeding the term fixed by section 254 (Sec. 48-7302, Burns') of this act, as may be agreed upon; but any such contract shall be submitted to the common council of such city and approved by ordinance before the same shall take effect, and, if so approved, shall immediately become effective: Provided, further, That nothing herein contained shall prevent any such department from issuing any bond or other obligation expressly authorized by this act and provided for by ordinance."

Section 254 of Chapter 129 of the Acts of 1905, page 396 (48-7302 Burns' Indiana Statutes Annotated, 1933):

"Any city or town may enter into contract with any person, corporation or association to furnish such city or town and its inhabitants with water, motive power, heat or light, or drainage or sewerage facilities, or to build or extend railroads, interurban or street-car lines, telegraph or telephone lines, drainage or sewerage system, or other public conveniences, into or through such city or town; and may provide in such contract the terms and conditions on which such water, motive power, heat, light, drainage, sewerage, railroad,

interurban, street-car, telegraph or telephone service, or other uses and accommodations of such and other public conveniences may be furnished by such person, corporation or association to such city or town, and to its inhabitants: Provided, That no such contract shall be entered into by any such city or town for furnishing such city or town and its inhabitants with water, motive power, drainage, sewerage, heat or light, upon or along the streets of such city or town for a term longer than twenty-five (25) years: And, provided further, That before any such contract shall be made by any city of the first, second, third, or fourth class such contract shall be first agreed to by the board of public works of such city, after which agreement, such board shall cause a proper ordinance approving and confirming such contract to be presented for adoption by the common council of such city."

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In the Supreme Court of the United States

OCTOBER TERM, 1940.

CITY OF INDIANAPOLIS, *et al.*,
Petitioners,
vs.
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., *et al.*,
Respondents.

10-11
Nos. ~~421-422~~

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC.,
Petitioners,
vs.
CITIZENS GAS COMPANY OF INDIANAPOLIS, *et al.*,
Respondents.

12-13
Nos. ~~423-424~~

ADDITIONAL AUTHORITIES OF CITY OF INDIANAPOLIS, ET AL., PETITIONERS AND CROSS-RESPONDENTS, CITED TO POINT III (pages 43 to 52) IN THE ORIGINAL BRIEF OF CITY OF INDIANAPOLIS, ET AL., PETITIONERS AND CROSS-RESPONDENTS.

WILLIAM H. THOMPSON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
Counsel for City et al., Petitioners and Cross-Respondents,
1350 Consolidated Building,
Indianapolis, Indiana.

EDWARD KNIGHT,
Corporation Counsel,
MICHAEL B. REDDINGTON,
City Attorney of Indianapolis,
City Hall, Indianapolis, Indiana,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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III.

LEASE UNENFORCEABLE AGAINST CITY. (Pages 43 to 52.)

Scott—The Law of Trusts (1939) Vol. II, Section 189.2 page 1010;

Restatement of the Law—Trusts—Vol. I, Section 189 (c) page 499.

Respectfully submitted,

WILLIAM H. THOMPSON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
Counsel for City et al., Petitioners and Cross-Respondents,
1350 Consolidated Building,
Indianapolis, Indiana.

EDWARD KNIGHT,
Corporation Counsel,

MICHAEL B. REDDINGTON,
City Attorney of Indianapolis,
City Hall, Indianapolis, Indiana,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1940.

CITY OF INDIANAPOLIS, *et al.*,
Petitioners,
vs.
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., *et al.*,
Respondents.

10 - 11
Nos. 421-422.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC.,
Petitioners,
vs.
CITIZENS GAS COMPANY OF INDIANAPOLIS, *et al.*,
Respondents.

12 - 13
Nos. 423-424.

ADDITION TO APPENDIX OF BRIEF OF PETITIONERS, CITY OF INDIANAPOLIS, ET. AL.

WILLIAM H. THOMPSON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
Counsel for City et al., Petitioners and Cross-Respondents,
1350 Consolidated Building,
Indianapolis, Indiana.

EDWARD KNIGHT,
Corporation Counsel,

MICHAEL B. REDDINGTON,
City Attorney of Indianapolis,
City Hall, Indianapolis, Indiana,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Nos. 423-424.

ADDITION TO APPENDIX OF BRIEF OF PETITIONERS, CITY OF INDIANAPOLIS, ET AL. (page 89)

Acts Indiana General Assembly 1911, Chap. 229

"An Act to amend Sections 55 and 249 of an Act entitled 'An Act concerning municipal corporations' approved March 6, 1905":

"Sec. 2. That section 249 of the above entitled Act be amended to read as follows: Sec. 249. Any city or town may erect or construct water works, gas works, electric light works, heating, steam and power plants, or combination of such utilities, together with all buildings, lines and accessories necessary thereto and may purchase or lease any such

works and utilities already constructed, or in course of construction and owned by any other person; and may also purchase, condemn or lease other lands for said purposes; and may also extend, change and improve such works and utilities when so acquired; all for the purpose of furnishing the inhabitants of such city or town and vicinity with the use and convenience of any or all of such utilities: Provided, that before any city or town shall enter upon the policy of erecting and constructing any such new works and utilities, or the purchase or lease of the same from other persons, the common council of such city or the board of trustees of such town as the case may be, shall adopt a resolution, designated by number declaring the necessity for entering upon the policy of such erection and construction or purchase or lease. In case of the proposed erection and construction of new works said declaratory resolution shall fix the general character and the probable maximum cost thereof; and in case of the purchase or lease of such works from other persons such common council or board of trustees shall first procure an option from the owners of such works agreeing to sell or lease the same upon the terms of a definite proposed contract of sale or lease upon approval thereof by popular vote, and a full copy of said proposed contract of sale or lease shall be incorporated in and made a part of said declaratory resolution. Before such declaratory resolution is confirmed and the policy thereof entered upon said common council or board of trustees shall submit the same to the qualified voters of such city or town at a special or general election of which election previous notice shall be given by publication once each week for two weeks in some newspaper printed and of general circulation in such city or town and if there be no such newspaper, then in some newspaper printed and of general circulation in the county in which such city or town is situated, the first of said publication to be at least twenty days prior to the day fixed for such election. The tickets for such election shall have printed thereon, in separate line the following phrases: 'For Declaratory Resolution No—' and 'Against Declaratory Resolution No—,' assigning the number of the resolution submitted, or other similar phrases by which the voter may effectually express his choice upon the question submitted; and each phrase shall have printed to the left thereof a voting square, by marking in which square the voter shall express his choice; and such elections shall otherwise be governed by the general election laws of the state of

Indiana, so far as applicable, if such resolution be submitted at a general election of such city the ticket therefor shall be printed upon and at the bottom of the general tickets containing the names of candidates at such election. If a majority of the votes cast at such election be in favor of such resolution, such common council or board of trustees may by ordinance confirm such resolution and proceed to execute the policy thereof; but if a majority of such votes be opposed to such resolution, then such common council or board of trustees shall have no power to confirm the same or to execute the policy thereof. Such city or town is hereby authorized, for the purpose of procuring the means to acquire the aforesaid works and utilities, or to improve the same when acquired, as hereinbefore authorized to issue and sell the bonds of such city or town pursuant to and in conformity with the provisions of section 55 of this Act."

Note:

The Act of 1911 was amended in 1915 by deleting the prohibitions respecting the leasing of utility property. It was again amended in 1931 by restoring the prohibitions against the making of leases without an election.

(The Act as amended appears in Burns' Indiana Statutes Annotated 1933—Sec. 48—7201.)

Respectfully submitted,

WILLIAM H. THOMPSON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
Counsel for City et al., Petitioners and Cross-Respondents,
1350 Consolidated Building,
Indianapolis, Indiana.

EDWARD KNIGHT,
Corporation Counsel,

MICHAEL B. REDDINGTON,
City Attorney of Indianapolis,
City Hall, Indianapolis, Indiana,
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Respondents.

12-13
Nos. ~~423-424~~

ANSWER BRIEF OF PETITIONERS CITY OF INDIANAPOLIS, ET AL., TO RESPONDENT CHASE'S SUPPLEMENTAL BRIEF.

WILLIAM H. THOMPSON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
Counsel for City et al., Petitioners and Cross-Respondents,
1350 Consolidated Building,
Indianapolis, Indiana.

EDWARD H. KNIGHT,
Corporation Counsel,

MICHAEL B. REDDINGTON,
City Attorney of Indianapolis,
City Hall, Indianapolis, Indiana,
Of Counsel.

MARK GRAY CO., INDIANAPOLIS

IN THE

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Respondents.
Nos. 423-424

ANSWER BRIEF OF PETITIONERS CITY OF INDIANAPOLIS ET AL., TO RESPONDENT CHASE'S SUPPLEMENTAL BRIEF.

This brief is submitted in answer to the Supplemental Brief of respondent Chase. Leave is asked to file this answer brief if leave is granted respondent for filing its Supplemental Brief.

NO STATUTORY AUTHORITY FOR CITY OF INDIANAPOLIS TO ASSUME OBLIGATIONS OF LEASE.

At the time the lease in question here was executed by Indianapolis Gas and Citizens Gas, Chapter 229 of the Acts of the Indiana General Assembly 1911 (Pg. 561) was in full force. Section 2 of Chapter 229 prohibited any city or town in Indiana from purchasing or

leasing any utility works without first obtaining an approval of such purchase or lease by popular vote of the electors of such city or town.

In the case of *Todd v. Citizens Gas Company* (1931, 46 F. 2d 855, 865) (Res. Supp. br. pg. 2) Newton Todd sought to prevent the city from taking over the property comprising the public charitable trust being operated by the initial trustee Citizens Gas Company. Among other things, Todd alleged that the attempt on the part of the City to take over the property of Citizens Gas was *ultra vires* because no popular election had been held. (II R. 714) Defendant City answered this allegation by admitting no election had been held because the provisions of the statute relied upon by Todd did not apply. It was further alleged that by the terms of Section 53 of Chapter 129, Acts of the Indiana General Assembly 1905 (Page 219, 247)

> "the Common Council of said City had power by ordinance to receive and accept public trusts and to agree to conditions and terms accompanying the same and bind such city to carry them out." (II R (1) 737).

The Circuit Court of Appeals held (Pg. 866) that the franchise contract from the City to the initial trustee Citizens Gas was neither a purchase nor a contract for a purchase. The Court said:

> "It was an agreement by which the City obtained an interest in the plant subject to the charge in favor of the certificate holders. No funds of the City were paid, or contracted to be paid, for the plant. We think that approval at an election was not essential to the validity of the contract. And certainly this is true if a trust was created, as above pointed out, for the City in express terms is given power to receive public trusts."

In its original brief respondent Chase, in speaking of the City's answer in the Todd case, asserted (page 94):

> "In that case the City correctly interpreted this statute, but gave it an interpretation which is directly contrary to the argument it is now advancing."

In this Chase is mistaken. The Common Council of the City has the power to enact ordinances for the purpose of receiving public trusts and agreeing to conditions and terms accompanying the same and bind the corporation to carry them out. (Sec. 53, Acts 1905, Clause 6th, pg. 247). The conditions and terms, however, must be such as are authorized by law and within the powers of the City to carry out. Compare *Dykeman v. Jenkins* (1913) 179 Ind. 549, 559.

At the time the lease was executed the City was prohibited by statute from leasing utility works without first obtaining approval by popular vote of the electors of the City. (Acts 1911, Chap. 229, Sec. 2, pg. 563).

There has never been an approval by popular vote of the electors of the City in respect of the 99 year lease in question here.

Furthermore, the City expressly rejected an assignment of the lease (I R. 130, II R. 468, II R. 423, III R. 1019). The rejection of the assignment was ratified by an ordinance of the Common Council of the City (III R. 1017, 1018, offered II R. 429).

No approval of the execution of the lease has ever been given by (a) City Council (III R. 982, offered II R. 424), (b) Board of Public Works of City (II R. 932, offered II R. 424), (c) Board of Trustees of the Department of Utilities of City (III R. 934, offered II R. 425).

or (d) Board of Directors of the Department of Utilities of City (III R. 985, offered II R. 425). No other officers of the City had or now have power or authority to take any action in connection with the lease.

The answer of the City in the Todd case alleged simply and solely that the City Council had power by ordinance to *receive* public trusts without the approval of the electors of the City. It was not alleged nor could it have been alleged that the City had power to accept the lease without approval of the electors because the lease was not a condition or term *accompanying* the trust, but was entered into by Citizens Gas Company, lessee, and Indianapolis Gas, lessor, in 1913, several years after the trust was created. The City was not a party to the lease nor is it named in the lease. It never ratified it nor accepted it, but, on the contrary, expressly rejected an assignment of it.

Chase asserts in its supplemental brief in speaking of the operation of the Indianapolis Gas property by the City (p. 4) that:

> "The only agreement between the City and Indianapolis Gas prior to March 2, 1936, is that set forth in the two letters of September 30th relating to the interest payment of October 1, 1935."

This statement of Chase is contrary to the fact.

The trial court found as its finding of fact No. 51 (III R. 1185):

> "That in pursuance of agreements made between the City and The Indianapolis Gas Company, which agreements have been continuously in effect since September 9, 1935, the City has operated the gas producing and distributing plant and system of The Indianapolis Gas Company.

> Such agreements provided, among other things, in substance that such operation by the City should not prejudice the rights of either the City or The Indianapolis Gas Company, and further provided that the City by operating such plant did not recognize the validity of the lease and The Indianapolis Gas Company by consenting to such operation did not admit that the lease was invalid."

Leading up to the agreement for temporary use of the property to commence on September 9, 1935, certain correspondence was interchanged between the City by its Board of Directors for Utilities or its counsel and officers of the Indianapolis Company or the corporation itself. One such letter was written on August 31, 1935 (P. X. 59, III R. 837, offered II R. 329). Another such letter was written on September 30, 1935. (P. X. 66, III R. 838, offered II R. 329). On February 8, 1936, Indianapolis Gas, in a letter to the Board of Directors for Utilities, called attention to the near approach of March 9, 1936, "at which time our *tentative arrangement* will expire." (Our emphasis) (P. X. 75, III R. 839, offered II R. 329).

On September 9, 1935, the Board of Directors for Utilities of the City adopted a resolution for the temporary use of the property of the Indianapolis Gas Company (I R. 200).

The resolution for temporary use, together with the rejection by the City of Indianapolis of the assignment of the 99 year lease, were delivered to Mr. William J. Yule, Secretary of the Indianapolis Gas Company, on September 9, 1935. (II R. 463).

On March 2, 1936, shortly prior to the expiration of the six months' temporary use agreement, a standstill agreement was entered into between the Department of Utili-

ties of the City of Indianapolis and the Indianapolis Gas Company. (I R. 205-207).

The other assertions of Chase made in its Supplemental Brief have been fully presented to the Court in the City's briefs, heretofore filed or in the oral presentation on February 7, 1941.

Respectfully submitted,

WILLIAM H. THOMPSON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
Counsel for City et al., Petitioners and Cross-Respondents,
1350 Consolidated Building,
Indianapolis, Indiana.

EDWARD H. KNIGHT,
Corporation Counsel,
MICHAEL B. REDDINGTON,
City Attorney of Indianapolis,
City Hall, Indianapolis, Indiana,
Of Counsel.

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THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc.
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CITIZENS GAS COMPANY OF INDIANAPOLIS, et al.,
Respondents.

PETITION OF CITY OF INDIANAPOLIS ET AL. TO LIMIT OPENING STATEMENT AND ARGUMENT OF RESPONDENT--CROSS-PETITIONER, CHASE NATIONAL BANK.

WILLIAM H. THOMPSON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
Attorneys for City of Indianapolis, et al.,

EDWARD H. KNIGHT,
Corporation Counsel,
MICHAEL B. REDDINGTON,
City Attorney,
Of Counsel.

Mark Gray Co., Printers, Indianapolis, Ind.

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PETITION OF CITY OF INDIANAPOLIS ET AL. TO LIMIT OPENING STATEMENT AND ARGUMENT OF RESPONDENT—CROSS-PETITIONER, CHASE NATIONAL BANK.

To the Honorable Supreme Court of the United States:

The City of Indianapolis, a municipal corporation of the State of Indiana, and the members of its Board of Trustees for Utilities and the members of its Board of Directors for Utilities, petitioners in causes 10 and 11 and respondents in causes 12 and 13, October Term, 1941, respectfully petitioning, show to the Court:

1. On September 12, 1940, petitioner's petitions for writs of certiorari were docketed on the dockets of this Court as Causes numbered 421 and 422, October Term, 1940.

2. On September 12, 1940, the cross-petitions of the Chase National Bank of the City of New York, Trustee, respondent in Causes numbered 421 and 422, October Term, 1940, and numbered Causes 10 and 11, October Term, 1941, were docketed as Causes numbered 423, 424, October Term, 1940, now docketed as causes numbered 12 and 13, October Term, 1941.

3. The petitions of petitioner City of Indianapolis et al., and the cross-petitions of The Case National Bank of the City of New York, Trustee, were granted on October 28, 1940.

4. The cross-petitions of The Chase National Bank of the City of New York, Trustee, present but one question, viz: If The Chase National Bank of the City of New York, Trustee, is entitled to recover against the City of Indianapolis, et al., whether it is entitled to 6% interest on overdue interest on certain outstanding bonds, and whether it is entitled to 6% interest on the judgment ordered entered by the Circuit Court of Appeals reversing the District Court; or is entitled on each to only 5% interest, as held by the United States Circuit Court of Appeals for the Seventh Circuit.

5. Said causes were presented orally to the Court by counsel for all of the parties on February 6th and 7th, 1941.

6. Said causes have been set by the Court on its own motion for reargument on October 13, 1941.

7. Under part 1 of Rule 28, it is provided that when there are cross writs of certiorari the causes should be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument. The cross-wits of The Chase National Bank of the City of New York, Trustee, are limited to the one question as pointed out in number 4 above. The Chase National Bank, in being permitted to open by reason of being the plaintiff in the court below, should be limited in its opening to that statement of facts which is necessary to present the one question raised by the cross-writs of certiorari and should be limited in its opening argument on its cross-writs to the single question of whether it is entitled to 5% or 6% interest, if the judgment of the Circuit Court of Appeals against the City is affirmed by this court.

8. The question of whether the interest rate should be 5% or 6% is wholly unrelated to the main controversy in this case, viz., the validity of the 99 year lease against the City. A statement of the controlling facts in respect of the main issue is not necessary to a presentation of the question of the interest rate. Nor would a statement of the controlling facts in respect of the main question prove helpful in a determination of the rate of interest. The rate of interest to which Chase will be entitled from the City if the decision of the Circuit Court of Appeals is affirmed will rest on whether there is an applicable contract rate of 5% or whether the statutory rate of 6% will apply.

WHEREFORE, the City of Indianapolis and the individual members of its Board of Trustees and Board of Directors for its Department of Utilities, pray that the Court will limit The Chase National Bank of the City of New York, Trustee, respondent in Causes 10 and 11, and cross-peti-

tioner in Causes 12 and 13, October Term, 1941, to the presentation on its opening on reargument to the facts and argument in respect of the limited question raised by its cross-writs of certiorari.

Respectfully submitted,

WILLIAM H. THOMPSON,
PERRY E. O'NEAL,
PATRICK J. SMITH,

Attorneys for City of Indianapolis, et al.,

1350 Consolidated Building,
Indianapolis, Indiana.

EDWARD H. KNIGHT,
Corporation Counsel,

MICHAEL B. REDDINGTON,
City Attorney,

Of Counsel.

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THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., *Petitioner*, *v.* CITIZENS GAS COMPANY OF INDIANAPOLIS, et al., *Respondents.*	Nos. 12 and 13.

REQUEST FOR PERMISSION TO FILE SUPPLEMENTAL MEMORANDUM AND SUPPLEMENTAL MEMORANDUM

WILLIAM H. THOMPSON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
Attorneys for City of Indianapolis, et al.,
Indianapolis, Indiana.

EDWARD H. KNIGHT,
Corporation Counsel,
MICHAEL B. REDDINGTON,
City Attorney,
Of Counsel.

The Mark Gray Co., Inc., Indianapolis, Ind., Printers

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Nos. 12 and 13.

REQUEST FOR PERMISSION TO FILE SUPPLEMENTAL MEMORANDUM.

The City of Indianapolis and the individual members of its Boards of Trustees and Directors for Utilities, petitioners and cross-respondents, respectfully ask permission of the

Court to file the supplemental memorandum attached to this motion.

Respectfully submitted,

WILLIAM H. THOMPSON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
Attorneys for City of Indianapolis, et al.,
Indianapolis, Indiana.

EDWARD H. KNIGHT,
Corporation Counsel,
MICHAEL B. REDDINGTON,
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SUPPLEMENTAL MEMORANDUM OF CITY OF INDIANAPOLIS, ET AL., PETITIONERS.

NOTE: This memorandum is intended merely to supplement the briefs heretofore filed by petitioners in this cause and all propositions advanced in our original briefs are still relied upon.

I.

FACTUAL SUMMARY.

Citizens Gas Company on August 25, 1905, by a franchise contract with the City of Indianapolis became the initial trustee of a public charitable trust (I R. 81-116), the corpus of which now consists of certain personal and real property utilized in the manufacture and distribution of artificial gas.

Todd v. Citizens Gas Company, 46 F. (2d) 855.

On September 9, 1935, the City, in accordance with its franchise contract with Citizens Gas, took over the trust res, as successor trustee of the public charitable trust.

On September 30, 1913, Indianapolis Gas Company, lessor, and Citizens Gas, lessee, executed the 99 year lease in question here.

When the City became successor trustee on September 9, 1935, it rejected an attempted assignment of the 99 year lease. (Exhibit G to complaint, I R. 130; II R. 468; II R. 423, 463; III R. 965.)

The rejection was ratified by an ordinance of the Common Council of the City. (III R. 1017, offered II R. 439.)

The property of the Indianapolis Gas Company was not a part of the trust res; indeed, the public charitable trust in the property of Citizens Gas Company was created for the very purpose of furnishing and maintaining competition with Indianapolis Gas.

This suit was instituted by Chase National Bank, trustee, under a mortgage of Indianapolis Gas, to enforce the lease against the City.

II.

LEASE WHEN EXECUTED WAS NOT BINDING ON CITY.

The facts in this case show conclusively that the 99 year lease was not, when executed, the obligation of or binding upon the City in any sense. Not only is this statement demonstrably true, but it is strongly, though inferentially, admitted by Chase. The theory of the complaint is that the City is *estopped* to deny the enforceability of the lease and that the City is bound by the principle of *res adjudicata*. *This theory necessarily implies that the lease was initially unenforceable against the City.*

The facts which show indisputably that the lease when executed did not bind the City are:

1. No part of the property of Indianapolis Gas and no [illegible] any part of that property was a part of the trust res. [illegible] one of the underlying purposes of the organization of Citizens Gas was to provide a competitor for Indianapolis Gas.

2. The Trust instruments contain no authorization to lease or acquire the property of a competitor. (Finding No. 2, III R. 1167.)

3. The City did not sign or execute the lease of September 30, 1913. *The only parties to the lease are the lessor, Indianapolis Gas, and the lessee, Citizens Gas.* (Finding No. 22, III R. 1167, 1168.)

4. The City is not named as a party obligated by the lease. (Finding No. 25, III R. 1171.)

5. The City is not an assignee of the lease. An assignment was tendered and rejected. The evidence shows that this assignment was made in a separate written instrument (Finding No. 28, III R. 1171), because the City had advised Citizens Gas prior to September 9, 1935, the date of the transfer to the City as successor trustee, that it would not accept an assignment of the lease. (II R. 464.)

6. No ordinance was ever adopted by the Common Council nor any resolution ever adopted by the Board of Public Works of the City authorizing the execution of the lease, or ratifying it or agreeing to be bound by its terms. No action was ever taken by the Board of Trustees or the Board of Directors of the Department of Utilities accepting the lease or agreeing to be bound by its terms. (City Stip. X 1, 2, 3, 4, III R. 982, 986, offered II R. 424, 425.) (Findings No. 26 and 27, III R. 1171.)

The action of the Board of Directors of the Department of Utilities of the City rejecting the lease was ratified by an ordinance of the Common Council of the City. (III R. 1017, 1018, offered II R. 429.)

7. The City has not accepted a part of a trust res and refused to accept another part. *It has accepted the entire trust res* (Finding No. 22, III R. 1167, 1168) *and rejected a lease which it claims the initial trustee had no power to impose upon the City.*

III.

NO SUBSEQUENT ACTION OF MUNICIPAL AUTHORITY COULD RATIFY OR VALIDATE THE LEASE, WHICH INITIALLY DID NOT BIND THE CITY.

The lease between Indianapolis Gas and Citizens Gas

was for a term of 99 years. The applicable Indiana statutes prohibit the making of such a contract for furnishing gas and other utility services to the City for a term longer than twenty-five years. *Even a lease for a twenty-five year term must first be agreed to by the Board of Public Works and then approved by an ordinance of the Common Council of the City. There is no claim of such approval.*

> Chapter 129, Acts Indiana General Assembly 1905, Sections 85 (Pg. 271) and 254 (Pg. 396) (Burns' Indiana Statutes Annotated, 1933, Sections 48-1705 and 48-7302, respectively.) [1]

A contract for utility services for a term longer than that permitted by statute is void in Indiana and cannot be ratified by any *subsequent* municipal action.

> *Gas, Light & Electric Company v. City of New Albany* (1901), 156 Ind. 406, 415.

At the time the lease was made in 1913 Indianapolis Gas, through its artificial gas producing and distributing facilities, was supplying gas to more than 41,000 consumers in Indianapolis. Its property was twice the size of Citizens Gas. (II R. 621, offered II R. 327.)

When operations commenced under the lease, it was the medium of an agreement to supply gas to 41,000 consumers (or such as continued to take gas) for a term of nearly four times the maximum statutory term permitted for such contracts.

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[1] The relevant portions of Sections 85 (pg. 271) and 254 (pg. 396), Acts 1905, are set out as appendices A and B, respectively, at the end of this memorandum.

The 99 year lease was within the terms of Sections 85 and 254, Acts 1905, because it was a contract for supplying the City and its inhabitants with gas, heat and light.

The lease was not authorized or approved by the Board of Public Works or by any ordinance of the Common Council (III R. 982, 983, offered II R. 424).

The City in its operation of the utility is not responsible to the state Public Service Commission as to rates or fair return.

> Chapter 190, Acts Indiana General Assembly, 1933. (Pg. 928.)

The only check upon rates in such cases is public opinion.

Both Sections 85 and 254, Acts of 1905, serve as a protective shield against unreasonable leases which might well result in the imposition of excessive rates for service, by limiting the duration of such leases and *requiring municipal approval of their terms.*

It is well settled law in Indiana that a contract or lease by which it is sought to bind a municipal corporation, which has been made in violation of the terms of an Indiana statute is absolutely void and cannot be ratified. The doctrine of estoppel has no applicability to such a situation.

> *Gaslight, etc., Co. v. City of New Albany* (1901), 156 Ind. 406, 415;
>
> *City of Indianapolis v. Wann, Receiver* (1895), 144 Ind. 175, 187;
>
> *Hamer v. City of Huntington* (1939), 215 Ind. 594, 600, 601.

In the case first cited, the Supreme Court of Indiana used the following apposite language.

> "It is elementary that municipal officers have no powers beyond those expressly conferred by statute, or necessarily implied to enable them to make effective the powers granted or to protect the public welfare. Therefore, when they attempt an act that is beyond the limit of their power, the act has no official sanction and is no more effectual than if performed by non-official persons. *As a municipal act it is wholly void and being void, nothing of substance may flow from it* * * *' 'Where a municipal council is authorized by statute to contract for a period not exceeding ten years, its contract for twenty years or for an indefinite time cannot be sustained for ten years but is entirely void * * *'" (Our emphasis.)

If then, as we submit, the lease when executed was unenforceable against the City and could not have been enforced against it for complete lack of municipal authorization, as well as complete lack of intention on the part of the contracting parties to bind any one but themselves, *then it follows that it cannot be made binding on the City by indirection either on the theory that there was implied power to execute the lease or on the doctrine of estoppel. The absolute prohibition of the statute based upon the soundest consideration of public policy cannot be circumvented in any manner. Formal municipal approval of such a lease is an absolute condition precedent to its validity.*

IV.

STATUTES UNDER WHICH CITY TOOK OVER PROPERTY OF CITIZENS GAS DID NOT REQUIRE CITY TO ACCEPT INDIANAPOLIS GAS LEASE.

It has been argued by our opponents that the Acts of the Indiana General Assembly of 1929 and 1931, pursuant

to which the Department of Utilities of the City was created and authorized to take over utility property, mandatorily required the City to accept the Indianapolis gas lease.

But a mere reading of the applicable statutes discloses that they are permissive in character and give authority to accept property or leases without the slightest indication of legislative intent that the City shall be *required* to do so.

Section 1 of Chapter 78, Acts Indiana General Assembly, 1929, provided that in cases such as here:

> "Said municipal corporation *shall be authorized to accept*, hold and own all the property of such corporation so transferred to it, including that located within this state and that located in any other state and any shares of stock or other interest in any other corporation of which said corporation making such transfer shall be the owner, and any right, title or interest such transferring corporation may have in any lease upon other property." (Our emphasis.)
>
> (Burns' Indiana Statutes Annotated, 1933, Sec. 48-7218.)

By Chapter 77 of the Acts of the Indiana General Assembly 1929 (Pg. 252) (as amended by Chapter 67, Acts 1931, Pg. 152) a new and additional executive department was created in Indiana cities of the first class, of which Indianapolis is the only one. This is the Department of Utilities, governed by a board of directors for utilities, and which has

> "the exclusive government, management, regulation and control of all public utilities consisting of any . . . . gas works . . . including any public utility and all property thereof which such city may now or

hereafter hold as trustee for the benefit of the inhabitants of such city . . ."

Section 2, Chapter 67, Acts 1931, pg. 152.

This same section also provides in part that:

"In connection with the duties devolving upon such board of directors in the government, management, regulation, control and operation of all such utilities, or any thereof, it *shall have power* as follows:

. . . . .

"To take over, adopt and assume the performance of the provisions of any lease under which any utility property may be held at the time of the acquisition of any utility by any such city, either in absolute ownership or in trust, and take any and all steps necessary to perform and fulfill the terms of any such lease, and to obtain and preserve the benefits therefrom; and in event there be any outstanding open mortgage upon the property covered by such lease so taken over under the provisions of which bonds may be withdrawn from the trustee under such mortgage for the purpose of paying all or part of the cost of additions to the property covered by such mortgage, to do and perform all things necessary in order to secure the benefit of such mortgage provisions and to enable the escrow bonds held by the trustee under any such mortgage to be taken down and sold in order to defray the cost of any extensions and betterments to such leased property; and to sell any such bonds so taken down for the purpose of assisting in defraying the costs of any such extensions or betterments to such leased property." (Our emphasis.)

The statutory phrases "Shall be authorized to accept" and "Shall have power" connote only the right to accept such a lease, and are wholly removed from any concept of compulsion.

At the time these statutes were enacted, Citizens Gas

had a favorable lease on portions of the Majestic Building (P. Stip. X 56 III R. 835 offered II R 327), as well as the lease from Indianapolis Gas. The obvious purpose of the legislation was to permit the City to accept desirable leases, not to foist on it burdensome ones. This entire situation was one of which there was widespread public knowledge and it is indeed strange that the legislature, if it intended to require the City to assume the obligations of the 99 year lease, did not find apt language to express such intention. No amount of statutory construction can fairly lead to the conclusion contended for by Chase.

It is clear that the board of directors were not obligated to take over the 99 year lease at the time the City became successor trustee of the public charitable trust. The Board rejected the attempted assignment of the lease, as it had the right to do. (I R. 130; II R. 423, 463, 468.)

V.

DECISION OF CIRCUIT COURT OF APPEALS BASED UPON IMPLIED POWER OF TRUSTEE IS ERRONEOUS.

As we have heretofore shown, the 99 year lease was unenforceable against the City irrespective of whether it was of a burdensome character. Lack of precedent municipal authorization rendered the lease, as against the City, absolutely void and insusceptible of ratification.

This being true, the lease cannot properly be held to be binding on the City on the theory of *implied power* of the trustee to execute it, where, as here, the statutory plan requires express approval by designated municipal authorities and, in the interest of the public, prohibits the execution of leases for a period of more than 25 years.

There are, however, a number of additional reasons, why the decision of the Circuit Court of Appeals on this issue of the implied power of the trustee to bind the City is erroneous. These reasons are:

1. The City was denied any hearing whatever on the burdensome character of the lease, in violation of the Due Process clause of the Fifth Amendment.

2. The Circuit Court of Appeals held the lease to be enforceable against the City on the ground of res adjudicata and determined the binding effect of certain judgments *as a matter of law*. Under a long line of uniform Indiana decisions the question of res adjudicata is one of *fact*.

3. Although concededly the relevant trust documents contain no express authorization empowering the trustee to execute a long-term lease, the Circuit Court of Appeals held that such right did exist and completely ignored the established Indiana rule that grants by a municipality are to be strictly construed and that nothing passes by implication.

4. The Circuit Court of Appeals misconstrued and misinterpreted the trust instruments and ignored the factual background of the public charitable trust, both of which negative the existence of any implied power in the trustee to execute such a lease. The charitable trust was created for the purpose of establishing and maintaining competition with Indianapolis Gas and the execution of the 99 year lease was entirely antagonistic to the expressed purposes of the donors found in the trust instruments.

The propositions stated above are fully discussed in the City's original brief (under title "Due Process of Law," pages 32 to 43, inclusive, and under title "Lease Unenforceable Against City," pages 43 to 52, inclusive).

We will therefore here refer to them only briefly:

1. That the issue of the burdensome character of the lease was reserved for future determination by the court does not admit of substantial dispute. (II R. 321, 322, 475; III R. 1159, 1192; IV R. 1320.)

The City's counterclaim directly placed in issue the burdensome character of the lease, as an additional reason for its non-enforceability and specifically alleged the facts showing such burdensomeness. (I R. 136.)

The City had the right to rely on the reservation of the issue of burdensomeness and was under no obligation to offer proof on that issue and indeed would not have been permitted to do so.

Saunders v. Shaw et al., 244 U. S. 317, 320.

The City was thus denied due process of law.

Hovey v. Elliott, 167 U. S. 409, 417.

Ohio Bell Tel. Co. v. Public Utilities Comm., 301 U. S. 292, 304-306;

Ohio Water Works Co. v. Ben Avon Borough, 253 U. S. 287, 289.

The requirements of due process are not satisfied without an opportunity to be heard *on both questions of law and fact*.

Bluefield Water Works & Improvement Co. v. Public Service Commission, 262 U. S. 679, 692.

Furthermore, the Circuit Court of Appeals held that

the question of whether the lease was prudent, i. e., burdensome, was urged before the Indiana Supreme Court and "that court did not find the lease in question unreasonable as to time or as to its other terms. *Williams v. Citizens Gas, et al.*, 206 Ind. 448, 458, 460" (IV R. 1300).

The Circuit Court of Appeals also held that the cases relied upon by Chase in its complaint were res judicata "as to the validity of the 99 years lease" (IV R. 1300). Thus it was held that the reserved issue of the burdensome character of the lease was res adjudicata as against the City.

The burdensome character of the lease was specially pleaded by the City in a counterclaim (I R. 186). Chase for its answer to the City's counterclaim filed merely a general denial (I R. 214). While Chase pleaded in its complaint certain decisions as res adjudicata, it did not plead res judicata in its answer to the issue of burdensomeness raised by the City's counterclaim.

Despite the fact that no issue of res adjudicata was presented by Chase's answer to the City's counterclaim despite the reservation of the issue by the trial court, the Circuit Court of Appeals decided that the burdensome character of the lease was res adjudicata.

2. Under the uniform decisions of the highest courts of Indiana, the question of whether a former judgment was a complete adjudication of the issues involved in this case is a question of fact.

McSweeney v. Carney, 72 Ind. 430, 433.

The Circuit Court of Appeals held that the lease was enforceable against the City *if not burdensome* in char-

acter, but was unenforceable if burdensome. It then proceeded to determine that the question of the burdensomeness of the lease had been adjudicated, and denied the City any right to be heard on that issue. It thus deprived the City of rights guaranteed by the Fifth Amendment to the Federal Constitution.

Cf. *Cobbledick v. U. S.*, 309 U. S. 323, 325.

The hearing to which the City was entitled was a hearing in the trial court. Nothing short of that, will satisfy the requirements of due process.

The City by a timely petition for a rehearing emphasized this denial of due process and requested the Circuit Court of Appeals to reverse its decision and to remand the cause for a hearing on the issue of the burdensome character of the lease. (IV R. 1309, 1310, 1346.)

3. The Circuit Court of Appeals refused to follow an unbroken line of Indiana decisions to the effect that nothing passes by implication when a grant is made by a municipality—and it thus violated the rule laid down by this court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64. Having determined that there was no express power granted to execute such a lease, the Circuit Court of Appeals should have held that inasmuch as the grant was from the City of Indianapolis, no power to execute such a lease could be implied.

The trial court found as a fact from the trust instruments in evidence that:

> "There is no provision in any of the trust instruments authorizing Citizens Gas Company to become lessee of a competing gas property." (Finding No. 20, III R. 1167.)

With this finding the Circuit Court of Appeals agreed. It said:

> "The terms of the trust neither expressly conferred upon nor expressly denied the trustee the power to acquire a non-freehold interest in property. In truth the terms of the trust remain silent on the subject of trustee's powers. The only applicable language relates to duties and not to powers. This language imposes upon the trustee the duty 'to supply the City of Indianapolis and its inhabitants with light, heat and power.' Plainly the extent of the trustee's powers are measured by the scope of the duty imposed in the terms of the trust, and it is reasonable to conclude that the trustee had the power to secure what utility property was necessary or appropriate to enable it to engage in the gas business and to supply the City with light, heat and power."
>
> 113 F. (2d) 217, 227 (IV R. 1297.)

Yet the Circuit Court of Appeals held that:

> "We therefore conclude that the trustee had the power to make the long term lease in question and that this particular leasehold interest in the Indianapolis Gas property is part of the trust res."
>
> 113 F. (2d) 217, 229 (IV R. 1300).

The trust instruments consisted of the franchise contract from the City to Citizens Gas (I R. 81) and the Articles of Incorporation of Citizens Gas (I R. 95).

The franchise contract designated the material provisions to be inserted in the Citizens Gas Articles of Incorporation. These material provisions thus became a condition to the grant and are to be construed strictly against the grantee.

In *Indianapolis Cable Railroad Co. v. Citizens Street Railroad Company* (1890), 127 Ind. 369, 390, it was said:

> "A grant made by the commonwealth, or by a municipal corporation, under authority from the commonwealth, is to be taken most strongly against the grantee, and nothing is to be taken by implication against the public, except what necessarily flows from the nature of the terms of the grant."

The same rule was announced by this court in *Piedmont Power & Light Co. v. Town of Graham, et al.*, 253 U. S. 193, 194, 195; *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 34; *Blair v. Chicago*, 201 U. S. 400, 471; and *Mitchell v. Dakota Central Telegraph Co.*, 246 U. S. 396, 412.

Under the above rule prevailing in Indiana and announced by this court, implied power in the trustee to make the lease should not be read into the trust instruments which admittedly are barren of any express power.

4. The entire historical background of the public charitable trust involved in this case and the terms of the trust instruments themselves, negative the idea of the right of the initial trustee to enter into a 99 year lease with Indianapolis Gas. Citizens Gas was organized to compete with Indianapolis Gas. Surely the settlors of the trust never contemplated a surrender of this competitive situation by agreement with Indianapolis Gas.

The lease requires rental to be paid until 2012 of sums equal to (1) 5% on the outstanding bonds (which now amount to $6,881,000); (2) 6% on the common stock of $2,000,000; (3) all taxes for which Indianapolis Gas would become liable including property and income taxes, state and federal; and (4) certain additional miscellaneous items

There is no provision for any adjustment of the lease rental due to economic or business conditions, or for any change based upon the earning power of invested capital. No matter how much taxes are increased, the burden falls always upon the lessee. There is not even a provision for a periodical adjustment of rental by agreement, or failing agreement, by arbitration.

Surely such a lease was not within the implied power of the trustee to execute.

VI.

THE CITY IS NOT ESTOPPED TO ASSERT THE UNENFORCEABILITY OF THE LEASE.

At pages 53 to 71, inclusive, of our original brief we pointed out that the doctrine of estoppel could not be successfully asserted against the City. The reasons for that conclusion may be thus briefly summarized:

1. There was no proof whatever that either Chase or any present bondholder of Indianapolis Gas even knew of, much less relied upon, any claimed act of estoppel. The Indiana rule is that the doctrine of estoppel has no application where the other party was not influenced by the acts claimed to result in such estoppel.

Ross et al. v. Banta (1894), 140 Ind. 120, 150;
Hosford v. Johnson (1881), 74 Ind. 479, 485.

2. The acts relied upon do not form the basis for an estoppel, nor has it been shown that any representative of the City ever asserted that the lease was enforceable against it.

3. A municipal corporation cannot, under the Indiana law, be estopped by the unauthorized acts of its officers.

Platter v. Board (1885), 103 Ind. 360, 381;

Cummins v. City of Seymour (1881), 79 Ind. 491, 496;

Lake County, etc., Co. v. Walsh (1902), 160 Ind. 32, 39.

In addition, the trial court found the facts respecting estoppel against Chase. (Findings No. 44, 45, III R. 1181; 46, 47, III R. 1182; 51, 54, III R. 1185; 58, III R. 1187.)

The third and fourth conclusions of law of the trial court were:

"3. That the City is not estopped by any of its conduct from denying the validity and enforceability against it of the lease.

"4. That the Citizens Gas Company is not estopped by any of its conduct from denying the validity and enforceability against it of the lease." (III R. 1190.)

These findings are supported by ample evidence.

In *Guilford Const. Co. v. Biggs* (1939, C.C.A. 4) 102 F 2d, 46, 47, it was said:

"The provisions of the new procedural rules that the findings of fact of the trial judge are to be accepted on appeal unless clearly wrong (Rule 52 (a) 28 U.S.C.A., following section 723 (c)) is but the formulation of a rule long recognized and applied by courts of equity."

This court said in *Adamson v. Gilliland* (1916), 242 U. S. 350, 353:

> "Considering that a patent has been granted to the plaintiff, the case is pre-eminently one for the application of the practical rule that so far as the finding of the master or judge who saw the witnesses 'depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' *Davis v. Schwartz*, 155 U. S. 631, 636."

In the instant case there is ample evidence consistent with the findings of the trial court. Its findings under the above rules are unassailable.

VII.

ALL CONTESTED ISSUES FOUND AGAINST CHASE AND INDIANAPOLIS GAS BY TRIAL COURT.

As pointed out, the trial court found the facts specially. On every contested issue, the findings were against Chase and Indianapolis Gas.

Despite the findings of the trial court both Chase and Indianapolis Gas have presented this case to the Circuit Court of Appeals and to this court as though there were no findings of the trial court against them.

Each finding of the trial court is amply supported by competent and relevant evidence. The findings of the trial court thus supported are unassailable.

VIII.

WILLIAMS CASE DOES NOT STATE APPLICABLE INDIANA LAW.

The case of *Williams v. Citizens Gas Co., et al.* (206 Ind. 448) is not res judicata of the issues present here for reasons pointed out in our original brief at pages 75 to 79.

Nor does the Williams case express the Indiana law applicable to the issues here. The Williams case was decided on a demurrer. The Indiana Supreme Court passed on only those facts pleaded in the complaint.

The nature of the Williams case is stated by the Indiana Supreme Court to be a "Suit by appellant (Williams) to establish a trust; to quiet title to property of the trust estate; to recover diverted assets of the trust estate; to recapture the trust and its property from delinquent and insolvent trustees and sequester the same with receiverships; to administer the trust during an emergency and at the end of the emergency turn over the trust and its property to its lawful beneficiaries."

Thus it is apparent that the cause of action in the Williams case is different from the cause of action here. Hence it follows that an issue not actually litigated in the Williams case is not res adjudicata.

The validity of the 99 year lease against the City as successor trustee was not actually litigated in the Williams case; thus, is not res judicata.

IX.

INDIANAPOLIS GAS SHOULD HAVE BEEN REALIGNED AS A PLAINTIFF AND THUS JURISDICTION OF THE LOWER COURT DESTROYED.

We have fully discussed this proposition at pages 22 to 32 of our original brief.

Chase and Indianapolis Gas both actively urge the enforceability of the lease against the City. The City denies this claim. Unless and until the lease is held binding upon the City, neither Chase nor Indianapolis Gas can obtain any relief whatever against the City under the terms of the lease.

This is the real, the main and the controlling controversy in this case. The attitude of the parties in respect of this controversy (and not in respect of subsidiary or dependent issues) should determine whether realignment is required.

Sutton v. English, 246 U. S. 199, 204, 62 L. Ed. 664.

This record shows (see our original brief, page 26) that as a practical proposition Indianapolis Gas is *completely insulated* from paying the judgment of more than a million dollars rendered against it in favor of Chase. It taxes one's credulity to believe that Chase and Indianapolis Gas are hostile litigants, when Indianapolis Gas in all courts in which this case has been heard has readily admitted that the judgment against it for the principal sum is correct and did not even ask this court to review such judgment. The original alignment of Indianapolis Gas was based on no reality of conflict with Chase on the dominant issue in this case, viz: the enforceability of the 99 year lease against the City.

X.

FISHBACK CASE NOT RES JUDICATA

The case of *Fishback v. Public Service Commission* (193 Ind. 282), pleaded by Chase to be res judicata (I R. 10, 13) and relied on by the Circuit Court of Appeals as a barrier to the City's contentions (IV R. 1300), in reality determined only that the attempted appeal was not taken in time. The case was dismissed as to the City before judgment in the trial court. In speaking of the order of the Public Service Commission, also pleaded by Chase as res judicata of the validity of the lease (I R. 8, 18), the court said (page 285):

> "The approval of a lease of the property of one public utility corporation by another is a legislative act . . ."

It is not a judicial act. Being merely legislative in character it could not be res judicata.

XI.

We deem it unnecessary to discuss the other questions presented in our original briefs, as this memorandum is intended merely to supplement such briefs.

The City submits that the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

WILLIAM H. THOMPSON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
Attorneys for City of Indianapolis, et al., Petitioners.
1350 Consolidated Building,
Indianapolis, Indiana.

EDWARD KNIGHT,
Corporation Counsel.
MICHAEL B. REDDINGTON,
City Attorney.
City Hall,
Indianapolis, Indiana.

APPENDIX A.

Chapter 129, Acts 1905 (Pg. 271)

Sec. 85. "No executive department, officer or employee thereof shall have power to bind such city to any contract or agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purposes of such department; and all contracts and agreements, express or implied, and all obligations of any and every sort, beyond such existing appropriations are declared to be absolutely void: Provided, That the board of public works shall have power to contract with any individual or corporation for lighting the streets, alleys and other public places or for supplying the city with gas, water, steam, power, heat or electricity, and for the collection, removal and disposal of garbage, ashes or refuse on such terms and for such times, not exceeding the term fixed by section 254 (Sec. 48-7302) of this act, as may be agreed upon; but any such contract shall be submitted to the common council of such city and approved by ordinance before the same shall take effect, and, if so approved, shall immediately become effective: Provided, further, That nothing herein contained shall prevent any such department from issuing any bond or other obligation expressly authorized by this act and provided for by ordinance."

APPENDIX B.

Chapter 129, Acts 1905 (Pg. 396)

Sec. 254. "Any city or town may enter into contract with any person, corporation or association to furnish such city or town and its inhabitants with water, motive power, heat or light, or drainage or sewerage facilities, or to build or extend railroads, interurban or street-car lines, telegraph or telephone lines, drainage or sewerage system, or other public conveniences, into or through such city or town; and may provide in such contract the terms and conditions on which such water, motive power, heat, light, drainage, sewerage, railroad, interurban, street-car, telegraph or telephone service, or other uses and accommodations of such and other public conveniences may be furnished by such person, corporation or association to such city or town, and to its inhabitants; Provided, That no such contract shall be entered into by any such city or town for furnishing such city or town and its inhabitants with water, motive power, drainage, sewerage, heat or light, upon or along the streets of such city or town for a term longer than twenty-five (25) years: And, provided further, That before any such contract shall be made by any city of the first, second, third or fourth class such contract shall be first agreed to by the board of public works of such city, after which agreement, such board shall cause a proper ordinance approving and confirming such contract to be presented for adoption by the common council of such city."



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IN THE

Supreme Court of the United States

October Term, 1941

THE CITY OF INDIANAPOLIS, et al., *Petitioners*, v. THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., et al., *Respondents.*	Nos. 10 and 11.
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., *Cross-Petitioner*, v. CITIZENS GAS COMPANY OF INDIANAPOLIS, et al., *Respondents.*	Nos. 12 and 13.

REPLY BRIEF OF CITY OF INDIANAPOLIS TO REJOINDER BRIEF OF CHASE NATIONAL BANK AND SUPPLEMENTAL ANSWER BRIEF OF INDIANAPOLIS GAS COMPANY

Respondent and cross-petitioner Chase in its rejoinder brief at page 6 says that:

> "The argument (Supp. Mem. 6-8) that the Lease itself was prohibited by Sections 85 and 254 of Chapter 129 of the Acts of 1905 (quoted, Pl. Br. 147-9) is absurd. These statutes obviously relate solely to contracts to which a municipality is a party and the City was not a party to the contract here in question."

Chase thus claims that Sections 85 and 254 of Chapter 129 of the Acts of 1905 are inapplicable as limiting the duration of a contract with the City because the City did not execute the lease. Chase thus admits that there was no initial liability on the City in respect of the obligations of the lease.

The above named statutes, however, are applicable whenever any attempt is made to bind the City at any time. The obvious purpose of these acts and wise public policy which caused their enactment cannot be evaded by first executing a contract to which the City is not a party and then at some subsequent time seeking to make the City liable thereunder. The language of the Acts is all embracing and condemns any contract in violation of the prohibition therein contained whenever and however made so long as the City is sought to be held liable thereunder.

Indianapolis Gas, in its Supplemental Answer Brief, claims at page 9 that Sections 85 and 254 of Chapter 129 of the Acts of 1905, were repealed. Indianapolis Gas says:

> "So far, if at all, as Chapter 129, Acts Indiana 1905, sections 85 and 254, were in conflict with the Public Service Commission Act they were repealed by the last section (130) of Chapter 76, Acts 1913 (Appendix L), which expressly repealed all prior legislation 'so far as inconsistent therewith.' This included repeal of all statutes (if any) which forbade the execution of this lease 'at a price and on terms fixed by the Commission.' "

Section 130 of Chapter 76, Acts of 1913, did not repeal Sections 85 and 254, Chapter 129, of the Acts of 1905 because Sections 85 and 254 are not inconsistent with the

provisions of Chapter 76 (Shively-Spencer Act) of the Acts of 1913.

Section 130 of Chapter 76, Acts of 1913 (p. 214) does not enumerate the Acts or parts of Acts repealed, but simply repeals all Acts and parts of Acts conflicting with the provisions of Chapter 76 so far as they are inconsistent with the provisions of said Chapter 76.

It is not claimed by Indianapolis Gas that Chapter 76 of the Acts of 1913 expressly repealed either of Sections 85 or 254 of the Acts of 1905.

Repeals by implication are not favored by Indiana courts.

Robinson v. *Rippey* (1887), 111 Ind. 112;
City of Indianapolis v. *Morris* (1900), 25 Ind. App. 409.

The purpose of the Shively-Spencer Act and these two sections of the Cities and Towns Act of 1905 are essentially different in that the Shively-Spencer Act with certain exceptions was not intended to regulate municipally owned utilities; whereas, the Cities and Towns Act was intended in part to prevent the imposition of onerous contracts on municipally owned utilities which would result in burden to the taxpayers.

This situation is emphasized in this case when we consider that the Act of 1933 (Chapter 190) exempts the City of Indianapolis in respect of this utility from all control by the Public Service Commission; and that while the express point here involved was not before the Indiana Supreme Court in *Hamer* v. *City of Huntington* (1939), 215 Ind. 594, the Court dealt with Section 85 of the Acts of 1905 and

recognized the efficacy of this statute. In that case it was held that a contract entered into on December 31, 1936, was absolutely void because no appropriation of funds had been made prior to the execution of the contract in violation of the provisions of said Section 85. Section 85 refers to Section 254 and the two statutes stand together.

Chase, in its brief, page 2, quotes an alleged admission of the City (I R. 243):

> "that defendant Citizens Gas Company of Indianapolis conveyed and transferred all of its property to the City of Indianapolis subject to all outstanding legal obligations of that Company, * * * "

In order to make what Chase now says is its main point, it takes a position not borne out by the record. A reference to the sentences in the record immediately following the quoted portion set out by Chase, show the unfairness of Chase's position. The portion quoted by Chase, together with the clauses and phrases immediately following the quoted portion and omitted by Chase, are herewith set out (the italicized portion was omitted by Chase):

> "that defendant Citizens Gas Company of Indianapolis conveyed and transferred all of its property to the City of Indianapolis subject to all outstanding legal obligations of that Company, *but they aver that said lease was not and is not one of such obligations; and they aver that the tendered assignment of said lease was expressly rejected by the City of Indianapolis, that said lease was not assumed by the City, and is wholly invalid and unenforceable as against defendant City of Indianapolis*" (I R. 243).

Chase also in its brief at page 3 quotes a portion of the City's answer and counter claim in respect of certain averments in respect of the existing controversy and states that the quoted extract establishes "that Citizens Gas had power

to execute the lease and make it binding on the public charitable trust."

We set out below the relevant portion of the answer and counter claim and have italicized the portions omitted by Chase in its quotation:

> "*These answering defendants admit that a real and actual controversy exists as to the binding force and effect of said lease of September 30, 1913, but they allege:*
>
> (b) *That such controversy exists only as to the binding force and effect of said lease of September 30, 1913, upon these answering defendants after the transfer of the property and assets formerly held by the Citizens Gas Company as Trustee of a public charitable trust to the City of Indianapolis as the successor Trustee of said trust, which transfer was made on September 9, 1935, and allege* that as to these defendants, no controversy ever existed as to the binding force and effect of said lease for and during the term of trusteeship of said Citizens Gas Company." (I R. 243.)

A cursory examination of the quoted language completely refutes the claim of Chase of any admission of liability under the lease. The City was here only dealing with the question of when the controversy arose. It is significant to remember that the quoted portion is a part of an answer and counter claim in which the City sought a declaratory judgment that the lease was unenforceable as to it.

In its rejoinder brief at page 3 Chase quotes one question and answer from a colloquy between Mr. Justice Reed and counsel for the City.

We have had no experience with the practice of quoting colloquies occurring at a former argument, but if any weight is to be given to such a colloquy, then the full discussion

relating to the subject-matter should be set forth. This, we have done in an appendix to this brief, the transcript having been furnished us by Chase's counsel. An examination of this discussion will serve to show that in the colloquy in its entirety the position of the City was then as expressed in its brief and as it has been throughout this controversy. To quote half sentences, or isolated statements, and torture a construction from them not warranted by the full text, is to give rise to confusion and unfairness to one's opponents.

Respectfully submitted.

WILLIAM H. THOMPSON,
PERRY E. O'NEAL,
PATRICK J. SMITH,

Attorneys for City of Indianapolis, et al.,

1350 Consolidated Bldg.,
Indianapolis, Indiana.

EDWARD H. KNIGHT,
Corporation Counsel,

MICHAEL B. REDDINGTON,
City Attorney,
Of Counsel.

APPENDIX A

MR. JUSTICE REED: The City entered into possession?

MR. THOMPSON: The City entered into possession under the terms of the standstill *bill* (agreement). We faced this situation, if the Court please. There were 50,000 consumers on the lines of the Indianapolis Gas Company. We called the attention of the Gas Company to the fact the public interest demanded that that service should not be interrupted. We offered to pay (in connection with) the take-over on December (September) 9, 1935, interest due October 1. We offered to pay the $171,000 of interest, provided they would agree that the payment of that money, and the use of this property, should not constitute an admission on our part that the lease was valid, or an admission on their part that the lease was invalid. On December (September) 30, our offer was accepted, and then on March 2, 1938, that agreement was continued until the question of enforceability of this lease against the City should be finally determined; so that our occupation of this property has not been on the theory that we were bound by the lease, but it has been under an agreement with the Indianapolis Gas Company that our occupancy should not affect us in this litigation.

MR. JUSTICE REED: Mr. Thompson, as I understand the record, there has (had) been some arrangement made prior to the actual deeding by the Citizens to the City of Indianapolis of this property. The City had passed a resolution which they carried out, providing for taking over the property of the Citizens.

MR. THOMPSON: That is true.

MR. JUSTICE REED: Do you claim there was any refusal to take this lease prior to the actual presentation?

MR. THOMPSON: No. I claim the resolution of 1929 adopted by the Board of Public Works simply was a general resolution to take over that property which constituted the trust res. In that connection, I must call Your Honor's attention to the fact that this Charitable Trust was created in 1908. No part of the property of the Indianapolis Gas Company, and no lease on that property, was a part of the original trust lease (res). The lease was not executed until five years later, in 1913, so that it is our contention that when we adopted a resolution to take over the property of this trust—and that resolution indicates that it is the property that is coming to us under this arrangement—we were not obligated and did not intend to take over a lease which the initial trustee had no power to execute.

MR. JUSTICE REED: In that resolution you did not eliminate the lease you were going to take over?

MR. THOMPSON: Nor did we say it was included.

MR. JUSTICE REED: As I understand the lease, it took over whatever property belonged to the trustee.

MR. THOMPSON: That is right.

MR. JUSTICE REED: We have here, then, at least as one phase of it, to determine whether or not this lease became a part of the property of the corporate trustee.

MR. THOMPSON: Your statement is entirely correct. If it did, we are obligated by its terms. If it did not, we are not obligated by it.

MR. JUSTICE REED: And you take the position that the corporate trustee had no right to take over this lease of the Indianapolis (Gas)?

MR. THOMPSON: I do.

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In the Supreme Court of the United States

OCTOBER TERM—1940.

CITY OF INDIANAPOLIS, *et al.*,
Petitioners,
v.
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., *et al.*,
Respondents.

No. [redacted] 10

CITY OF INDIANAPOLIS, *et al.*,
Petitioners,
v.
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., *et al.*,
Respondents.

No. 122 11

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI.

HOWARD F. BURNS,
WILLIAM L. TAYLOR,
HARVEY J. ELAM,
Counsel for Respondent, The Chase National Bank of the City of New York, Trustee.

BAKER, HOSTETLER & PATTERSON,
Union Commerce Building,
Cleveland, Ohio,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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TABLE OF ABBREVIATIONS.

For convenience we shall use the abbreviations employed in the petitions and also the following:

Bill	Bill of Complaint.
Bonds	The First Consolidated Mortgage 5% Gold Bonds of The Indianapolis Gas Company issued under the Mortgage.
DX	Exhibit offered by defendants City of Indianapolis, *et al.*, during trial.
DX Stip.	Stipulation Exhibit offered by defendants City of Indianapolis, *et al.*, during trial.
Lease	The Lease of September 30, 1913, from Indianapolis Gas to Citizens Gas (Exhibit B to Bill, I R. 51-80).
Mortgage	Indenture of Mortgage from Indianapolis Gas to Chase's predecessors dated October 1, 1902 (Exhibit A to Bill, I R. 23-51).
PX	Exhibit offered by plaintiff during trial.
PX Stip.	Stipulation Exhibit offered by plaintiff during trial.
Pet.	Petitions for writ of certiorari and briefs in support thereof filed by the City of Indianapolis, *et al.**
.... R.	Printed transcript of the record.
Stip.	Subdivision of Stipulation of Facts (PX 1, II R. 616-639, offered II R. 326-7).

* The City's petition and brief in Cause No. 421 is substantially identical with its petition and brief in Cause No. 422 and references to either petition and brief are equally applicable to the other.

In the Supreme Court of the United States

OCTOBER TERM—1940.

CITY OF INDIANAPOLIS, *et al.*,
Petitioners,
v.
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., *et al.*,
Respondents.
No. 421.

CITY OF INDIANAPOLIS, *et al.*,
Petitioners,
v.
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., *et al.*,
Respondents.
No. 422.

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI.

Separate appeals (Nos. 7143, 7144) from the single decision of the trial court were heard together by the Circuit Court of Appeals on the same record. The City has filed separate petitions for a writ of certiorari (causes 421 and 422) with respect to each appeal. Since these two petitions and the supporting briefs are substantially identical, plaintiff is filing this one brief in opposition to each of the City's petitions.

The decision of the Circuit Court of Appeals (IV R. 1281-1306) is reported in 113 F. (2d) 217.

STATEMENT OF FACTS.

The absence of any adequate Statement of Facts in the petitions requires a brief statement of the undisputed facts upon which the Circuit Court of Appeals based its opinion.

In 1902 Indianapolis Gas gave an open mortgage upon its plant and property to one of Chase's corporate predecessors to secure an authorized bond issue of $7,500,000. (Bill, Exhibit A, I R. 23, offered, II R. 327.) In 1913 Indianapolis Gas leased its property to Citizens Gas, as lessee, for 99 years, the lessee agreeing to pay, as part of the rental, the interest on the outstanding mortgage Bonds of Indianapolis Gas and on any additional Bonds which might subsequently be issued. (Bill, Exhibit B, I R. 51, offered, II R. 327.) Citizens Gas paid the interest on the Bonds from 1913 to 1935 (II R. 627, Stip. par. 11(a)), and sold additional Bonds (about $2,000,000) to the public on representations that it had a 99 year lease on the property and had agreed to pay the interest on the Bonds as part of the rental. (II R. 627, Stip. par. 10(a); II R. 573, 592-605; III R. 899-922.) Citizens Gas was the trustee of a Public Charitable Trust for the benefit of the inhabitants of the City of Indianapolis. On September 9, 1935, it conveyed all of its property, including the Lease in question, to the City, as successor trustee, the entire consideration being paid to the bondholders and stockholders of Citizens Gas, leaving it without assets. (II R. 634-5, Stip. pars. 16-17.)

The City *accepted and recorded* the various instruments of transfer, *including an assignment of the Lease*, went into possession of the Citizens Gas property, *including the leased property*, and has operated all of said property and received the revenues therefrom continuously since September 9, 1935. (II R. 330, 350, 467-8; II R. 622-3, Stip. par. 6(c).) The statement made in the petitions (p. 9) that the City rejected the assignment of the Lease tendered by Citizens Gas has no support in the record.

except the single fact that the City—at about the time when it accepted the assignment of the Lease from Citizens Gas, had the assignment recorded, and took possession of the leased property—adopted an *ex parte* resolution *saying* that it refused to accept the assignment. The petitioners' statement (Pet. 9) that Indianapolis Gas consented to the City's taking possession of and operating the property is wholly unsupported by the record. The City received no communication of any sort from Indianapolis Gas until September 30, 1935 (PX Stip. 66, III R. 838, offered, II R. 329), three weeks after it had taken possession of the leased property, and there was no agreement concerning the City's *use of the property* until March 2, 1936. (DX Stip. 64, 65, III R. 968-9, offered, II R. 433-4; DX B, III R. 981, offered, II R. 386.) Thus, the City had no right to take possession of the leased property on September 9, 1935, except as assignee of the Lease.

The City provided for the payment of the Bond interest due on October 1, 1935, and on April 1, 1936, but no interest has been paid since April 1, 1936.

The respondent, Chase, brought this action in the District Court of the United States for the Southern District of Indiana, suing as Trustee under the Indianapolis Gas mortgage and joining Indianapolis Gas, Citizens Gas, and the City as defendants. All of the defendants were citizens of Indiana and federal jurisdiction was based on diversity of citizenship. Chase sought to recover judgment for the overdue interest on the Bonds, with interest on unpaid interest, against all the defendants and against the property once owned by Citizens Gas and transferred by it to the City. Plaintiff also sought a declaratory judgment to establish that the Lease from Indianapolis Gas to Citizens Gas was and is binding on all the defendants and on the property transferred to the City by Citizens Gas.

The District Court originally held that Indianapolis Gas should be realigned with plaintiff and dismissed the

case for want of jurisdiction (I R. 271). The Circuit Court of Appeals reversed this decision and remanded the case for trial. (II R. 285-92; 96 F. (2d) 363.) This Court denied certiorari. (305 U. S. 600.) On the trial the District Court denied plaintiff any relief except a judgment against Indianapolis Gas alone in the amount of the unpaid coupons. ($1,032,150.00, See III R. 1193.)

Separate appeals were taken by plaintiff and Indianapolis Gas to the Circuit Court of Appeals for the Seventh Circuit. These two causes, Nos. 7143 and 7144, were heard together on the same record. The Circuit Court of Appeals reversed the judgment of the District Court and held (IV R. 1306):

> (I) That Chase is entitled to a coercive judgment for the overdue interest, with interest on overdue interest at 5%, against "(1) the City as successor trustee and the trust property; (2) Citizens Gas; and (3) Indianapolis Gas." (The amount due is now about $1,700,000.)
>
> (II) That "Chase is entitled to a declaratory judgment to the effect that the lease is valid and enforceable against the parties * * *."

The City has filed two petitions for certiorari (Nos. 421 and 422). Chase has filed a cross-petition for writs of certiorari (Nos. 423 and 424), asking that writs be granted on its cross-petition only in the event that the City's petitions are granted.

ARGUMENT

We shall discuss briefly the City's four reasons for the allowance of a writ to show

> (1) that no questions warranting the exercise of this Court's extraordinary jurisdiction are presented, and
>
> (2) that the decision below is obviously sound upon universally accepted principles.

I. The City's So-called "Constitutional" Question Is Obviously Fanciful.

The City's answer and counter-claim asserted that the City was entitled to reject the assignment of the Lease because the rent was excessive and the Lease burdensome. (I R. 181, 186.) Chase moved to strike these allegations from the City's pleading (II R. 317); the District Court overruled that motion (II R. 320), but directed that the taking of evidence in support of that defense should be deferred.* (II R. 321-2.) Chase's first two assignments of error (Statement of Points) on appeal were addressed to the District Court's failure to strike out this immaterial matter. (III R. 1196.) This error was fully briefed and argued before the Court of Appeals without any suggestion from the City that a constitutional question was involved.

The Court of Appeals came to the conclusion, *as a matter of law*, that the City's allegations of "burdensomeness" presented no defense, and therefore directed final judgment without permitting the City an opportunity to prove something which would be wholly immaterial even if it were proved. The City claims that unless it has an opportunity to prove these wholly immaterial allegations, its constitutional rights have been violated.

The City never asserted any rights under the Fourteenth Amendment until its first Petition for Rehearing. (IV R. 1310.) It is clear that the Court's action not being that of a state the Fourteenth Amendment has no application.

> *Jones v. Buffalo Creek Coal & Coke Co.*, 245 U. S. 328, 329 (1917, Brandeis, *J.*).

* While Chase did not object to this order (Pet. 11, 21, 25), it has consistently maintained that the allegations of burdensomeness presented no valid defense and that no evidence to support them should be received. (e.g. IV R. 1331-2.) Under this order several claims on which Chase relied are still to be tried (e.g., failure to maintain the leased property, recovery of fees and expenses, etc.), but they do not affect the determination of the validity of the Lease.

The City never asserted any rights under the Fifth Amendment until its Second Petition for Rehearing. (cf. IV R. 1310 and IV R. 1346.) The substance of its contention in this respect is that the action of the Appellate Court in deciding, *as a matter of law*, that the defense of "burdensomeness" is wholly ineffectual and in denying the City a right to prove such immaterial allegations amounts to a lack of due process. There is no substance in such a contention. It is the universal practice for a trial court or an appellate court, in sustaining a demurrer, a motion to strike, or other similar attacks upon a particular defense to refuse to allow a party to prove facts which would constitute no defense if they were proved. Any other rule would hopelessly encumber the courts in the trial of cases. The right to prove facts which would constitute no defense if proved cannot be an element of due process.

It should also be noted that the issue reserved by the District Court was merely whether the City "had the right as such successor trustee to refuse and reject an assignment of such lease on the ground that such lease was burdensome." (II R. 322.) Since, as the Court of Appeals held (IV R. 1292, 1300-01), the City did not "refuse and reject an assignment of such lease," there was no occasion to receive evidence on the question whether the City had a right which it did not exercise.

The City had ample opportunity in *both* lower courts to present its views as to the validity of the defense of burdensomeness. Moreover, the requirements of due process of law would have been fully satisfied even if the City had had no hearing on this question in the *District* Court. *American Surety Co. v. Baldwin*, 287 U. S. 156, 168 (Brandeis, *J.*, 1932). This is especially true in a federal equity case in which the Court of Appeals hears the case *de novo* and has full power to adjudicate all issues of law and fact.

Alexander v. Redmond, 180 Fed. 92, 93, 96 (C. C. A. 2nd, 1910);

Unkle v. Wills, 281 Fed. 29, 34 (C. C. A. 8th, 1922).

The cases on which the City relies (Pet. 14, 23-25)—holding that due process of law necessitates a judicial review "as to both law and facts" (not necessarily by a *trial* court)—are not germane to the question here presented.

The record discloses ample reasons why the decision of the Court of Appeals—that the alleged burdensomeness is no defense—is sound.

(1) When the Lease was made in 1913 it was expressly approved by the Public Service Commission of Indiana as being in the public interest. (Bill, Exhibit D, I R. 116, offered I R. 327.) The City was a party to the proceedings before the Commission and the Lease was made, to use the City's own language, "with the full consent and approval of the City of Indianapolis." (PX 89, III R. 847, 859, offered II R. 334.) It is the settled law of Indiana that the determination of the Public Service Commission —that the Lease was in the public interest, hence not burdensome—is binding upon all the world and cannot be *collaterally* attacked.

Public Service Commission v. Indianapolis, 193 Ind. 37, 43; 137 N. E. 705, 707 (1922).

(2) In 1930 Williams, suing as a beneficiary of the Public Charitable Trust, brought suit to set aside the Lease as a burden and cloud upon the trust. (PX Stip. 35, II R. 762, 770, 780, offered II R. 328.) All of the parties to the present case were joined as defendants by Williams. (II R. 761-4.) In that case the Supreme Court of Indiana held, among other things, that Citizens Gas and Indianapolis Gas had power to execute the Lease in question, that the action of the Public Service Commission in approving the

Lease was valid, and that the Lease could not be set aside on the ground that it was burdensome.

Williams v. Citizens' Gas Co., 206 Ind. 448; 188 N. E. 212, 215-16 (1934).

See also opinion below, IV R. 1290, footnote 5.

This decision of the Indiana Supreme Court was binding upon the court below as to the validity of the Lease because it was (1) a final adjudication between the parties, and (2) an authoritative statement of the law of Indiana, which was binding in the federal courts under the rule of *Erie Railroad v. Tompkins*, 304 U. S. 64 (1938).

(3) Under the law, which is clearly established in Indiana as elsewhere, neither a party to nor an assignee of a contract or lease can escape its obligations by showing that they either were originally or have become burdensome. This rule is peculiarly applicable where the Lease, as in this case, was made "with the full consent and approval of the City of Indianapolis."

Hamilton v. Hamilton, 162 Ind. 430; 70 N. E. 535, 537 (1904);

Warner v. Marshall, 166 Ind. 88; 75 N. E. 582, 592 (1905);

Indianapolis v. Indianapolis Gas-Light & Coke Co., 66 Ind. 396, 407 (1879);

Terre Haute v. Terre Haute Waterworks Co., 94 Ind. 305, 307 (1884).

Thus the Circuit Court of Appeals was obviously right in holding that the City's allegations of burdensomeness presented no valid defense. Certainly no constitutional rights of the City were violated when the court refused to allow it to prove facts which would constitute no defense.

II. The Circuit Court of Appeals Properly Refused to Re-Align Indianapolis Gas with Chase as a Party Plaintiff.

The City contends that Indianapolis Gas should be re-aligned with Chase as a party plaintiff. The District Court rendered a coercive judgment for Chase against Indianapolis Gas alone for $1,032,150. (III R. 1193.) The City did not appeal from that decision of the District Court; it was content with federal jurisdiction as long as the decision on the merits was in its favor. The decision of the Court of Appeals requires a coercive judgment *against Indianapolis Gas* for about $1,700,000.

Is it possible that a party against whom plaintiff is entitled to a judgment of this kind should be aligned *with* the plaintiff? The suggestion answers itself.

Petitioners' argument is based wholly upon the fact that the City, as successor trustee, has been found primarily and Indianapolis Gas secondarily (or tertiarily) liable, and that the City as trustee can pay the judgment. A parity of reasoning would require a re-alignment whenever a creditor sues a principal and a surety on a debt.

The proposition of law stated by the Court of Appeals on the first appeal (II R. 291-2)—that a defendant against whom plaintiff asks specific relief and with whom plaintiff has distinct conflicts of interest should not be re-aligned with plaintiff in determining federal jurisdiction—has been universally recognized by this Court and other federal courts.

Petitioners' counsel fail to cite a single case from any court in which a defendant was re-aligned with the plaintiff for jurisdictional purposes where a single substantial controversy between plaintiff and such defendant was presented by the bill. On the other hand, the decisions of this Court and the several Circuit Courts of Appeals unanimously support the proposition that there will be no re-alignment if there is a single substantial controversy between plaintiff and the defendant sought to be re-aligned.

Sutton v. English, 246 U. S. 199, 204 (1918);

Republic National Bank & Trust Co. v. Massachusetts Bonding and Insurance Co., 68 F. (2d) 445, 447 (C. C. A. 5th, 1934);

Detroit Tile & Mosaic Co. v. Mason Contractors' Association, 48 F. (2d) 729 (C. C. A. 6th, 1931);

Franz v. Franz, 15 F. (2d) 797, 799 (C. C. A. 8th, 1926);

Feidler v. Bartleson, 161 Fed. 30, 35 (C. C. A. 9th, 1908).

The federal courts have continued to apply this rule since the decision of the jurisdictional question in this case in 1938, relying upon the cases just cited and the decision of the Court of Appeals in this case. See *Rex Co. v. International Harvester Co.*, 107 F. (2d) 767, 768 (C. C. A. 5th, 1939).

We submit that the decision of the Circuit Court of Appeals sustaining jurisdiction, as to which this Court has previously denied certiorari (305 U. S. 600), accords with the settled law and presents no question requiring examination by this Court.

III. The Rule of Erie Railroad v. Tompkins Required the Decision Made by the Court of Appeals and There Was No Departure from that Rule.

The rule of *Erie Railroad v. Tompkins*, 304 U. S. 64, compelled the result reached by the Circuit Court of Appeals. Every Indiana decision bearing upon the validity of the Lease compels the conclusion that it is valid. The City's present contentions as to the validity of the Lease were all conclusively negatived, *as a matter of Indiana law*, in *Williams v. Citizens' Gas Co.*, 206 Ind. 448; 188 N. E. 212 (1934). Entirely aside from the question of *res judicata*, that decision conclusively established the law of Indiana which the Court of Appeals was bound to follow.

Let us examine briefly the respects in which the Court of Appeals is supposed to have disregarded the Indiana law.

(1) *Estoppel against the City.* (Pet. 12, 15, 29.) The Court of Appeals made no decision on the question of estoppel *in pais*, although it would have been fully warranted in doing so. In both its first and its second Petitions for Rehearing the City admitted, as to any claimed estoppel of the City, that "there is no express holding to that effect." (IV R. 1313, line 17; IV R. 1351, line 1.) The court can hardly have disregarded the Indiana law on a question as to which it made no express holding.

(2) *Res Judicata.* (Pet. 12, 15, 30.) The decision of the Court of Appeals was based primarily upon its independent conclusion that the Lease is valid. The court did state, however, "in passing," that certain cases "are determinative of the immediate issue here, *i.e.*, as to the validity of the 99 years lease." (IV R. 1390; 113 F. (2d) 217, 229.)

It is not clear whether the court regarded the cases referred to as "determinative" on the ground of *res judicata* or on the ground that they established the Indiana law on the subject. Each of them was important in establishing the Indiana law, and at least one of them was plainly binding as *res judicata*. For example, in the *Williams* case the Supreme Court of Indiana determined, *as to the very Lease here in question*, in a case in which all the parties now before the court were joined, that the Lease was valid and a part of the trust estate.

(3) *Construction of Municipal Grants.* (Pet. 13, 15, 30.) The construction of the franchise contract here in question is largely a question of fact peculiar to this case and presents no question of general importance. However, it is interesting to observe that the result reached by the Court of Appeals in holding that Citizens Gas had the power to make this 99 year Lease is in complete agreement

with the decision of the Public Service Commission in 1913, the decision in *Fishback v. Public Service Commission*, 193 Ind. 282, 138 N. E. 346 (1923), the decision of the Supreme Court of Indiana in *Williams v. Citizens' Gas Co.*, 206 Ind. 448, 188 N. E. 212, 215-16 (1934), and the uniform practical construction of the franchise contract by Citizens Gas and the City over a period of 22 years. Moreover, the power to make the Lease in question was *specifically conferred* by § 95½ of the Shively-Spencer Act of 1913.*

(4) *The alleged statutory prohibitions.* (Pet. 13, 16, 31.) The City has express power to receive trusts "and to agree to conditions and terms accompanying the same" (Burns Indiana Statutes, 1933, § 48-1407**) and this power is not subject to the statutes on which the City relies. Beyond that, the "validating acts" of 1929† gave the City express power to take over all the Citizens Gas property, including the Lease.

The frequently repeated assertion that "the lease had no municipal sanction" (Pet. 7, 13, 16, 31) is wholly immaterial if it refers to the execution of the Lease in 1913 and is contrary to the facts if it refers to the City's assumption of the obligations under the Lease. Both the Board of Directors for Utilities and the City Council took appropriate action to take over the Public Charitable Trust, which included the Lease in question. (II R. 330, 350, 467-8; DX 8, III R. 1018-19, offered, II R. 429.) This necessarily involved the assumption of the lessee's obligations under the Lease.

---

* This section is quoted in full in Appendix A to this brief, *infra*, p. 15.

** The pertinent portions of this section are quoted in Appendix B to this brief, *infra*, p. 16.

† The pertinent portions of these acts are quoted in Appendix C to this brief, *infra*, p. 17. As admitted by the City in the *Todd* case and pointed out by the Court of Appeals (IV R. 1288, note 3), the "validating acts" of 1929 were passed to remove any doubt as to the City's authority to take over the Citizens Gas property, including the Lease here in question.

It is clear that in upholding the validity of the Lease the Court of Appeals followed the controlling Indiana decisions and thereby conformed to the rule laid down by this Court in *Erie Railroad v. Tompkins*.

IV. The Judgment Ordered by the Court of Appeals Binds the City as Successor Trustee and the Trust Property but Imposes no Burden on Revenues Raised by Taxation.

The statement repeatedly made throughout the petitions that the judgment directed by the Circuit Court of Appeals "presumably imposes the burden on revenues raised by taxation" (Pet. 13, 16, 31) is wholly unsupported by the record. Both the opinion and order of the Court of Appeals make it clear that the City is liable under the Lease *as successor trustee only*, which means that its liability is limited to the trust property (including the leasehold of the Indianapolis Gas property) and the revenues from the trust property. Thus the decrees of the Circuit Court of Appeals (IV R. 1307-8) direct the District Court to enter a declaratory judgment "to the effect that the lease is valid and enforceable against the parties in the following order of liability:

> "(1) The City as Successor Trustee and the Trust Property; * * *."

Similarly, the coercive judgment for the overdue interest is to be "enforceable against the parties in the following order of liability:

> "(1) The City as Successor Trustee and the Trust Property; * * *."

The City raised this same question in its Petition for Rehearing (IV R. 1312-13) and to avoid any possible question on this point the Court of Appeals amended its opinion by inserting the words "as successor trustee" in the one place in its opinion where it had omitted such language in directing the judgment. (Compare IV R. 1306, line 34, and IV R. 1335.)

Both the opinion and order of the Court of Appeals make it abundantly clear that the coercive judgment and the declaratory judgment will bind the City in its capacity as successor trustee only and the trust property.

CONCLUSION.

The federal questions raised by the City are clearly without substance and present no reason for granting a writ of certiorari. As to the questions of Indiana law, the decision of the Circuit Court of Appeals sustaining the validity of the Lease is in complete accord with the applicable law of Indiana. In fact, the Indiana law directly in point was established by the *Williams** case, in which the Supreme Court of Indiana held that the Lease was valid and binding on the Public Charitable Trust. Obviously, this attempt by the City to have this Court overrule the *Williams* case is contrary to rather than in support of *Erie Railroad v. Tompkins.*

We submit that the decision of the Circuit Court of Appeals sustaining the validity of the Lease is clearly correct and that this case presents no ground for the exercise of this Court's discretionary power to grant a writ of certiorari.

Respectfully submitted,

HOWARD F. BURNS,
WILLIAM L. TAYLOR,
HARVEY J. ELAM,
Counsel for Respondent, The Chase National Bank of the City of New York, Trustee.

October 2nd, 1940.

BAKER, HOSTETLER & PATTERSON,
Union Commerce Building,
Cleveland, Ohio,
Of Counsel.

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* *Williams v. Citizens' Gas Co.*, 206 Ind. 448.

APPENDIX A.

Section 95½ of the Shively-Spencer Act.

CHAPTER 76—LAWS OF INDIANA OF 1913.
(pp. 199-200.)

[*H. 361. Approved March 4, 1913.*]

* * * * *

Joint Service—Requirements.

SEC. 95½. That with the consent and approval of the commission but not otherwise, any two or more public utilities, furnishing a like service or product and doing business in the same municipality or locality within this state, or any two or more public utilities whose lines intersect or parallel each other within this state may be merged and may enter into contracts with each other that will enable such public utilities to operate their lines or plants in connection with each other; and any public utility may also, with the consent of the holders of three-fourths of the capital stock outstanding, purchase or lease the property, plant or business or any part thereof of any other such public utility at a price and on terms fixed by the commission. Any such public utility may, with the consent of three-fourths of the holders of the outstanding stock, sell or lease its property or business or any part thereof to any other such public utility at a price and on terms fixed by the commission upon paying in cash to non-consenting stockholders the appraised value of their stock as fixed by the commission.

APPENDIX B.

Excerpt from Chapter 129 of Laws of Indiana of 1905 (pp. 246-7).

* * * * *

SEC. 53. The common council of every city shall have power to enact ordinances for the following purposes:

* * *

Sixth. To receive gifts, donations, bequests and public trusts and to agree to conditions and terms accompanying the same and bind the corporation to carry them out. [Burns Indiana Statutes, 1933, § 48-1407.]

APPENDIX C.

Excerpts from Chapters 77 and 78 of Laws of Indiana of 1929.

CHAPTER 77—LAWS OF 1929.
(pp. 252, 257, 259-260.)

AN ACT supplemental to an act entitled "An act concerning municipal corporations," approved March 6, 1905.

[*H. 132. Approved March 11, 1929.*]

First Class Cities, Utilities Department.

SECTION 1. *Be it enacted by the general assembly of the State of Indiana*, First Class Cities, Utilities Department. In addition to the existing executive departments of cities of the first class, as such cities are defined in an act entitled "An act concerning municipal corporations," approved March 6, 1905, and acts amendatory thereof, there is hereby created in any such city having a population of not less than three hundred thousand (300,000), as shown by the last preceding United States census, a department of public utilities, which shall be under the control of a board of seven (7) members, to be known as the "board of directors for utilities," to be appointed annually by the board herein provided for and designated as the board of trustees for utilities.

* * * * *

Powers and Duties of the Board of Directors.

SEC. 3. Powers and Duties of the Board of Directors. The said board of directors for utilities shall have the exclusive government, management, regulation and control of any water works, gas works, electric light works, heating and power plants, and all property relating thereto, which any such city may heretofore have acquired or may hereafter acquire or construct for the service of the public as consumers, and such board of directors shall be charged with the duty of and shall have all necessary power to make all necessary repairs, renewals, enlargements, extensions or additions to any such plant or property which in the judgment of said board of directors is desirable or necessary for the proper serving of the inhabitants of said city and the adjacent community served with respect to

any such utility from any such plant or plants. In connection with the duties devolving upon such board of directors as aforesaid, it shall have power as follows:

* * * * *

(7) To take over, adopt and assume the performance of the provisions of any lease under which any utility property may be held at the time of the acquisition of any utility by any such city, and to take any and all steps necessary to perform and fulfill the terms of any such lease, and to obtain and preserve the benefits therefrom; and in event there be any outstanding open mortgage upon the property covered by any such lease so taken over under the provisions of which bonds may be withdrawn from the trustee under such mortgage for the purpose of paying all or part of the cost of additions to the property covered by such mortgage, to do and perform all things necessary in order to secure the benefit of such mortgage provisions and to enable the escrow bonds held by the trustee under any such mortgage to be taken down and sold in order to defray the cost of any extensions and betterments to such leased property; and, subject to the approval of the public service commission of Indiana, to sell any such bonds so taken down for the purpose of assisting in defraying the costs of any such extensions or betterments to such leased property.

* * * * *

CHAPTER 78—LAWS OF 1929.

(Printed in full.)

(pp. 268-271.)

AN ACT relating to corporations organized before May 1, 1913, for the purpose of furnishing gas for fuel or illuminating purposes, or electric lights or water, or light, heat and power to any town or city or the citizens or inhabitants thereof, and the articles of incorporation of which provide for the transfer of the property of such corporation to such town or city, legalizing certain provisions in the articles of incorporation thereof and authorizing the conveyance of the property of such corporations to such towns or cities and authorizing such towns or cities to accept such conveyance, repealing all laws in conflict therewith and declaring an emergency.

[*H. 133. Approved March 11, 1929.*]

Gas Corporations, Certain—Conveyance of Property to Municipality—Retirement of Stock.

SECTION 1. *Be it enacted by the general assembly of the State of Indiana*, That if in the original articles of incorporation of any corporation organized under the laws of this state prior to May 1st, 1913 (that being the date of the creation of the public service commission of this state), for the purpose of furnishing natural or artificial gas for fuel or for illuminating purposes, or for furnishing electric lights or water to the citizens of any town or city within this state, or to furnish light, heat and power to any town or city, or the inhabitants thereof, provision is made for the transfer or conveyance of the property of such corporation to such town or city, subject to the outstanding legal obligations of said corporation, whenever the holders or owners of shares of stock, stock certificates or holders or owners of any beneficial interest in such capital stock shall have received the face or par value of such shares of stock, stock certificates or beneficial interest, together with the interest or dividends thereon provided for in such articles of incorporation, such provision in such articles shall be, and is hereby legalized and declared to be valid and binding upon such corporation and upon the holders and owners of any such shares of stock, stock certificates or beneficial interest

therein or their assigns, and said town or city shall be authorized and entitled to accept a transfer and conveyance of any such property in accordance with the terms and conditions of such articles of incorporation, without the question of the acceptance or acquisition of such property being submitted to a vote of the electors of such town or city and without any election being held therein to determine whether such property shall be acquired by such town or city. It shall not be necessary to obtain the consent or approval of the public service commission of Indiana or any other state board, commission or officer for such transfer and conveyance or of the terms and conditions upon which the same is to be made, but such transfer and conveyance shall be valid without any order or approval of such commission, board or officer, and any provisions in such articles authorizing the board of directors, trustees or other officers of said corporation to issue bonds or to mortgage or otherwise encumber such property before such transfer and conveyance for the purpose of borrowing money with which to pay to such holders or owners of such shares of stock, stock certificates or owners of such beneficial interest thereof the face or par value of such shares of stock, stock certificates, together with the interest or dividends provided for in such articles, and authorizing such directors, trustees or other officers to transfer or convey the property of such corporation to such town or city whenever the holders or owners of the shares of stock, stock certificates or any beneficial interest therein have been paid the par or face value of such shares of stock or stock certificates together with the interest or dividends provided for, are hereby legalized and declared to be valid and binding and such directors, trustees or other officers of such corporation shall have the right and power to carry out and perform any such provisions in accordance with the terms of such articles. This act shall apply to any such corporation if organized before May 1, 1913, and in which the aforesaid provisions are contained in the articles of incorporation and which articles have thereafter been amended and in which such amended articles of incorporation such provisions are contained.

Any provisions in either the original articles of incorporation of any such corporation, or in any amendment

thereof, providing for the retirement of the outstanding preferred stock of such corporation before such conveyance is made to any such municipal corporation are hereby legalized and declared valid and binding and said corporation and the officers thereof are authorized to retire such stock in accordance with such provisions and the terms of such preferred stock, and to mortgage such property to secure funds with which to redeem such preferred stock and to pay the holders and owners of the shares of common stock or common stock certificates or of any beneficial interest therein the amounts provided for in such articles, and whenever the outstanding preferred stock in any such corporation shall have been redeemed and the holders and owners of such common stock, common stock certificates or of any beneficial interest therein shall have received the amounts therein provided for in such articles of incorporation, then the property of such corporation shall be conveyed to such municipal corporation in accordance with the provisions of such articles or amended articles of incorporation.

Whenever any instrument of transfer or conveyance shall be executed, transferring or conveying the property, either real or personal, of any such corporation to such town or city the title to such property shall vest in such town or city, subject to all outstanding legal obligations of said corporation: *Provided, however*, That such town or city shall not be liable for any such obligations and the same shall not constitute a debt of such town or city, but all such obligations shall be a charge upon said property so conveyed, and any mortgage or other lien or encumbrance executed by the board of directors, trustees or other authorized officers of such corporation before such transfer shall continue to be a lien on such property to the same extent as before such transfer or conveyance.

Said municipal corporation shall be authorized to accept, hold and own all the property of such corporation so transferred to it, including that located within this state and that located in any other state and any shares of stock or other interest in any other corporation of which said corporation making such transfer shall be the owner, and any right, title or interest such transferring corporation may have in any lease upon other property.

Provided, however, That if in any such municipal corporation there is now or is hereafter created or existing a separate taxing unit or district which shall be subject to taxation to raise money with which to either retire or redeem the stock of any such transferring corporation, or to pay obligations incurred for the benefit of such property, then all such property so transferred to such municipal corporation shall be held thereby in trust for the use and benefit of such separate taxing unit or district, and for the general public.

Repeal.

SEC. 2. That all laws and parts of laws in conflict herewith are hereby repealed.

Emergency.

SEC. 3. An emergency existing for the immediate taking effect of this act, the same shall be in full force and effect from and after its passage.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

Numbers 421 and 422
(Cross-Petition Numbers 423 and 424)

THE CITY OF INDIANAPOLIS, et al.,
Petitioners,
v.
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, et al.,
Respondents.
No. 421

THE CITY OF INDIANAPOLIS, et al.,
Petitioners,
v.
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, et al.,
Respondents.
No. 422

RESPONDENT THE INDIANAPOLIS GAS COMPANY'S BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

LOUIS B. EWBANK,
WILLIAM R. HIGGINS,
Indianapolis, Indiana,
Counsel for Respondent, Indianapolis Gas Company.

1311 Fletcher Trust Bldg.
1008 Odd Fellows Bldg.

C. E. Pauley & Co., Inc., Indianapolis

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ABBREVIATIONS

The following abbreviations are used throughout this brief:

City of Indianapolis is referred to as "City".

City of Indianapolis and those trustees and Directors for Utilities who join in the Petition for Certiorari as "Petitioners".

Chase National Bank of the City of New York, Trustee, respondent herein, as "Chase".

Citizens Gas Company of Indianapolis as "Citizens Gas."

The Indianapolis Gas Company as "Indianapolis Gas," the three respondents herein and Chase National Bank, Citizens Gas Company and the Indianapolis Gas Company, as "Petitioners".

The Bill of Complaint is called the "Bill".

The word Paragraph is called "Par."

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

Numbers 421 and 422
(Cross-Petition Numbers 423 and 424)

THE CITY OF INDIANAPOLIS, ET AL.,
Petitioners,

v.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ET AL.,
Respondents.

BRIEF OF RESPONDENT THE INDIANAPOLIS GAS COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Two appeals (Nos. 7143, 7144) from the same judgment of the District Court were heard together on the same record, and decided with a single opinion (IV R. 1281 to 1306) and the same judgment was entered in each (IV R. 1307, 1308).

Substantially the same petitions and supporting briefs have been filed by the City, et al., in each cause (No. 421, 422) and defendant appellant Indianapolis Gas is filing one brief in opposition to such petition. The said opinion of the Circuit Court of Appeals is reported in 113 Fed. (2d)

217. The cross-petitions for certiorari (Nos. 423, 424) of Chase National Bank being conditional upon what disposition is made of the City's petitions, are not separately answered.

STATEMENT OF FACTS AND MATTERS INVOLVED.

The decision of the Circuit Court of Appeals in these causes, the review of which by this court is now sought by the petitioner, is set out in IV R. 1281-1305 and reported in 113 Fed. (2d) 217.

The facts are there fully and accurately stated, and while in neither the petition nor brief of the petitioner does there appear any direct contradiction of or objection to any statement of fact or issue as therein made, we shall briefly discuss the same as they bear on the correctness of the decision challenged.

A. In 1902, Indianapolis Gas, operating in the City of Indianapolis, executed a mortgage to secure a bond issue in the authorized amount of $7,500,000, of which $4,000,000 were originally authenticated and issued. Chase is now sole trustee under said mortgage indenture.

B. In 1905, Citizens Gas was formed as a public utility for the purpose of supplying the City of Indianapolis with light, heat and power. The Citizens Gas was original trustee of a charitable trust in the property it acquired with the right given the City of Indianapolis to become successor trustee, subject to legal obligations.

C. In 1913, under express provisions section 95½ of the Indiana Public Utility Law (Appendix No. I, p. 16), Citizens Gas, with the approval and by order of the Public

Service Commission, leased the property of the Indianapolis Gas for a term of 99 years. Among other provisions, lessee for itself, successors and assigns undertook to pay interest on all outstanding bonds of Indianapolis Gas. At hearing by Public Service Commission on petition to approve proposed lease, City was represented by counsel and consented to order of approval. (Bill, par. 8, I. R. 9, 10; admitted I R. 149, 150.)

Following the order of Commission and the execution of the lease, one Fishback, a resident of Indianapolis and certificate holder of Citizens Gas, brought suit in the court of Marion County, Indiana, to set aside the order of the Public Service Commission and to enjoin the lease being put into effect. Citizens Gas, Indianapolis Gas, the City and members of the Public Service Commission, were made parties defendant. Among other alleged grounds for invalidity of the lease, Fishback alleged the lease was for too long a time and that it would be so burdensome as to defeat the charter provisions by which the City might take under the plant and property of the Citizens Gas. Upon trial judgment was entered against plaintiff; appeal was taken to Supreme Court of Indiana, where it was dismissed (193 Ind. 282).

In 1921 Citizens Gas surrendered its City franchise and received from Public Service Commission an indeterminate permit pursuant to Acts 1921, Chapter 93, page 197.

Appendix No. 3, p. 17.

On March 20, 1929, City, through its Board of Public Works, declared its intention to succeed to the property and interest of Citizens Gas pursuant to franchise agreements and demanded of that company its entire property and

interests "of whatever nature or character." (I R. 671-672.) Said gas system was to be taken by the City subject to "all legal obligations against said Company," by virtue of Ordinance of the Common Council of the City (Vol. III R. 1017-1019) and pursuant to the Acts of 1905, pages 246, 247.

Appendix No. 2, p. 16.

It was provided by the ordinance "that the Public Charitable Trust in all such plant and property so delivered to and accepted by said Board of Directors for Utilities be and is hereby received and accepted and the City of Indianapolis hereby agrees to the conditions and terms accompanying such trust and acknowledges itself bound to carry them out" (III R. 1017-1019).

E. In 1930, one Williams brought a representative suit in Marion County, Indiana, naming as defendants the City, and its trustees and directors for utilities, Citizens Gas, Indianapolis Gas, and the then trustees under the mortgage deed of trust of Indianapolis Gas, being all parties to the action at bar. Williams sued as a beneficiary of the public charitable trust and for all others similarly situated, seeking judgment declaring the 99-year lease invalid.

The following grounds, among others, were alleged in the complaint: that the lease was void and a cloud on the title of the public charitable trust, and that the order of the Public Service Commission approving the lease was invalid (II R. 785).

That the lease was disadvantageous to the lessee and burdensome on the public charitable trust (II R. 795).

That the lease was "ultra vires" said Citizens Gas Company (II R. 790).

In the hearing of said cause, all defendants, including City and Citizens Gas, demurred to the complaint and urged the validity of said lease (II R. 806-807). The trial court entered final judgment in the cause against plaintiff (II R. 632-633), from which judgment Williams appealed to the Supreme Court of Indiana. Judgment was affirmed by that court in an opinion reported in *Williams v. Citizens Gas*, 206 Ind. 448.

F. In March, 1935, City by its Board of Directors for Utilities authorized the issuance of bonds in the principal aggregate amount of $8,000,000, principal and interest to be paid from income and revenue of the gas system. The proceeds from such sale of bonds to be used to take over the property owned by Citizens Gas "and/or in which it had an interest" (II R. 822-830).

G. In seeking sale of its revenue bonds, City issued a prospectus to certain security firms as prospective bidders. The City there stated that the gas system of Citizens Gas was owned partly in fee and held partly under the 99-year lease (II 535).

Said bonds were purchased by security houses in reliance on said statements (II R. 533 to 536) who in turn offered them for sale to the public under a circular setting out similar statements of fact (I R. 194-198).

H. On September 9, 1935, after having previously notified Indianapolis Gas that it would take over the property "which has been operated by Citizens Gas," (III R. 836), the City accepted, recorded and retained instruments of conveyance and assignments of all property of Citizens Gas, including the lease in question and went into possession of all of said property, including the leased property and has continued in possession and operation of

the said property continuously thereafter (II R. 230, 350, 622-3). Subsequent to receipt of said instruments and on taking possession of said property, it adopted an ex parte resolution in which it denied the acceptance of the obligations incidental to the leasehold estate (I R. 131). By Ordinance of City's Common Council above referred to the City accepted the public trust and agreed to be bound by the conditions and terms accompanying it (III R. 1017-1919).

Until March 2, 1936, no right was granted City by any party to retain possession of the leased property other than by virtue of the assignment to it of the lease by Citizens Gas (III R. 981).

Interest on bonds of Indianapolis Gas due October 1, 1935, and April 1, 1936, was paid by the City. All interest due thereafter has been unpaid and in default.

SUIT AND JUDGMENT.

This action was brought by Chase as Trustee under the mortgage indenture against Indianapolis Gas, Citizens Gas and the City seeking a declaratory judgment that the lease was valid and to recover judgment for unpaid bond interest, with interest thereon, against all defendants and the trust property taken over by the City.

The decision now sought to be reviewed held:

1. That Chase was entitled to a declaratory judgment that the lease is valid and enforceible according to its terms and provisions against City as trustee and the trust property and all other parties defendant.

2. That judgment be entered in favor of Chase, as Trustee for bondholders, for all past due bond interest with

interest thereon at the rate of 5 per cent per annum, against the City as Successor Trustee, Citizens Gas and Indianapolis Gas, in said order of liability.

ARGUMENT.

The petitioner in the brief supporting its petition presents certain assignments of error, with argument thereon. We shall briefly discuss these in the order they are presented.

A.

THE DECISION OF THE CIRCUIT COURT OF APPEALS PROPERLY DIRECTED A JUDGMENT TO BE ENTERED AGAINST THE CITY AS SUCCESSOR TRUSTEE AND NO ISSUE OF BURDENSOMENESS OF THE LEASE REMAINED IN THE CASE FOR ANY FURTHER TRIAL. BY THE DECISION THE CITY WAS NOT DENIED ANY RIGHT OF DUE PROCESS OF LAW.

The question of burdensomeness of the lease arose solely through allegations by City in its counter-claim that it had the right as Successor Trustee "to refuse and reject an assignment of the lease on the ground that such lease was burdensome and not advantageous to the trust" (I R. 186).

This issue was entirely removed from the case, and properly so, by the decision that the lease is valid, and that the leasehold estate became, upon its creation, a part of the *res* of the public charitable trust expressly accepted by the City. By its express acceptance of the trust as Successor Trustee, "agreeing to the conditions and terms accompanying such trust" (III R. 1017-1019), and through the instruments of conveyance and assignment of the entire trust property, including that held both in fee and under the lease, and taking possession, an alleged reason for "rejecting" part of it becomes solely academic.

Indianapolis Gas in its brief to the Circuit Court of Appeals urged that this alleged burdensomeness of the lease was immaterial and not a proper issue in the cause, and that it required no further trial by the District Court. To this contention the City made no denial, either in brief or by oral argument.

Whether or not the lease was invalid because of being burdensome on the trust had been raised in early litigation in the courts of Indiana by beneficiaries of the trust, suing in behalf of all so situated. It was in those cases decided that no "burdensomeness" existed, such as might create a defense to or cast a cloud upon the validity of the lease.

The decisions so rendered were in accord with the contentions made both by City and Citizens Gas throughout that litigation.

> *Fishback v. Public Service Commission*, 193 Ind. 282 (II R. 624 to 626; 648 to 668);
> *Williams v. Citizens Gas Company*, 206 Ind. 448 (II R. 630 to 633; 761 to 812).

The issue of burdensomeness as a ground for urging invalidity of the lease was thus settled and determined in those adjudications, as to the trust itself, which bind all succeeding trustees. This issue being fairly and definitely tried and adjudicated, no constitutional right exists to a party or privy to retry that issue in subsequent litigation.

The issue of burdensomeness was, however, definitely presented to the City in the forming of its decision whether it would or would not succeed Citizens Gas as trustee of the charitable trust. It was for the City to determine in that decision whether the trust in its entirety, weighing both its assets and liabilities, was one which it desired to administer as a succeeding trustee. It decided

upon succession, and voluntarily accepted said trust in its entirety, with all of its values and likewise subject to all its liabilities.

It is respectfully submitted that the question of burdensomeness was never a proper issue in this cause and even had it been, it would have ceased to be so upon the decision of Circuit Court of Appeals that the lease was valid for its express term upon execution and approval by the Public Service Commission, and that the leasehold estate was part and parcel of the trust *res* at the time of City's succession as trustee.

All the cases cited by petitioner declare rulings universally accepted, but that they support the present petition of the City or are in anywise applicable to the present issues is conclusively disproved by the undisputed facts and the issues determined.

It is submitted that petitioner's contentions that it has been deprived of constitutional rights of due process are wholly without substance.

B.

JURISDICTION OF THE UNITED STATES COURT OVER THE CAUSE RESTS UPON DIVERSITY OF CITIZENSHIP AND THE REALIGNMENT OF INDIANAPOLIS GAS TO THE POSITION OF A PLAINTIFF WAS PROPERLY DENIED.

The District Court upon the pleadings and prior to the trial on the merits, realigned Indianapolis Gas as a party plaintiff and thereupon dismissed plaintiff's Bill for want of jurisdiction. This decree was reversed upon appeal to the Circuit Court of Appeals with opinion reported in 96 Fed. (2d) 363; II R. 285-293. City's petition for certiorari was by this court denied (305 U. S. 600).

The contention of the City made then, and now repeated, that no substantial controversy existed between Chase and Indianapolis Gas, indeed seems extraordinary in view of the decree rendered after trial on the merits by the District Court granting judgment in favor of Chase solely against Indianapolis Gas in the amount of $1,032,150; and the decision of the Circuit Court of Appeals directing a judgment in favor of Chase against Indianapolis Gas and others in even a larger amount. It is true that by the judgment of the Court of Appeals the liability for the discharge of this judgment by Indianapolis Gas is a secondary one, but that it remains liable for its payment until its satisfaction may not be denied. Being the mortgagor its liability continues as a surety and a surety is a necessary co-defendant.

The cases cited and argument here made by petitioner were all presented to this court in support of the former petition for certiorari which this court denied (305 U. S. 600).

Suffice it to say that existence of the controversy between Chase and Indianapolis Gas, as alleged in the pleadings, was substantiated both by the judgment of the District Court after trial on the merits and by the judgment of the Circuit Court of Appeals, a review of which is now sought.

Venner v. Great Northern R. Co., 209 U. S. 24, 31-32, 52 L. Ed. 666;

Republic Nat. Bank v. Massachusetts B. & I. Co., 68 Fed. (2d) 445, 447;

Rex. Co. v. International Harvester Co., 107 Fed. (2d) 767, 768.

C.

The Rule Announced by the Court in Erie Railroad v. Tompkins, 304 U. S. 64, Was Not Disregarded or Violated by the Decision of the Circuit Court of Appeals, in the Determination of Any Issue Presented.

Both in the District Court and the Circuit Court of Appeals, this respondent contended that under the rule of *Erie Railroad v. Tompkins* all issues as to the validity of the lease and its enforceibility against the City as successor trustee and the trust property should be determined by the law of Indiana. And *Williams v. Citizens Gas Company*, 206 Ind. 448, was cited as declaring the law which controls. This was accepted by the Circuit Court of Appeals and its decision is in full accord with both the statutory law of the State and the decisions of its court of last resort.

It was accepted by the courts both at the trial and on appeal and all parties litigant that no federal question was in issue, nor was any presented either in brief or in argument.

It has long been established in Indiana, as it has generally, that where an issue has been legally adjudicated that judgment is binding upon the parties and their privies in interest.

> *Skelton v. Sharp*, 161 Ind. 383;
> *Fischli v. Fischli* (1825), 1 Blackford (Ind.) 360;
> *Knott v. Clark Construction Co.*, 191 Ind. 365.

It is also settled in Indiana, as it is generally, that the judgment in a representative suit brought by one beneficiary of a trust in behalf of all is binding upon all.

Burns Ind. Ann. Statutes (1933), sec. 2-213; 2-220;
Gaiser v. Buck, 203 Ind. 9;
***Sigel v. Archer*, 212 Ind. 599.**

The cases cited by petitioner wholly fail to support a contention that the judgment in this cause is other than entirely in accord with the controlling laws and decisions of Indiana. The decision itself conclusively shows that it firmly rests upon that law.

D.

THE JUDGMENT IS AGAINST THE CITY SOLELY AS TRUSTEE AND THE TRUST PROPERTY. IT IS NOT AN OBLIGATION OF THE CITY AS A MUNICIPALITY OR A CHARGE UPON ITS POWERS OF TAXATION.

The sole issue presented in this cause, so far as City is concerned, is the liability it assumed as a successor trustee of the public charitable trust. No judgment was either sought or given declaring any liability against the City as a taxing unit. The language of the opinion of the Circuit Court of Appeals is clear and definite upon this point.

No direct obligation of the City being in issue, the statutes set out in appendix in the petitioner's brief have no application to any issue presented. These statutes refer solely to the creation of direct obligations of the City, such as contracts for street lighting, police and fire protection, etc. Were it otherwise, the bonds issued by the City in the principal amount of $8,000,000 which are solely a charge upon the revenues of the gas system, would be invalid. The City had express statutory power

> "to receive gifts * * * and p[illegible] rusts and to agree to conditions and terms a[illegible]panying the

same and bind the corporation to carry them out' (See Appendix 2, pp. 16, 17).

The section quoted and sections 85 and 254 cited by petitioner are parts of the same statute.

It is submitted no public question is here presented, no municipal rights are involved, and the sole responsibilities determined are those of a trust now voluntarily administered by the City as trustee; responsibilities all of which were expressly undertaken and assumed by the City in its succession to such trusteeship.

SUMMARY

This respondent respectfully submits that no valid reason has been presented or exists for granting the writ sought by the petitioner. No important public question is presented or federal issue involved. The decision itself rightly decides the questions presented in accord not only with the law of Indiana, but with principles universally accepted and followed.

WHEREFORE, this respondent prays that the petition for the writ here sought be denied.

Respectfully submitted,

LOUIS B. EWBANK,
WILLIAM R. HIGGINS,
Both of Indianapolis, Indiana,
Counsel for Respondent,
The Indianapolis Gas Company.

APPENDIX

Appendix No. 1

Section 95½, Chapter 76, Acts 1913, page 199 (since amended).

> "That with the consent and approval of the commission but not otherwise, any two or more public utilities, furnishing a like service or product and doing business in the same municipality or locality within this state, or any two or more public utilities whose lines intersect or parallel each other within this state may be merged and may enter into contracts with each other that will enable such public utilities to operate their lines or plants in connection with each other; and any public utility may also, with the consent of the holders of three-fourths of the capital stock outstanding, purchase or lease the property, plant or business or any part thereof of any other such public utility at a price and on terms fixed by the commission. Any such public utility may, with the consent of three-fourths of the holders of the outstanding stock, sell or lease its property or business or any part thereof to any other such public utility at a price and on terms fixed by the commission upon paying in cash to non-consenting stockholders the appraised value of their stock as fixed by the commission."

Appendix No. 2

Section 53 (in part), Chapter 129, Acts 1905, page 247: Burns' 1933, sec. 48-1407. In part:

> "Sec. 53. The common council of every city shall have power to enact ordinances for the following purposes:

"First. To provide a corporate seal, with appropriate device, for such city, to be affixed to all instruments or writings needing authentication.

"Second. To fix the salaries or compensation of the various officers and employes of such city, except where a different provision is made in this act: *Provided*, that in cities of the first and second classes, no member of the common council shall be allowed more than two hundred dollars; in cities of the third and fourth classes, more than one hundred and fifty dollars; and, in cities of the fifth class, more than one hundred dollars for each year of his service. No salary or compensation, of any city officer so fixed shall be changed after his election or appointment during the term of his office.

"Third. To protect all city property.

"Fourth. To provide for the punishment of contempt and disorder in the rooms of the council.

"Fifth. To authorize a census of the city.

"Sixth. To receive gifts, donations, bequests and public trusts and to agree to conditions and terms accompanying the same and bind the corporation to carry them out. * * *"

Appendix No. 3

Section 1, Chapter 93, Acts 1921, page 197:

"Section 1. * * * any public utility operating under an existing license, permit, or franchise, from any county, city or town, within the State of Indiana, shall upon filing at any time prior to July 1, 1923, with the auditor or clerk of any such county, city or town which granted such license, permit or franchise, and with the public service commission of Indiana, a written declaration, legally executed that it surrenders such license, permit or franchise, received by operation of law in lieu thereof an in-

determinate permit as provided in the act creating the public service commission of Indiana, entitled 'An act concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission,' approved March 4, 1913, and such public utility shall hold such permit under all the terms, conditions and limitations of said act as fully and completely as if the same had been done prior to July 1, 1915."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1940

CITY OF INDIANAPOLIS, et al.,
Petitioners,

vs.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., et al.,
Respondents.

No. 421

CITY OF INDIANAPOLIS, et al.,
Petitioners,

vs.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., et al.,
Respondents.

No. 422

BRIEF OF RESPONDENT, CITIZENS GAS COMPANY OF INDIANAPOLIS, UPON PETITION FOR WRIT OF CERTIORARI

PAUL Y. DAVIS,
WILLIAM G. SPARKS,
Indianapolis, Indiana
Counsel for Respondent, Citizens Gas Company of Indianapolis.

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THE OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals is reported in 113 Federal (2nd) 217.

STATEMENT OF THE CASE

The petitioners' statement of facts should be supplemented in the following particulars:

(1) Citizens Gas* was a quasi-public corporation organized for the purpose of acting as the original Trustee of a public charitable trust created for the benefit of the gas users of the City. (I R. 246, 250.) The Franchise Ordinance and the Articles of Incorporation (I R. 81) constituted the trust instruments and defined the powers and duties of Citizens Gas.

Todd v. Citizens Gas Company, et al, 46 Federal (2nd) 855 (C. C. A. 7).

(2) Such trust instruments provided that upon satisfaction of the claims of stockholders, the property of Citizens Gas should be conveyed to the City subject to all the legal obligations of the Company, and that thereafter Citizens Gas should be wound up (I R. 84, 85, 98, 115).

(3) During its trusteeship, Citizens Gas entered into the lease with Indianapolis Gas (I R. 51-80), pursuant to the authority granted by the statutes of the State of Indiana then in force. Upon joint petition of both parties the lease was approved by the Public Service Commission of the State of Indiana (I R. 116-122). It has been stipulated that the surrender of the franchise and the acceptance of an indeterminate permit under the Public Service Commission Law of Indiana did not have the effect of modifying or rendering nugatory the terms of the Franchise in so

* Throughout this brief the parties will be referred to by the appellations used by Petitioners in their petition and brief.

far as they created a Public Charitable Trust and defined the terms and conditions thereof and the rights, duties and liabilities of Citizens Gas as original trustee, of the City as successor trustee, and of the inhabitants of the City as the beneficiaries of the trust (II R. 622).

(4) Citizens Gas continued in possession and operated the leased property until September 9, 1935, and fully performed the rental covenants of the lease (II R. 627-628).

(5) Prior to September 9, 1935, the claims of stockholders of Citizens Gas had been completely satisfied (II R. 634), and the authority and duty of Citizens Gas to convey and transfer all of its property to the City had been finally adjudicated (*Todd v. Citizens Gas Company, et al.*, 46 Federal (2nd) 855 (C. C. A. 7)).

(6) Thereupon, on September 9, 1935, Citizens Gas conveyed and transferred to the City all of its property subject to all outstanding obligations of the Company, and otherwise in strict accordance with the terms and conditions of the trust instruments (I R. 122, 127; III R. 833, 835). The City reserved its right to contest the validity of the lease (I R. 202-204, II R. 468). After September 9, 1935, Citizens Gas owned and held no property of any description and engaged in no business activity (II R. 466).

ARGUMENT

The primary controversy in this litigation is whether the City and the property conveyed to it by Citizens Gas are liable under the lease for the remainder of the term of ninety-nine years. Throughout, Citizens Gas has asserted that it has no interest in that primary controversy and has adopted a completely neutral position with reference thereto. Citizens Gas contends that whether or not the City and the property are liable under the lease, Citizens Gas has fully and lawfully performed its duties as Trustee of the Public Charitable Trust and has no further obligation to any person.

Furthermore, Citizens Gas has never denied its power and authority to bind itself as Trustee and the trust property for the term of its trusteeship. It has always recognized the validity of the lease during all the time it had the power and authority to operate as a public utility, and it fully performed the lease covenants during that period of time (II R. 627-628).

In so far as the propriety of the acts of Citizens Gas is in question, the essential factors which define the rights and duties of Citizens Gas are as follows:

(1) No party has questioned the validity of the Public Charitable Trust as created and defined in the Franchise Ordinance and the Charter of Citizens Gas (I R. 233, 242, 246, 250). This had been adjudicated prior to the conveyance to the City (*Todd v. Citizens Gas Company, et al.*, 46 Federal (2nd) 855 (C. C. A. 7); *Williams v. Citizens Gas Company, et al.*, 206 Indiana 448, 188 N. E. 212).

(2) The terms and conditions of the Public Charitable Trust defined the powers and duties of Citizens Gas. As stated by the Court in *Todd v. Citizens Gas Company, et al.*, 46 Federal (2nd) 855 (865) (C. C. A. 7): "Provisions for the protection of the public interests were properly included in its charter, and are binding upon its stockholders and directors, who must act in accordance therewith until they are legally abrogated or altered."

(3) Both Indianapolis Gas and the purchasers of its bonds from Citizens Gas had full knowledge of the terms and conditions of the Public Charitable Trust, and the obligation of Citizens Gas to convey all of its property to the City and thereafter wind up its affairs (I R. 62; II R. 583-586). Moreover, Indianapolis Gas was notified of the contemplated transfer and of the City's desire to contest the validity of the lease some time before the conveyance was made (III R. 836).

(4) Since Citizens Gas was a public utility as well as the original Trustee of the Public Charitable Trust, the lease in question was made pursuant to the authority of the Public Service Commission Law of Indiana and only after approval had been given by the Public Service Commission of Indiana (I R. 116-122).

(5) Prior to September 9, 1935, it had been adjudicated that neither the enactment of the Public Service Commission Law by the General Assembly of the State of Indiana nor the granting of an indeterminate permit thereunder to Citizens Gas had affected in any way the terms of the Franchise Ordinance in so far as they created the Public Charitable Trust and defined the terms and conditions thereof (*Todd v. Citizens Gas Company, et al.*, 46 Federal

(2nd) 855 (C. C. A. 7)). Moreover all the parties hereto have conceded that fact (II R. 622).

(6) On September 9, 1935, after the complete satisfaction of the claims of stockholders of Citizens Gas, it conveyed all of its property of every kind to the City *subject* to the legal obligations of the Company. The conveyance and transfer was made in strict accordance with the provisions of the Franchise Ordinance and the Charter of Citizens Gas (I R. 122, 127; III R. 833, 835). Thus Citizens Gas completely carried out and performed its duties as Trustee of the Public Charitable Trust, and as provided in the Franchise Ordinance and its Charter (I R. 84, 85, 98, 115). Citizens Gas has no further duty or obligation except to wind up its affairs.

Throughout its corporate existence Citizens Gas has acted within its authority and duty both as the original Trustee of the Public Charitable Trust and as a public utility. It affirms the validity and binding effect of the lease during the period during which it had the authority and the ability to operate as a public utility in the City of Indianapolis. Citizens Gas also affirms the validity and binding effect of the terms and conditions of the Public Charitable Trust. Whether or not the City has any liability under the lease, it is clear that Citizens Gas has fully performed its duties and obligations and that its legal capacity to secure further performance of the lease covenants terminated on September 9, 1935.

PAUL Y. DAVIS,
WILLIAM G. SPARKS,
Indianapolis, Indiana
Counsel for Respondent, Citizens Gas Company of Indianapolis.

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CHARLES ELMORE

In the Supreme Court of the United States

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HOWARD F. BURNS,
JOHN ADAMS,
HARVEY J. ELAM,
Counsel for The Chase National Bank of the City of New York, Trustee.

BAKER, HOSTETLER & PATTERSON,
Union Commerce Building,
Cleveland, Ohio,
Of Counsel.

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HARVEY J. ELAM,
Counsel for The Chase National Bank of the City of New York, Trustee.

BAKER, HOSTETLER & PATTERSON,
Union Commerce Building,
Cleveland, Ohio,
Of Counsel.

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TABLE OF ABBREVIATIONS.

For convenience we shall use the following abbreviations and designations:

Articles	The Articles of Incorporation of Citizens Gas (Part of Exhibit C to Bill, I R. 95-100).
Bill	Bill of Complaint.
Bonds	The First Consolidated Mortgage 5% Gold Bonds of The Indianapolis Gas Company issued under the Mortgage.
DX	Exhibit offered by defendants City of Indianapolis *et al.*, during trial.
DX Stip.	Stipulation Exhibit offered by defendants City of Indianapolis, *et al.*, during trial.
Franchise	The franchise contract between the City of Indianapolis and Alfred F. Potts, *et al.*, approved August 30, 1905 (Part of Exhibit C to Bill, I R. 81-95).
Lease	The Lease of September 30, 1913, from Indianapolis Gas to Citizens Gas (Exhibit B to Bill, I R. 51-80).
Mortgage	Indenture of Mortgage from Indianapolis Gas to Chase's predecessors, dated October 1, 1902 (Exhibit A to Bill, I R. 23-51).
PX	Exhibit offered by plaintiff during trial.
PX Dep.	Deposition Exhibit offered by plaintiff.
PX Stip.	Stipulation Exhibit offered by plaintiff during trial.
Pet.	Petitions for writ of certiorari and briefs in support thereof filed by the City of Indianapolis, *et al.**
.... R.	Printed transcript of the record.
Reply Br.	"Reply Brief of Petitioners to Briefs of Respondents in Opposition to Petitions for Writ of Certiorari."
Revenue Bonds	City of Indianapolis Gas Plant Revenue Bonds.
Stip.	Subdivision of Stipulation of Facts (PX 1, II R. 616-639, Offered II R. 326-7, Received III R. 1057).

* The City's petition and brief in Cause No. 421 is substantially identical with its petition and brief in Cause No. 422 and references to either petition and brief are equally applicable to the other, unless otherwise noted.

In the Supreme Court of the United States

OCTOBER TERM—1940.

CITY OF INDIANAPOLIS, *et al.*,
Petitioners,

v.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., *et al.*,
Respondents.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc.,
Cross-Petitioner,

v.

CITIZENS GAS COMPANY OF INDIANAPOLIS, *et al.*,
Respondents.

Nos. 421, 422, 423, and 424.

BRIEF OF CHASE NATIONAL BANK, TRUSTEE, RESPONDENT AND CROSS-PETITIONER.

A.

OFFICIAL REPORT OF OPINIONS BELOW.

The District Court made findings of fact (III R. 1160) and conclusions of law (III R. 1190) and wrote an opinion (III R. 1122). The opinion has not been officially reported.

The opinion of the Circuit Court of Appeals for the Seventh Circuit (IV R. 1281-1306) is reported in 113 F. (2d) 217. Its opinion on the first appeal (II R. 285-293) is reported in 96 F. (2d) 363; certiorari denied 305 U. S. 600.

NOTE: In the interest of brevity the parties will be referred to as follows:

The Chase National Bank of the City of New York, Trustee, respondent in causes 421 and 422, cross-petitioner in causes 423 and 424, and plaintiff in the trial court, as "Chase" or as "plaintiff";

(Continued on page 2)

B.

JURISDICTION.

The City filed petitions for certiorari (Nos. 421 and 422) on the 12th day of September, 1940. On the same day Chase filed a cross-petition for writs of certiorari (Nos. 423 and 424). In each petition the jurisdiction of this Court was invoked under Section 240(a) of the Judicial Code (28 U. S. C. § 347(a)). These cases are now before the Court upon the granting of these petitions and the cross-petition.

The judgments of the Circuit Court of Appeals were entered on June 6, 1940 (IV R. 1307-8). The City's petition for a rehearing and its petition for a reargument were denied July 19, 1940 (IV R. 1336). The City's second petition for a rehearing was denied August 15, 1940 (IV R. 1405).

C.

STATEMENT OF THE CASE.

Plaintiff brought this action in the United States District Court for the Southern District of Indiana, suing as trustee under the Indianapolis Gas Mortgage and joining Indianapolis Gas, Citizens Gas and the City as defendants. All of the defendants were citizens of Indiana and federal jurisdiction was based on diversity of citizenship. Plaintiff sought to recover judgment for the overdue interest on the Indianapolis Gas Bonds, with interest on unpaid interest, against all the defendants and against the property once owned by Citizens Gas and later transferred by it to the City. Plaintiff also sought a declaratory judgment to establish that the Lease from Indianapolis Gas

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(Continued from page 1)

Citizens Gas Company of Indianapolis as "Citizens Gas";

The Indianapolis Gas Company as "Indianapolis Gas";

The City of Indianapolis and the members of the Board of Trustees and the members of the Board of Directors for Utilities of said City, collectively, as the "City";

The holders of Indianapolis Gas Bonds as "Bondholders."

to Citizens Gas (later assigned to the City), under which the lessee agreed to pay the interest on the Bonds, was and is binding on all the defendants and on the property transferred to the City by Citizens Gas.

The District Court denied plaintiff any relief except a judgment against Indianapolis Gas alone in the sum of $1,032,150, the amount of the unpaid coupons on the Indianapolis Gas Bonds at the time of the court's decree (III R. 1193). The Circuit Court of Appeals held that plaintiff was entitled to all the relief sought, but differed with plaintiff as to the rate of interest on the unpaid coupons and the rate to be paid on the judgment itself (IV R. 1305-6).

Most of the facts were established by a Stipulation in which all the parties joined (PX 1, II R. 616-639, Offered,* II R. 326-7).

The Indianapolis Gas Mortgage.

In 1902 Indianapolis Gas gave an open mortgage on its plant and property to one of plaintiff's corporate predecessors to secure an authorized bond issue of $7,500,000 (Bill, Exhibit A, I R. 23, Offered, II R. 327). Originally only $4,000,000 of Bonds were issued, but the Mortgage provided that additional Bonds could be issued to acquire additional property or make improvements and extensions (I R. 28). Under this provision of the Mortgage $833,000 of additional Bonds were issued prior to September 30, 1913 and $2,048,000 of additional Bonds were issued between June 22, 1914 and February 11, 1932 (Stip. 10, II R. 627). There are now $6,881,000 of Bonds outstanding, of which $120,000 principal amount are held by

* All of the exhibits offered by plaintiff on the trial (except PX 135, which was excluded) were admitted in evidence after the close of the trial by a formal order appearing at III R. 1057.

Indianapolis Gas and $18,000 principal amount by the City (Stip. 3(a), II R. 618).

The Mortgage contains a very broad after-acquired property clause (I R. 37) and all the property or rights which Indianapolis Gas might acquire after its execution are pledged under the Mortgage. The Mortgage also contains a covenant whereby Indianapolis Gas expressly agreed "to and with" the trustee that it would provide for and pay the principal and interest on the Bonds (I R. 44).

Organization of Citizens Gas Company.

On August 30, 1905 the City entered into a Franchise contract (Bill, Exhibit C, I R. 81-94, Offered, II R. 327) in which it granted the right to carry on the business of manufacturing and distributing gas to the City of Indianapolis and its inhabitants. This Franchise was granted on the express condition that the grantees thereof (three individuals) would organize an Indiana corporation to which the Franchise would be assigned and whose articles of incorporation would include certain specified provisions (I. R. 82).

Citizens Gas was organized in 1906 under the general laws of Indiana for the incorporation of manufacturing and mining companies. Its Articles (Bill, Exhibit C, I R. 95-100, Offered, II R. 327) contained the provisions required by the Franchise and the Franchise was assigned to it in May, 1906.

In pursuance of its Franchise Citizens Gas, starting with an authorized capital of $1,000,000 (I R. 96), acquired the necessary property to manufacture and distribute gas throughout part of the City of Indianapolis and began to conduct such a business. Although organized as a corporation for profit, Citizens Gas was a quasi-public corporation and held the property acquired by it

subject to a public charitable trust for the benefit of the inhabitants of the City of Indianapolis. *Todd v. Citizens' Gas Co.*, 46 F. (2d) 855 (C. C. A. 7th, 1931).

Both the Franchise and Articles of Citizens Gas provided that its stock should be held by voting trustees who, in turn, would issue certificates of equitable ownership entitling the holders thereof to all dividends on their stock. The Franchise and Articles further provided that the City would be entitled to a conveyance of the "plant" of Citizens Gas upon the occurrence of certain events, among which were:

> (1) Whenever certificate holders had received the amount of their certificates plus a return of 10% per annum thereon (I R. 84).
>
> (2) Upon the expiration of the Franchise period the City could itself pay the certificate holders and require the conveyance of the property (I R. 93).

In 1921 Citizens Gas, in pursuance of the Indiana statutes authorizing it to do so, surrendered the Franchise previously granted by the City and accepted an indeterminate permit from the Public Service Commission, with the result that it operated from August 27, 1921, until September 9, 1935, as a public utility under an indeterminate permit (Stip. 6(b), II R. 622). At various times after its organization Citizens Gas increased the amount of its authorized common shares and sold additional common stock, authorized the issuance of and sold shares of preferred stock, and authorized various bond and note issues which were sold to the public for the purpose of financing and expanding its business (I R. 112-13, II R. 598-603). At the time when the City took over the property of Citizens Gas it had $2,000,000 of common stock, $1,000,000 of preferred stock and $2,745,000 of mortgage bonds outstanding (Stip. 16, II R. 634-5).

Lease from Indianapolis Gas to Citizens Gas in 1913 and Public Service Commission Approval Thereof.

In May, 1913, Citizens Gas and Indianapolis Gas filed a joint petition with the Public Service Commission requesting authority to make a lease of the property of Indianapolis Gas to Citizens Gas for a period of 99 years (PX Stip. 13, II R. 652-3, Offered, II R. 328, 331; Finding 38, III R. 1175). In the proposed lease the lessee agreed to pay the interest on the Bonds of Indianapolis Gas and a 7% return on the capital stock of Indianapolis Gas in the par value of $2,000,000 (PX 91, III R. 893, Offered, II R. 342). The considerations which led up to the making of this Lease are set forth in detail in the reports issued by Citizens Gas to its stockholders during the period when the petition was pending before the Public Service Commission and immediately following the Commission's approval of the Lease (PX 91, 92, 93 and 94, III R. 886-904, Offered, II R. 342). We quote only a few excerpts from these statements:

> "COMPETITION DANGEROUS TO THE COMPANY AND THE COMMUNITY.
>
> "Although the Citizens Gas Company has been able to compete successfully with its larger rival, and will continue to do so if necessary, *this competition has not been without dangers in the past, and may be found to be more dangerous in the future.** The old management of the Indianapolis Gas Company was bent on bringing the Citizens Gas Company into bankruptcy." (PX 91, III R. 887.)

And again:

> "Your Directors * * * have therefore carefully considered the interests of the Stockholders of the Citizens Gas Company under the operation of the proposed lease, and *they have concluded that there will be a large*

* Emphasis appearing in quotations throughout this brief is ours unless otherwise indicated.

profit therefrom which will enable your Company more quickly to reach the maximum dividend authorized and to pay off the accrued back dividends authorized, and to reduce the price of gas still further in this community." (PX 91, III R. 890.)

And again:

"* * * However, *it was possible to begin certain important economies soon after the merger became effective*, and these have already resulted in some net increase in your Company's profits after payment of all rental charges as well as your own bond interest." (Report to Stockholders, March 28, 1914; PX 93, III R. 902-3.)

After prolonged hearings before the Public Service Commission, it required certain modifications of the Lease, including a reduction in the rent so as to provide for a 6% rather than a 7% return on the capital stock of Indianapolis Gas. The parties agreed to these modifications and the Commission entered an order on October 1, 1913, approving the Lease as so modified (Stip. 7, II R. 623; Bill, Exhibit D, I R. 116-122, Offered, II R. 327).

Fishback intervention and petition for rehearing.

During the proceedings before the Public Service Commission one Frank S. Fishback filed an intervening petition in which he objected to the proposed lease. Fishback asserted that he was a stockholder of Citizens Gas and a resident freeholder of the City of Indianapolis and that he was objecting both as such stockholder and as such resident (PX Stip. 13, II R. 654, Offered, II R. 328, 331; Finding 38, III R. 1175). Fishback objected to the proposed lease on the following grounds among others (Bill, Par. 7, I R. 8-9; admitted by all defendants, I R. 137, 149, 223):

(a) That the rental provided therein was excessive.

(b) That Citizens Gas had no power to make such a lease because

(1) The proposed lease was for a period longer than the lessee's corporate life.

(2) The City of Indianapolis was the true owner of the lessee's property.

Following the approval of the Lease Fishback filed a petition for rehearing in which he contended (PX Stip. 13, II R. 659-60, Offered, II R. 328, 331; Finding 38, III R. 1175):

(1) That performance of the terms of the Lease would make it impossible for Citizens Gas to perform its contract with the City relating to the taking over of the property of Citizens Gas.

(2) That the City had not given its consent to the Lease.

(3) That Citizens Gas was not authorized to enter into such a Lease for a period of 99 years.

On November 28, 1913, this petition for rehearing was overruled and immediately thereafter Citizens Gas took possession and control of the plant and system of Indianapolis Gas (Stip. 8, II R. 624).

In these proceedings before the Public Service Commission the City of Indianapolis was duly served with notice to appear and did appear and participate through its duly authorized and appointed counsel. The City made no objection either to the execution of the Lease or to the order made by the Commission, and the City had never, down to the year 1935, sought to have the order of the Public Service Commission set aside or attempted to enjoin the enforcement thereof (Bill, Par. 8, I R. 9-10; admitted by all defendants, I R. 137, 149, 223).

Fishback's Suit to Enjoin Performance Under the Lease.

On November 28, 1913, the day when the Commission overruled his petition for rehearing, Fishback filed a suit to set aside the Commission's order and to enjoin the Commission and the parties to the Lease from carrying out the

provisions of the Lease. The Commission, Citizens Gas, Indianapolis Gas and the City were all parties to this suit (Stip. 9(a), II R. 624). In his pleadings in this suit Fishback asserted, among other things (PX Stip. 13, 14; II R. 648, 662; Offered, II R. 328, 331):

(1) That the City had not consented to the Lease (II R. 662, 665).

(2) That the rental and fixed charges to be paid were excessive (II R. 661, 664-5).

(3) That the obligations assumed by Citizens Gas under the Lease impaired the obligations of the contract between Citizens Gas and the City (II R. 665).

(4) That the Lease constituted such a lien and encumbrance upon the property and earnings of Citizens Gas that the City would not be able to acquire the Citizens Gas plant and system, as provided in its Franchise (II R. 666).

(5) That the trustees, directors and officers of Citizens Gas were not authorized to enter into such a Lease for a period of 99 years (II R. 668).

The City filed an answer in which it denied all of these contentions (Stip. 9(c), II R. 625).

Fishback brought this suit both as a resident of the City of Indianapolis and as a stockholder of Citizens Gas (PX Stip. 13, II R. 650, Offered, II R. 328, 331). As such resident he alleged that his rights as a beneficiary of the contract between the City and Citizens Gas were not being protected and that he was himself attempting to protect those rights.

This suit was not disposed of until February 15, 1921, when the court rendered judgment against Fishback (Stip. 9(c), II R. 625). During all of the period from 1913 to 1921 the City never joined with Fishback in asserting the invalidity of the Lease but, on the contrary, maintained its position in direct opposition to Fishback until the case was

disposed of.* Fishback carried the case to the Supreme Court of Indiana on appeal where the appeal was dismissed and a petition for rehearing denied in 1923. *Fishback v. Public Service Commission*, 193 Ind. 282; 138 N. E. 346, 139 N. E. 449. (Stip. 9(h), II R. 626.)

Representations by Citizens Gas as to Existence of 99 Year Lease.

There were $4,833,000 principal amount of Indianapolis Gas Bonds outstanding when the Lease was made. After Citizens Gas took possession of the Indianapolis Gas property it made various additions, extensions, and improvements to that property, and, in pursuance of the terms of the Mortgage and the Lease, Bonds of the Indianapolis Gas Company in the principal amount of about $2,000,000 were delivered to Citizens Gas to reimburse it for such expenditures. Citizens Gas sold these Bonds to the public and retained the proceeds of such sale. (Stip. 10, II R. 627.)

In the sale of these Bonds as well as in the sale of its own securities Citizens Gas represented that it had a 99 year Lease on the property of Indianapolis Gas and that it had guaranteed the payment of the interest on these Bonds.

We call the Court's attention to a few of the circulars used by Blodget & Co. in marketing Indianapolis Gas Bonds and securities of Citizens Gas. Mr. Baker, formerly a partner in Blodget & Co., testified that these circulars were prepared under his direction from information received from Citizens Gas and that it was the custom to send copies of the circulars to Citizens Gas for approval and correction (II R. 573). Thus, in 1921 the circular on which Indianapolis Gas Bonds were sold contained the following language (PX Dep. 3, II R. 592, Offered, II R. 420, 555):

---

* The action was voluntarily dismissed by the plaintiff as against the City on the same day and by the same entry which entered final judgment against Fishback (Stip. 9(e), II R. 625).

"The Citizens Gas Company of Indianapolis, in 1913, *leased the property of the Indianapolis Gas Company for 99 years at a rental equivalent to the annual bond interest required*, and 6% on the $2,000,000 stock of the latter company. This lease was executed with the approval of the Public Service Commission of Indiana."

A similar representation was made in 1925 in the sale of the same Bonds (PX Dep. 4, II R. 595, Offered, II R. 420, 557):

"* * * The property of the Indianapolis Gas Company is *leased for 99 years* from 1913 for a sum equal to the interest on the outstanding bonds, and 6% on the $2,000,000 stock of the Indianapolis Gas Company."

The circular issued in 1926 left no doubt that Citizens Gas was guaranteeing the payment of interest and the refunding of the principal on the Indianapolis Gas Bonds (PX Dep. 5, II R. 596-7, Offered, II R. 420, 558):

"INDIANAPOLIS GAS COMPANY

First Consolidated Mortgage 5% Gold Bonds

Dated October 1, 1902 Due October 1, 1952

* * * * *

GUARANTEED BY CITIZENS GAS COMPANY OF INDIANAPOLIS AS TO INTEREST AND REFUNDING OF PRINCIPAL

The Indianapolis Gas Company was incorporated in 1890 to supply artificial gas to the city of Indianapolis and vicinity. *The property of the company is leased for 99 years from October 1913* to the Citizens Gas Company of Indianapolis which now controls the entire gas business of the city of Indianapolis and surrounding communities, serving a population of about 375,000. The Citizens Gas Company operates under an indeterminate permit of the Public Service Commission of Indiana."

There are many other instances of such representations which will be discussed later (*infra*, pp. 121-2).

Continuous Performance by Citizens Gas under Lease.

From November 28, 1913, to September 9, 1935, a period of almost 22 years, Citizens Gas operated the plant and property of Indianapolis Gas under said Lease, paid the interest on the outstanding Bonds of Indianapolis Gas either directly to the Bondholders or at the office of the Mortgage trustee, and paid all the other rentals payable *in cash* under the terms of the Lease, as well as the taxes upon the leased property (Stip. 11 (a), II R. 627-8). The plants of the two companies were operated as a single unit (I R. 156, II R. 349-50) and Citizens Gas was thus relieved from the waste and expense of competition and duplication of facilities.

During all this period neither the City of Indianapolis nor Citizens Gas ever suggested that the Lease was invalid or that there was any lack of power in Citizens Gas to make a lease for 99 years. On the contrary, on every occasion when the question was raised, both the City and Citizens Gas contended that the Lease was valid and was binding according to its terms. This occurred not only before the Public Service Commission and in the *Fishback* case, but in the *Todd* case, the *Cotter* case, and the *Williams* case, to which we shall refer hereafter.

Exercise by City of Right to Take Citizens Gas Property.

On March 20, 1929, the City of Indianapolis, through its Board of Public Works, adopted a resolution (PX Stip. 22, II R. 670, Offered, II R. 327) by which it

> "* * * hereby asserts, claims and demands *all rights, title, interests and ownership, of whatever nature or character* granted, reserved, transferred or vested in and to said City *in and to the gas plant, mains and property of said Citizens Gas Company* * * *."

and demanded that Citizens Gas

> "* * * convey *said plant, property and assets of said company* to said City of Indianapolis in accordance with the premises; * * *."

As we shall see (*infra*, pp. 101-4), the circumstances surrounding the adoption of this resolution, as well as the language of the resolution itself, show conclusively that the City intended at that time to take over all of the property of Citizens Gas, *including the 99 year Lease* of the Indianapolis Gas property.

The Todd and Cotter cases.

On April 30, 1929, Newton Todd, a stockholder of Citizens Gas, commenced an action in the federal court in Indianapolis to enjoin Citizens Gas from transferring its property to the City. About two weeks later a similar action was filed in the same court by Cotter and others, non-resident stockholders of Citizens Gas. The court dismissed both bills of complaint on May 29, 1930. On appeal the two cases were heard together and the judgments of the District Court were affirmed (46 F. (2d) 855). Subsequently this Court refused to grant a writ of certiorari (283 U. S. 852). In these cases the Circuit Court of Appeals held that the property of Citizens Gas was subject to a public charitable trust for the benefit of the inhabitants of Indianapolis and that the City, upon taking over the property of Citizens Gas, would become the successor trustee of this trust (46 F. (2d) 855, 864, 866).

The *Todd* and *Cotter* cases involved the right of the City to take over the property of the Citizens Gas, including the Lease in question, after the City's exercise of that right. In its answer in the *Cotter* case, the City said (PX 89, III R. 859-60, Offered, II R. 334, III R. 1057):

> "* * * after the passage of the Shively-Spencer Act of 1913 the Citizens Gas Company, pursuant to an order of the Public Service Commission of Indiana and *with the full consent and approval of the City of Indianapolis*, entered into a contract whereby it leased from the Indianapolis Gas Company all its plants and property *for a period of ninety-nine years*; * * *.
>
> * * * * *

"These defendants admit that since 1913 the Citizens Gas Company *with full knowledge and consent of the City* has operated the combined properties under the provisions specified by the Commission and has used its earnings and its financial credit in the making of extensions, improvements and betterments, both to its own property and to the property subject to said lease."

Similarly, in the *Todd* case the stipulation of facts signed by the various parties, including Citizens Gas and the City, and filed with the court, recited (PX 139, III R. 942, 943, Offered, II R. 335, III R. 1057):

"* * * Defendant Company [Citizens Gas] also is the owner of a certain leasehold estate in and to the property of the Indianapolis Gas Company, as created by a certain contract of lease for ninety-nine years dated September 30, 1913, and recorded in Miscellaneous Record 78, pages 257-278, inclusive, of the records in the Recorder's office of Marion County, State of Indiana."

Questions Adjudicated in Williams Case.

On March 12, 1930, before the District Court had decided the *Cotter* and *Todd* cases, Allen G. Williams, an inhabitant and taxpayer of Indianapolis, brought suit as a beneficiary of the public charitable trust to protect it from the Lease, which he claimed to be burdensome. The following parties were joined as defendants: The City of Indianapolis and numerous officials of the City; Citizens Gas and a number of its officers; the Public Service Commission; Indianapolis Gas; and the trustees under the Indianapolis Gas Mortgage. Thus all of the parties to the present litigation were before the court (PX Stip. 35, II R. 761-4, Offered, II R. 328).

In his complaint Williams quoted in full the Franchise and Articles of Citizens Gas (II R. 765) and the Lease from Indianapolis Gas to Citizens Gas (II R. 780). Williams alleged (PX Stip. 35, II R. 761, Offered, II R. 328):

(1) That the Lease was "*ultra vires* said Citizens Gas Company" and wholly void (II R. 790, Par. 29).

(2) That the Lease "impairs the charter of said Citizens Gas Company" (II R. 780).

(3) That the Lease "impairs, also, the said contract of August 25, 1965, * * * whereby said Public Charitable Trust was created" (II R. 780-1).

(4) That the Lease was improvident and a burden upon the trust estate (II R. 780).

Williams declared that "said trust is now entitled to have made the formal and final transfer, accordingly, of all the property and franchises of said Citizens Gas Company" (II R. 771, Par. 14) and that the Lease should "be determined and adjudged to constitute an unlawful cloud upon the title of said Public Charitable Trust and should be removed by the proper decree of this court in this suit" (II R. 790, Par. 29).

Williams had been made a party to the *Todd* case and by stipulation filed in that case it was agreed that the *Williams* case would not be tried until the final determination of the *Todd* case (Stip. 13(f), II R. 629-30).

A number of defendants, including Citizens Gas and the City, filed a joint demurrer to Williams' complaint. Indianapolis Gas and the Mortgage trustees filed a separate demurrer, as did the Public Service Commission. The court sustained the demurrers and entered final judgment dismissing the complaint. (Stip. 14(d), (e), (f), (h); II R. 632-3).

On the appeal, the Supreme Court of Indiana considered the case on its merits, held the Lease to be valid, and affirmed the judgment of the lower court. *Williams v. Citizens' Gas Co.*, 206 Ind. 448, 188 N. E. 212. No relief was granted in respect of the claim that the City was then entitled to receive the Citizens Gas property, this relief having been obtained in the *Todd* case. In disposing of the contention that the Lease was an unlawful cloud on the title of the public charitable trust, the court said (pp. 215-16):

"In respect to the alleged invalidity of the lease executed between the Citizens' Gas Company and the Indianapolis Gas Company, it appears from the complaint that *the lease was one which the Citizens' Gas Company and Indianapolis Gas Company had the power to execute and one which would result in great advantage to the Citizens' Gas Company.* * * *. Further it was within the jurisdiction of the public service commission to consider and approve the lease and the complaint discloses that the public service commission did approve it. *The complaint does not make out a case for any relief on the basis of invalidity of the lease or of the action of the commission in approving the same.*"

Williams' suit to protect and enforce the rights of the beneficiaries of the public charitable trust was decided after it had been judicially determined that the City was entitled to receive the trust property from Citizens Gas. The Supreme Court of Indiana held that the alleged burdensomeness or improvidence of the Lease was not a valid ground for the attack on the Lease, that Citizens Gas had power to make the Lease and that, although the City was entitled to receive the trust property, that property would have to remain subject to the obligations under the Lease.

Sale of Revenue Bonds by City of Indianapolis.

In its resolution of March 20, 1929 (*supra*, p. 12) the Board of Public Works reserved the right to furnish the funds to retire the stock of Citizens Gas, instead of having that company mortgage its property for the purpose of raising such funds.

The *Todd* case, filed as early as April 30, 1929, and the *Williams* case, not finally disposed of until April, 1934, interfered with the City's carrying out the resolution of March 20, 1929. However, on May 7, 1935, these suits in respect of the contemplated transfer of the trust estate having been brought to an end, the Board of Directors for

Utilities adopted a resolution for a public offering of $8,000,000 of the City's Revenue Bonds. This began by reciting the purpose of issuing said bonds as follows (PX Stip. 47, III R. 822-3, Offered, II R. 327):

> "That for the purpose of obtaining funds for the taking over of certain property *owned* by Citizens Gas Company of Indianapolis *and or in which it has an interest*, * * *."

The resolution later set out specifically the form of the Revenue Bonds to be issued. This form stated that the bonds were to be (III R. 825):

> "* * * issued for the purpose of providing funds for the purpose of taking over property *owned* by Citizens Gas Company of Indianapolis *and or in which it has an interest*, * * *."

The form of the bonds recited how they were to be secured as follows (III R. 826):

> "The payment of the principal and interest of this and of all other bonds of this issue is secured by a charge upon *all the revenue from the operation of all of the gas system* **owned and or operated** *by the City of Indianapolis.*"

Toward the end of the resolution the City made the following agreement (III R. 828):

> "The City agrees * * * that when it has obtained the possession of *the property operated by Citizens Gas Company* of Indianapolis, it will cause the same to be continually operated as a gas system in an efficient manner and at reasonable cost, and maintained in good operating condition; and *it will use all reasonable efforts to resist competition and maintain the exclusive right to serve gas* in the City of Indianapolis * * *."

In connection with the public offering of the Revenue Bonds the City issued a prospectus which was produced and identified by Mr. Simond of Halsey, Stuart & Company (II R. 497-8). This prospectus (PX Dep. 110, II

R. 533, Offered, II R. 420, 518), was issued in May, 1935 and contained the following information for the benefit of prospective bidders (II R. 535):

> "For over twenty-one years gas has been supplied to the inhabitants of Indianapolis and neighboring communities solely through the system operated by Citizens Gas Company; a system having 867 miles of mains and with 75,949 meters in use as of May 1, 1935.
>
> "*This system is in part owned by Citizens Gas Company and in part is leased by it from Indianapolis Gas Company*, which is not an operating company.
>
> "* * *
>
> "*The lease is for a term of 99 years from October 1, 1913*, subject to a mortgage dated October 1, 1902, from Indianapolis Gas Company to Trust Company of America securing a 5% fifty year bond issue of $7,500,000 (not all of which bonds have been issued). *The rental thereunder is (a) the amount of the interest on the outstanding bonds under said mortgage*, and on any refunding bonds; * * *."

Thus the City expressly represented to the prospective bidders that the Citizens Gas property included the ninety-nine year Lease from Indianapolis Gas and that the leased property was included in "the system operated by Citizens Gas."

The Revenue Bonds were sold to Halsey, Stuart & Co. and Otis & Co., who relied upon the representations in the resolution of May 7, 1935, and the prospectus in making this purchase (II R. 493-4, 497-8, 456-7). In connection with the resale of the bonds, Halsey, Stuart & Co. issued an advertising circular, a copy of which appears as Exhibit B to the City's answer and counterclaim (I R. 192-9, Offered, II R. 327). This circular was submitted to and approved by Thompson, Rabb & Stevenson, counsel for the City of Indianapolis, before it was issued on July 1, 1935 (PX Dep. 111, 112, 113, 114, II R. 536-46, Offered, II

R. 420, 518). It contained, among others, the following representations:

(1) That said Revenue Bonds were issued to provide funds for the City to acquire the "property owned by Citizens Gas Company of Indianapolis and or in which it has an interest, * * *." (I R. 194).

(2) That Citizens Gas had "leased *for a period of 99 years* the properties and business of the Indianapolis Gas Company, thereby gaining control of the entire gas business of the City of Indianapolis and its environs." (I R. 195).

(3) That the Indianapolis Gas property covered by the Lease had a depreciated physical value of $9,181,960 and a reproduction value of $12,730,490, as against which there were outstanding $6,381,000 of Bonds and $2,000,000 of capital stock (I R. 195-6).

(4) That the City covenanted "That upon acquisition of the property operated by the Citizens Gas Company, it will cause the same to be continually operated as a gas system * * * and it will use all reasonable efforts to resist competition and maintain the exclusive right to serve gas in the City of Indianapolis and in Marion County * * *." (I R. 198).

(5) That "we are advised the coke oven and water gas plants of the leased property are not used in operations but it is anticipated that the coke oven plant will be in operation by October 1, 1935" (I R. 196).

The first, second and fourth of these representations were taken almost verbatim from the statements made by the City itself in its prospectus (*supra*, pp. 17-18), or from the resolution authorizing the sale of the Revenue Bonds (*supra*, pp. 16-17). Simultaneously with the publication of this circular, Halsey, Stuart & Company and Otis & Company published an advertisement in more than

forty newspapers throughout the country, which contained substantially the same representations as those in the circular (PX Dep. 104, 116; II R. 526, 547-8; Offered, II R. 420, 518).

Transfer of Citizens Gas Property, Including the Lease, to the City.

The City used some of the proceeds of the Revenue Bonds to retire the common stock, the preferred stock and the bonds of Citizens Gas. Then on September 9, 1965 Citizens Gas delivered to the City instruments transferring all of its property including the Lease. No cash was paid or any property transferred to Citizens Gas in return for the conveyance of all its property. On the contrary, the entire consideration for the transfer of the Citizens Gas property was paid to the stockholders and bondholders of Citizens Gas (Stip. 16, II R. 634).

The instruments of conveyance delivered to the City on September 9 were:

(1) A deed conveying all the real estate of Citizens Gas (PX Stip. 55, III R. 833, Offered, II R. 327).

(2) A transfer and assignment of the personal property (Bill, Exhibit E, I R. 122, Offered, II R. 327).

(3) An assignment of a lease of certain office space (PX Stip. 56, III R. 835, Offered, II R. 327).

(4) An assignment of the Lease here in question (Bill, Exhibit F, I R. 127, Offered, II R. 327).

Each of these four instruments specifically recited that the conveyance was made subject to all the existing liens and encumbrances on the Citizens Gas property *and subject to all other legal obligations* of Citizens Gas.

The four instruments of conveyance were all retained by the City and the City had three of them, *including the assignment of the Lease here in question*, filed for record

with the County Recorder (II R. 339, 467-8). The City immediately took possession of the Indianapolis Gas property and since September 9, 1935 it has continuously operated that property as a unified part of the entire system received from Citizens Gas (II R. 350; Stip. 6(c) II R. 622-3).

As a condition precedent to conveying its property to the City, Citizens Gas, by resolution of its Directors and Trustees (IX Stip. 86, 87; III R. 842, 845, Offered II R. 327), required that the City give an indemnity agreement of a specified form to Citizens Gas, and the City gave such an indemnity agreement (Stip. 21, II R. 638; Exhibit J to Second Amendment and Supplement to Bill, II R. 306, Offered II R. 327). By this Indemnity Agreement the City agreed to indemnify and save Citizens Gas harmless "from any and all loss, damage, costs, charges, *liability* or expense" on account of a large number of things, particularly including "any actions or suits which may hereafter be brought against said Company, arising from *any and all* acts or actions or *omissions to act* on the part of said company *of any nature whatsoever*" (II R. 307).

Thus we have a typical example of one corporation taking over all the assets and business of another corporation. The transferor is, of course, deprived of all resources with which to meet its liabilities and the transferee, therefore, takes the property subject to all existing obligations of the transferor and also agrees to indemnify the transferor against any liabilities of any kind whatsoever. That is precisely what occurred in the present case.

City's Performance Under the Lease.

Since September, 1935, the City has performed many of the obligations imposed upon the lessee under the terms of the Lease. Thus, it has continued to pay all the city, county, and state taxes on the Indianapolis Gas property (II R. 374, 377-9). It has continued to keep the property

of Indianapolis Gas insured (II R. 379), and, although it has done so quite inadequately, it has continued to spend some funds in the maintenance of the Indianapolis Gas property (II R. 380-81, 398-9). In addition to this the City furnished the money to pay the coupons falling due on October 1, 1935, and April 1, 1936, and paid $60,000 for dividends to the stockholders of Indianapolis Gas on December 31, 1935 (II R. 373, 375).

Proceedings in this Litigation.

On March 2, 1936, without any notice to the Mortgage trustee or the Bondholders (II R. 405-6, 408), the City and Indianapolis Gas entered into a written agreement which has never been modified or supplemented in any way (Stip. 19(a), II R. 637; Exhibit E to City's Answer, I R. 205, Offered as City's Exhibit B, II R. 386). This agreement provides that during the continuance of the agreement the City will make deposits in escrow in sums equal to the Lease rentals, including the amount of the interest due on the Indianapolis Gas Bonds. In direct violation of the rights of the trustee and of the Bondholders, however, the agreement provides that if the Lease is held to be binding on the City, the entire funds deposited in escrow, including those deposited in respect of the interest on the Bonds, shall be paid to Indianapolis Gas (I R. 206). The existence of this agreement came to the attention of the trustee and certain Bondholders some time later in March, 1936 (II R. 405-6), and in April, 1936 the Bondholders requested the trustee (Chase) to bring suit (PX 125, 126; III R. 937, 939; Offered, II R. 408). The Bill was filed on June 8, 1936, less than three months after plaintiff first learned of the agreement of March 2.

The District Court originally held that Indianapolis Gas should be realigned with plaintiff, thus destroying the requisite diversity of citizenship, and on November 15, 1937 dismissed the case for want of jurisdiction (I R. 271).

The Court of Appeals reversed this decision and remanded the case for trial (II R. 285; 96 F. (2d) 363). This Court denied certiorari (305 U. S. 600).

While the appeal was pending, certain Bondholders filed a wholly independent suit against those defendants who were made parties to Chase's Bill and also against the holder of the escrow fund. In this bill the plaintiffs, who hold Bonds aggregating almost $600,000.00 (Stip. 3(d), II R. 619), sued on behalf of themselves and all other Bondholders and asked for a personal judgment against Indianapolis Gas, Citizens Gas, and the City of Indianapolis for the unpaid interest on the Bonds and also asked, as Chase had, for a declaratory judgment holding that the Lease is a binding obligation of Indianapolis Gas, Citizens Gas, and the City.

In accordance with an order made by the District Court the two cases were tried together but not consolidated (II R. 325). All exhibits and evidence were considered as having been presented in both cases. This accounts for the designation of certain exhibits as "Plaintiffs' Exhibits," and certain other references in the record to "plaintiffs." The District Court has not yet decided the Bondholders' case.

In the trustee's case, the City renewed its attack on the court's jurisdiction, but the District Court upheld its jurisdiction (III R. 1192). On the merits, the court refused to grant plaintiff any relief against Citizens Gas or the City. The court held that the Lease was invalid and unenforceable against the City, Citizens Gas, Indianapolis Gas, or "the property formerly owned by the Citizens Gas Company of Indianapolis and now owned and operated by said City * * *"; and that the decision of the Supreme Court of Indiana in the *Williams* case was neither *res judicata* nor a binding decision as to the law of Indiana which the court was required to recognize (III R. 1192 3). The court did,

however, give plaintiff a judgment against Indianapolis Gas in the sum of $1,032,150.00, the amount of the unpaid coupons on the Bonds (III R. 1193).

Separate appeals were taken by plaintiff and Indianapolis Gas. These appeals (Nos. 7143 and 7144) were heard together on the same record. The Court of Appeals reversed the judgment of the District Court and held (IV R. 1306):

> (I) That Chase is entitled to a coercive judgment for the overdue interest, with interest on overdue interest at 5%, against "(1) the City as successor trustee and the trust property; (2) Citizens Gas; and (3) Indianapolis Gas." (The amount due is now about $1,700,000.)
>
> (II) That "Chase is entitled to a declaratory judgment to the effect that the lease is valid and enforceable against the parties * * *."

The City filed a petition for rehearing (IV R. 1309) in which it asserted, among other things, that it had not been given its day in court on the issue of the alleged burdensomeness of the Lease and that there could be no federal jurisdiction of the case. The Court of Appeals denied this petition but modified its opinion in certain respects, taking pains to make it clear that the judgment to be entered would bind the City only in its capacity as trustee of the public charitable trust and not as a municipality (IV R. 1335-6). A second petition for rehearing (IV R. 1343) was also denied (IV R. 1405).

The City filed two petitions for certiorari (Nos. 421 and 422). Chase filed a cross-petition for writs of certiorari (Nos. 423 and 424). The case is now before this Court upon the granting of these petitions and the cross-petition.

D.

SPECIFICATION OF ERRORS.

Since Chase was plaintiff in the District Court and is a cross-petitioner here, it has been agreed by all parties that it is to file the first brief in this Court. Plaintiff will accordingly present not only the error upon which it relies, but also the reasons why the judgments of the Court of Appeals should be affirmed except as to the single error of which plaintiff complains. In this connection we will deal with the alleged errors upon which the City relies.

I. PLAINTIFF'S SPECIFICATION OF ERROR.

The single error upon which plaintiff relies is that the Circuit Court of Appeals should have allowed interest on the overdue coupons from the dates of their respective maturities, and upon the judgment to be rendered from the time of its entry, at the rate of 6% in each instance and not at the rate of 5%. Plaintiff claims this right under the clear language of the Indiana statutes. (As of October 1, 1946, the difference amounted to more than $30,000.00.)

II. CITY'S SPECIFICATION OF ERRORS.

The City's "Reasons Relied Upon for Allowance of Writ" are (Pet. 13-16):

First: That the City has been denied a hearing on the question of the alleged burdensome character of the Lease and has thus been denied due process of law. (See below, p. 45.)

Second: That the Court of Appeals should have realigned Indianapolis Gas with plaintiff, in accordance with the City's conception of their interests in a so-called "dominant controversy," without regard to their conflicts of interest in the other controversies. (See below, p. 38.)

Third: That the Court of Appeals refused to follow the law of Indiana:

(1) As to the estoppel of a city. (See below, p. 118.)

(2) On the question of *res judicata*. (See below, p. 74.)

(3) As to the proper interpretation of a grant made by a municipality. (See below, p. 56.)

(4) To the effect that a municipal corporation cannot be bound by a contract made in violation of the Indiana statutes. In this connection the City claims that certain Indiana statutes prohibited the Lease in question. (See below, p. 93.)

E.

SUMMARY OF ARGUMENT.

I. THE CIRCUIT COURT OF APPEALS PROPERLY REFUSED TO REALIGN INDIANAPOLIS GAS WITH CHASE AS A PARTY PLAINTIFF.

(Brief, pp. 38-45.)

The decision of the Court of Appeals requires a judgment against Indianapolis Gas of over $1,700,000. A party *against* whom plaintiff is entitled to such a judgment should not be aligned *with* plaintiff. A defendant with whom the plaintiff has one or more controversies is never realigned with the plaintiff for jurisdictional purposes, and this rule applies without regard to whether plaintiff and such defendant are in accord as to some other phase of the same suit.

II. THE CITY HAD AMPLE OPPORTUNITY TO BE HEARD ON THE QUESTION WHETHER THE ALLEGED BURDENSOMENESS OF THE LEASE WAS A VALID DEFENSE AND THE COURT OF APPEALS' DIRECTION TO ENTER FINAL JUDGMENT WITHOUT A RETRIAL OF THAT ISSUE WAS IN FULL ACCORD WITH DUE PROCESS OF LAW.

(Brief, pp. 45-56.)

The City had ample opportunity to be heard on the question whether the alleged burdensomeness of the Lease was a valid defense, both in the trial court and in the Court of Appeals. The Court of Appeals was correct in determining this question of law adversely to the City's contentions and the City is not entitled to prove allegations which would be ineffectual as a defense even if they were proved.

The City admits that the order of the Public Service Commission approving the Lease is a conclusive determination that the Lease was "advisable and in the public interest" (Reply Br. 8). The *Williams* case* is a conclusive

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* *Williams v. Citizens' Gas Co.*, 206 Ind. 448, 188 N. E. 212 (1934).

determination by the Indiana Supreme Court (both as *res judicata* and as a statement of the Indiana law) that the Lease would be binding upon the public charitable trust even if it were proved to be burdensome. Also, the law is well settled in Indiana that neither a party to nor an assignee of a contract or lease can escape his obligations thereunder by showing that they were originally or have become burdensome. Thus, the Court of Appeals was correct in holding that the City's allegations of burdensomeness presented no valid defense.

The right to prove allegations which would be wholly immaterial and ineffectual as a defense even if they were proved is not an element of due process of law.

III. THE CIRCUIT COURT OF APPEALS WAS CORRECT IN HOLDING THAT CITIZENS GAS HAD THE POWER TO EXECUTE THE LEASE AND MAKE IT BINDING UPON THE PUBLIC CHARITABLE TRUST FOR THE FULL TERM OF THE LEASE.

(Brief, pp. 56-74.)

The City concedes that the Lease was valid until the trust property was transferred to the City (I R. 145-6). The theory that a trustee's contract, valid when made, becomes voidable when his successor takes his place as trustee is obviously unsound. In fact, Citizens Gas had ample authority to execute the Lease and make it binding on the trust for the full term of the Lease.

(a) Citizens Gas Had Express Statutory Authority to Make the Lease for 99 Years.

(Brief, pp. 56-58.)

Section 95½ of the Public Service Commission Law* specifically authorized competing public utilities to merge by purchase or lease, "at a price and on terms fixed by the

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* The pertinent portions of this Law are quoted in "Appendix A" to this brief, *infra*, p. 142.

commission." The Lease here in question was one between competing public utilities and was "at a price and on terms fixed by the commission."

(b) The Franchise and Charter Powers of Citizens Gas Included the Power to Execute the Lease and Make It Binding Upon the Trust for the Full Term of the Lease.

(Brief, pp. 58-66.)

The fact that its Articles gave Citizens Gas no *express* power to buy or sell property, hire employees, or make leases does not negative the existence of those powers, since they are necessarily *implied* from its general authority "to supply the city of Indianapolis and its inhabitants with light, heat and power." The charter powers of an Indiana corporation are derived both from its articles and the general laws governing such corporation, so that the statutory provisions authorizing public utilities to make leases were an express grant of such power to Citizens Gas.

(c) The Express Statutory Power of Citizens Gas to Effect a Merger by Making the Lease For 99 Years Overrode the Limitations, If Any, Arising From the Public Charitable Trust.

(Brief, pp. 66-69.)

In the *Williams* case the Supreme Court of Indiana held that the rights of the beneficiaries of the public charitable trust are "subject to the power of the state to control the Citizens' Gas Company as a public utility." This power was exercised by the enactment of the Public Service Commission Law and by the Commission's approval of the Lease, pursuant to the provisions of that Law.

(d) The Williams Case Conclusively Determined That Citizens Gas Had Power to Execute the Lease and Make It Binding Upon the Trust For the Full Term of the Lease.

(Brief, pp. 69-70.)

The decision of the Supreme Court of Indiana in the *Williams* case that "the lease was one which the Citizens' Gas Company and Indianapolis Gas Company had the power to execute" is a binding adjudication between the parties and a controlling authority as to the Indiana law.

(e) The Practical Construction of the Franchise and Articles by the City and Citizens Gas Shows That Those Instruments Gave Citizens Gas Power to Execute the Lease and Make It Binding Upon the Trust For the Full Term of the Lease.

(Brief, pp. 70-74.)

Over a period of more than 22 years (from 1913 to 1935) the City and Citizens Gas consistently construed the Franchise and Articles of Citizens Gas as granting it the power to execute this Lease and bind the public charitable trust thereto for the full term of the Lease. This practical construction of these documents by the parties themselves is of great, if not controlling, significance as to their proper interpretation.

IV. THE VALIDITY OF THE LEASE AND ITS BINDING EFFECT ON THE PUBLIC CHARITABLE TRUST HAVE BEEN CONCLUSIVELY ESTABLISHED BY THE JUDGMENT IN THE WILLIAMS CASE AND OTHER DECISIONS.

(Brief, pp. 74-92.)

The decision of the Indiana Supreme Court in the *Williams* case, the order of the Public Service Commission approving the Lease, and the decision in the *Fishback* case conclusively determined every issue now presented by the City in its attack on the Lease.

(a) The Judgment in the Williams Case Conclusively Determined That the Lease is Binding on the Public Charitable Trust, on Citizens Gas as Initial Trustee, and on the City as Successor Trustee.

(Brief, pp. 75-90.)

Williams sued in behalf of the public charitable trust and made all the parties to the case at bar, including the initial trustee and the successor trustee of the public charitable trust, parties to his suit. The refusal of the Indiana Supreme Court to remove the Lease as an "unlawful cloud upon the title of said Municipal City, as trustee" is a conclusive determination that the Lease is a binding obligation of the trust, of the initial trustee and of the City as successor trustee.

The City presents no issues as to the binding effect of the Lease which were not adjudicated in the *Williams* case and the judgment in that case would be conclusive even if the City were relying on new grounds of attack. Likewise, the mere transfer of the trust property did not affect the conclusiveness of the decision that the Lease is a binding obligation of the trust. The obligations of a trust cannot be evaded merely by changing the trustee.

Williams, a beneficiary, was permitted to present the case on behalf of the trust. It makes no difference, therefore, what issues, if any, were raised between the trustee (the City) and its co-defendants. The City had the opportunity to support Williams's contentions. It elected to oppose them.

Entirely aside from the question of *res judicata*, the *Williams* case conclusively settles the law of Indiana as to the very facts now presented to this Court.

(b) The Order of the Public Service Commission Conclusively Determined That the Lease Is in the Public Interest (Consequently in the Interest of the Trust Also) and in Fulfillment of the Duties of Citizens Gas as a Public Utility.

(Brief, pp. 90-92.)

The City admits that the Public Service Commission has conclusively determined that the Lease "was advisable and in the public interest" (Reply Br. 8). The Lease must, therefore, be in the interest of the beneficiaries of the public charitable trust—"the public." The Commission's decision is also a conclusive determination that the Lease was in fulfillment of the duties of Citizens Gas as a public utility and, therefore, superseded any limitations (in fact there were none) which might have been involved in the existence of the trust.

(c) The Fishback Case.

(Brief, p. 92.)

The decision in the *Fishback* case is *res judicata* between Indianapolis Gas and Citizens Gas. The primary importance of this case lies in the conduct of Citizens Gas and the City in upholding the validity of the Lease during the eight years immediately following the execution of the Lease, before the trial court entered final judgment.

V. THE CITY HAD AMPLE AUTHORITY TO ACCEPT THE TRUST AND ITS OBLIGATIONS, INCLUDING THE OBLIGATIONS UNDER THE LEASE, AND TOOK THE NECESSARY ACTION TO EXERCISE THAT AUTHORITY.

(Brief, pp. 93-117.)

The statutes* which the City asserts "prohibit any such lease" as the one here in question have no application to this case. The City had ample authority to take over

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* These statutes are quoted in full in "Appendix B" to this brief, *infra*, p. 147.

the public charitable trust and all its accompanying obligations, including those under the Lease, and took proper steps to exercise that authority.

(a) The City Had Ample Authority to Accept the Trust and Its Accompanying Obligations, Including the Obligations Under the Lease.

(Brief, pp. 93-98.)

Under Section 53 (clause 6) of the Cities and Towns Act the City had express power to accept trusts and "to agree to conditions and terms accompanying the same." This power is not subject to the limitations on the City's ordinary governmental powers. Moreover, the "validating acts" of 1929* conferred express authority on the City to accept the very trust here in question, including the leasehold estate and its accompanying obligations. Indeed, the "validating acts" were prepared and their enactment procured by the City's counsel for this very purpose.

(b) The City's Acceptance of the Trust Property Included the Acceptance of the Leasehold Estate and the Obligations Under the Lease.

(Brief, pp. 98-107.)

The City admits that it took over *all* the trust property (I R. 243). Since it also admits that the Lease was valid during the trusteeship of Citizens Gas (I R. 145), the leasehold must have been part of the trust property taken over by the City. The fact is that in March, 1929 the City demanded the transfer of *all* the trust property, including the leasehold estate, and during the succeeding six years consistently construed this demand as including a demand for the transfer of the Lease.

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* The pertinent portions of the "validating acts" are quoted in "Appendix C" to this brief, *infra*, p. 150.

(c) The City Accepted the Assignment of the Lease, Took Possession of the Leased Property and is Liable by Privity of Estate For the Obligations Under the Lease.

(Brief, pp. 107-111.)

The City received an assignment of the Lease, had it recorded, and took possession of the leased property, thereby becoming an assignee of the Lease. Its *ex parte* resolution *saying* that it rejected the assignment of the Lease is meaningless in view of its *acts* whereby it accepted the assignment. Also, the City had no agreement with Indianapolis Gas authorizing the City to take possession of the leased property. It had the right to take possession only as *assignee* of the Lease.

(d) The City Became Liable, as Successor Trustee, for All the Obligations of Citizens Gas, Including the Obligations Under the Lease.

(Brief, pp. 111-117.)

The City admits that it took the property of Citizens Gas "subject to all outstanding legal obligations of that Company" (I R. 243) and that the Lease was valid during the 22 years before the City received the trust property (I R. 145). This necessarily means that the obligations under the Lease were included among those to which the property was subject in the hands of the City. The City, as successor trustee, became liable for *all* the obligations of Citizens Gas in three ways: (1) by accepting the instruments transferring the trust property, all of which were expressly made subject to *all* the obligations of Citizens Gas; (2) by giving Citizens Gas an Indemnity Agreement, in which the City agreed to protect Citizens Gas from all *liability* arising from any acts or omissions to act on the part of Citizens Gas; and (3) by taking all the assets of Citizens Gas and paying the consideration therefor to the stockholders and bondholders of Citizens Gas, leaving it with no property out of which to satisfy its obligations.

VI THE CONTINUED ACQUIESCENCE IN THE VALIDITY OF THE LEASE BY CITIZENS GAS AND THE CITY FOR 22 YEARS, THEIR ACCEPTANCE OF THE BENEFITS UNDER THE LEASE, AND THEIR REPRESENTATIONS AS TO ITS BINDING EFFECT ON THE TRUST PRECLUDE BOTH OF THEM FROM ATTACKING THE LEASE.

(Brief, pp. 118-132.)

Although the Court of Appeals made no decision on the question of estoppel *in pais*, it would have been fully warranted in holding that both the City and Citizens Gas are estopped to deny that the Lease is binding for its full term.

(a) Citizens Gas is Estopped by its Conduct From Denying That the Lease is Valid for its Full Term.

(Brief, pp. 120-124.)

Before the Public Service Commission, in the *Fishback* case, and in the *Williams* case, Citizens Gas insisted that the Lease was valid for its full term and in each instance this contention was sustained. Also, Citizens Gas represented to the investing public that it had a 99-year Lease on the property of Indianapolis Gas, under the terms of which it guaranteed the interest on the Indianapolis Gas Bonds. There can be no doubt that as a result of these representations the general public was not only induced to buy the $2,000,000 of Indianapolis Gas Bonds sold by Citizens Gas, but also to continue to hold all the outstanding Bonds.

(b) The City is Estopped by Its Own Conduct From Denying That the Lease is Valid For Its Full Term.

(Brief, pp. 124-129.)

From 1913 to 1935 the City both actively urged and represented and stood by with full knowledge while Citizens Gas represented that the Lease was valid and bind-

ing for its full term. On several occasions when beneficiaries of the trust attacked the Lease the City not only failed to join in the attack but affirmatively insisted that the Lease was valid. As late as June, 1935 it sold its Revenue Bonds upon the express representation that it was taking over the entire system operated by Citizens Gas, including the property leased from Indianapolis Gas.

(c) The City is Precluded by Its Own Laches and the Laches of Citizens Gas From Denying That the Lease is Valid and Binding For Its Full Term.

(Brief, pp. 129-132.)

Citizens Gas and the beneficiaries of the trust had all the benefits of the Lease for a period of 22 years before the City asserted that the Lease was no longer binding. Moreover, during this period the City was a party to several proceedings in which it was incumbent on the City to speak if it ever intended to repudiate the Lease and in each instance the City failed to speak or took the affirmative position that the Lease was a binding obligation of the public charitable trust.

VII. THE RULE OF ERIE RAILROAD COMPANY v. TOMPKINS REQUIRED THE DECISION MADE BY THE CIRCUIT COURT OF APPEALS AND THE COURT FULLY COMPLIED WITH THAT RULE.

(Brief, pp. 132-134.)

Every Indiana decision bearing upon the validity of the Lease compels the conclusion that it is valid for its full term. The City's *present* contentions as to the validity of the Lease were all conclusively negatived, *as a matter of Indiana law*, in the *Williams* case.

VIII. THE CIRCUIT COURT OF APPEALS PROPERLY HELD THAT PLAINTIFF'S JUDGMENT SHOULD INCLUDE INTEREST ON THE COUPONS AFTER THEIR MATURITY AND INTEREST ON THE JUDGMENT ITSELF, BUT IN EACH CASE THE RATE OF INTEREST SHOULD BE SIX PER CENT.

(Brief, pp. 134-138.)

Under the express provisions of the Indiana statutes plaintiff is entitled to interest at the rate of six per cent on (1) the overdue coupons from the dates of their respective maturities, and (2) the judgment itself. The fact that the Bonds bear interest at the rate of 5% is wholly immaterial with respect to the proper rate of interest on the overdue *coupons* and on plaintiff's judgment.

F.

ARGUMENT.

I. THE CIRCUIT COURT OF APPEALS PROPERLY REFUSED TO REALIGN INDIANAPOLIS GAS WITH CHASE AS A PARTY PLAINTIFF.

In the Court of Appeals the City raised no question as to federal jurisdiction of this case until its first petition for rehearing. It was content with federal jurisdiction so long as the decision on the merits was in its favor. The Court of Appeals having decided the merits against it, the City is once more raising the question of jurisdiction which was determined adversely to it by the Court of Appeals in April, 1938. *Chase National Bank, Trustee v. Citizens Gas Co.*, 96 F. (2d) 363 (H R. 285).

After the Court of Appeals sustained federal jurisdiction of these cases in 1938, the City filed a petition for a writ of certiorari, which was denied (305 U. S. 600). Both in the Court of Appeals and in this Court the City argued, as it is now arguing again (Pet. 11-12), that

> "* * * the attitude of the respective parties toward the essential, substantial controversy, should determine whether realignment shall take place for the purpose of testing the jurisdiction of the court as a federal court; irrespective of the attitude of the parties toward subsidiary or different issues." (Supporting Brief, p. 16, case No. 168, 1938.)

The Court of Appeals denied that there was any such test for determining when realignment should be required, saying (96 F. (2d) 367, H R. 291):

> "* * * A perusal of these authorities discloses that such realignment has been required when there is no actual controversy between plaintiff and defendant, or no bona fide prayer for relief against it. * * * The rule seems to be that *before such realignment may be required, the parties must be in substantial accord upon all issues presented. Boston Safe-Deposit & Trust Co. v. City of Racine*, C. C., 97 F. 817. It is not

sufficient that they merely be in accord upon one issue or some of the issues."

In the case at bar the District Court gave plaintiff a judgment against Indianapolis Gas for $1,032,150 (III R. 1193). The decision of the Court of Appeals requires a coercive judgment *against Indianapolis Gas* for approximately $1,700,000. It is inconceivable that a party against whom plaintiff is entitled to recover such a judgment can be aligned with the plaintiff under any circumstances.

The City's argument is based entirely on the fact that the City, as successor trustee, has been held primarily liable and Indianapolis Gas secondarily liable for the amount of the judgment, and that the City is well able to pay the judgment out of the funds of the public charitable trust (Pet. 11). A parity of reasoning would require a realignment whenever a creditor sues a principal and surety on a debt. No such realignment is required.

It is clear under the authorities, particularly in Indiana, that this case itself involves a principal and surety relationship. The situation here is substantially the same as that when a mortgagor sells the mortgaged property to a third person, who agrees to pay the mortgage debt. In such a situation the mortgagor becomes the surety, and the grantee of the mortgaged property becomes the principal debtor.

Union Mutual Life Insurance Co. v. Hanford, 143 U. S. 187 (1892);
Birke v. Abbott, 103 Ind. 1, 1 N. E. 485 (1885);
Todd v. Oglebay, 158 Ind. 595, 64 N. E. 32 (1902).

The relationship of principal and surety is similarly involved where, as in the case at bar, the mortgagor merely leases the property to a third person, who in turn agrees to pay the interest on the mortgage as rent. Thus, in *Central Trust Co. v. Berwind-White Coal Co.*, 95 Fed. 391 (1899) the court had such a situation before it and said (pp. 395-6):

> "* * * The fact that the parties were lessor and lessee, instead of being vendor and vendee, and that a sum equal to the interest only was to be paid by the lessee to the mortgagee, instead of its principal, makes no difference in the principle which underlies all the mortgage cases. * * * *The lessee, as between the lessor and lessee, has become the principal for the payment of interest.* The intention and the object of the provision were, as in the mortgage cases, palpably and primarily for the benefit of the plaintiff, and to enhance its certainty of securing the interest upon the lessor's mortgage."

When there has been an assumption of the mortgage obligations, either by a vendee or a lessee, and the mortgagee sues to recover the debt, he ordinarily joins as defendants both the original mortgagor and the vendee or lessee who has assumed the mortgage obligations. The mortgagor may be vitally interested in having an adjudication that his vendee or lessee did assume the mortgage and that he, the mortgagor, is merely a surety on the obligation, but such a fact does not require a realignment of the mortgagor with the mortgagee. The mortgagee has a bona fide claim for relief against both defendants and it is wholly immaterial that one of them is liable only as surety.

So in the case at bar. The plaintiff has a bona fide claim for unpaid interest against Indianapolis Gas, Citizens Gas, and the City, and they are all properly aligned as defendants, even though some of them may be primarily and others only secondarily liable.

The City has never cited a single case in which the plaintiff had even one substantial controversy with a defendant and such defendant was realigned with the plaintiff for jurisdictional purposes. The fact that plaintiff and such defendant may be in accord as to some of the other issues in the case is wholly immaterial. To be sure, realignment is required where there is **no** bona fide prayer for relief against a particular defendant, as in *City of Dan-*

son v. Columbia Trust Co., 197 U. S. 178 (Pet. 12, 27), but that is not the situation in the case at bar. An analysis of *Sutton v. English*, 246 U. S. 199, the only other case on which the City relies (Pet. 28-9),* will show how completely it supports federal jurisdiction of this case. The facts were as follows:

Moses and Mary Jane Hubbard accumulated community property valued at about $100,000 and made a joint will establishing a charitable trust of this property on the death of Moses. After Moses' death the trustees secured a "pretended judgment" confirming the trust. Subsequently Mary Jane accumulated separate property of her own worth about $18,000 and died leaving all her property to a niece, Cora Spencer.

There were eight heirs at law of Mary Jane, of whom Cora was one. The other seven heirs (nonresidents of Texas) brought suit in a federal court in Texas, joining Cora Spencer and the trustees as defendants. All defendants were citizens of Texas. The objects of this suit, as stated by this Court, were (pp. 203-4):

(1) To annul the joint will setting up the trust.

(2) To set aside the judgment confirming the trust.

(3) To annul the will of Mary Jane in so far as it bequeathed the community property to Cora Spencer, but not to take the $18,000 from her.

(4) To partition the community property among plaintiffs and Cora Spencer.

Clearly, the interests of plaintiffs and Cora Spencer were identical as to issues (1), (2) and (4), since all the heirs would benefit by having the community property taken from the trustees and distributed among the heirs. Unless plaintiffs were successful as to issues (1) and (2),

* The City's prior petition for certiorari was based entirely on this case (Petition, No. 168, 1938, pp. 17-19).

in which Cora Spencer was interested with plaintiffs against the other defendants, the remaining issues would never become important, because they related solely to the distribution of the property to be recovered under issues (1) and (2). Thus, *the only controversy* between plaintiffs and Cora Spencer related to the *distribution* of the property which the plaintiffs sought to recover from the trustees. This Court held that this single divergence of interest prevented the realignment of Cora Spencer as a plaintiff. Thus *Sutton v. English* directly refutes the City's proposition that a defendant with whom plaintiff has a genuine controversy can nevertheless be aligned with the plaintiff.

The Court will notice the similarity between *Sutton v. English* and the case at bar. Here the interests of plaintiff and Indianapolis Gas are clearly adverse as to the disposition of the rent under the Lease. The Lease makes part of this rent payable to plaintiff or the Bondholders, as interest on the Bonds. In the contract of March 2, 1936, however, Indianapolis Gas is contending that *all* the rent should be paid to it. (I R. 206.) Plaintiff's judgment for the unpaid interest, against both Indianapolis Gas and the City, the present lessee, settles this matter in plaintiff's favor. Thus this case presents a conflict of interests substantially the same as the only conflict between the plaintiffs and Cora Spencer in *Sutton v. English*, i.e. as to how the fund shall be distributed once it has been recovered from the other defendants.

In direct contrast with the City's inability to cite a single case in which its theory was adopted and put into effect is the fact that the decision of this Court in *Sutton v. English* and the decisions of the Circuit Courts of Appeals are unanimous in holding that there will be no realignment if there is a single substantial controversy between the plaintiff and the defendant sought to be realigned.

Sutton v. English, 246 U. S. 199, 204 (1918);

Republic National Bank & Trust Co. v. Massachusetts Bonding and Insurance Co., 68 F. (2d) 445, 447 (C. C. A. 5th, 1934);

Detroit Tile & Mosaic Co. v. Mason Contractors' Association, 48 F. (2d) 729, 731 (C. C. A. 6th 1931);

Franz v. Franz, 15 F. (2d) 797, 799 (C. C. A. 8th, 1926);

Feidler v. Bartleson, 161 Fed. 30, 35 (C. C. A. 9th, 1908).

In each of these cases there was at least one controversy between the plaintiff and the defendant sought to be realigned, and this single controversy prevented such realignment, despite the fact that plaintiff and such defendant were in accord as to some of the other controversies. The rule of law applied in these cases and in the case at bar on the first appeal (II R. 291-2)—that a defendant against whom plaintiff asks relief and with whom plaintiff has distinct conflicts of interests cannot be realigned with the plaintiff in determining federal jurisdiction—has been universally recognized. The federal courts have continued to apply this rule since the decision of the jurisdictional question in this case in 1938. For example, see *Rea Co. v. International Harvester Co.*, 107 F. (2d) 767, 768 (C. C. A. 5th, 1939), in which the court cited *Sutton v. English* and the first decision of the Court of Appeals in the case at bar in support of its decision.

The City's contention that the question as to the validity of the Lease is the dominant controversy in this case and must govern the question of realignment, without regard to any other controversies, is based on the proposition that plaintiff and Indianapolis Gas are on the same side of that controversy (Pet. 28-9). The fact is however that plaintiff asks precisely the same relief against Indianapolis Gas on this issue that it asks against the City

and Citizens Gas, namely, that the Lease be held binding on each (Prayer 2, I R. 20-21). The fallacy in the City's argument is its assumption that a defendant can destroy the controversy upon which federal jurisdiction depends by admitting its liability, or even by consenting to have its liability enforced. The law is well settled to the contrary.

Re Metropolitan Railway Receivership, 208 U. S. 90 (1908).

In this case the Court sustained the jurisdiction of a federal court to appoint a receiver, against the contention that the court had no jurisdiction because (p. 107):

> "* * * the defendant admitted the indebtedness and the other allegations of the bill of complaint, and consented to and united in the application for the appointment of receivers."

Thus, this Court said (pp. 107-8):

> "* * * Notwithstanding this objection, we think there was such a controversy between these parties as is contemplated by the statute. * * * Jurisdiction does not depend upon the fact that the defendant denies the existence of the claim made, or its amount or validity. If it were otherwise, then the Circuit Court would have no jurisdiction if the defendant simply admitted his liability and the amount thereof as claimed, although not paying or satisfying the debt."

It is, therefore, wholly immaterial that Indianapolis Gas admits the validity of the Lease and is willing to have its binding effect established.

Plaintiff sought and obtained a substantial judgment against Indianapolis Gas, to say nothing of its other controversies with it, and the City has no support for its novel theory that a defendant against whom such a judgment has been obtained should be, or even could be, made a party plaintiff to this suit. Plaintiff has several direct controversies with Indianapolis Gas and that company was prop-

erly made a party defendant. As shown by the authorities reviewed above, even if plaintiff's interests were not adverse to those of Indianapolis Gas *as to one phase of this suit*, that would not warrant the realignment of Indianapolis Gas as a party plaintiff, so long as there is a single substantial controversy between it and the plaintiff.

II. THE CITY HAD AMPLE OPPORTUNITY TO BE HEARD ON THE QUESTION WHETHER THE ALLEGED BURDENSOMENESS OF THE LEASE WAS A VALID DEFENSE AND THE COURT OF APPEALS' DIRECTION TO ENTER FINAL JUDGMENT WITHOUT A RETRIAL OF THAT ISSUE WAS IN FULL ACCORD WITH DUE PROCESS OF LAW.

The Court of Appeals determined that a final judgment should be entered declaring the Lease valid and enforceable against the parties and awarding plaintiff judgment for the portion of the rent represented by the unpaid interest on the Bonds. The City contends (Pet. 13-14) that it has been denied due process of law because the Court of Appeals did not remand the case to the District Court to determine:

(1) The question of fact whether the Lease is burdensome; and

(2) The question of law whether such burdensomeness, if any, would be a valid defense.

This contention is based on the assertion that the District Court "reserved for future determination the question of the burdensome character of the lease," and that when the Court of Appeals directed a final judgment to be entered in plaintiff's favor it denied the City "a hearing in a trial court on the issue of the burdensome character of the lease" (Pet. 11). The absurdity of the City's contention is clearly demonstrated by a recital of what the record shows as to the reservation made by the District Court with respect to the issue of burdensomeness.

To facilitate the trial below several claims presented by plaintiff's Bill were excluded from the first trial, pursuant to Rule 42(b) of the new *Rules of Federal Procedure*. As to the claims *not* so excluded, the District Court entered an order* directing that evidence should be heard upon the issues whether the Lease is binding and enforceable and whether plaintiff is entitled to a judgment for interest on the Bonds against the defendants or the trust property—

> "with the one exception that evidence shall not be heard therewith but shall be deferred on one certain reason assigned by the City of Indianapolis in its answer, for claimed unenforceability of such lease against it or its said property viz., that the City as successor trustee of a certain public charitable trust in property of the Citizens Gas Company of Indianapolis *had the right as such successor trustee to refuse and reject an assignment of such lease on the ground that such lease was burdensome* and not advantageous to such trust: * * *." (II R. 321-2.)

The language just quoted is very similar to that in the proposed form of order presented to the District Court by counsel for the City, and the italicized language is precisely the same as that in the City's proposed order (IV R. 1320, Par. (3); IV R. 1330). Thus the only issue, so far as the validity of the Lease is concerned, upon which the taking of evidence was deferred was whether the City "had the right as such successor trustee *to refuse and reject an assignment of such lease* on the ground that such lease was burdensome." This is the "reserved" issue.

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* Under this order several claims on which Chase relied are still to be tried (e.g., failure to maintain the leased property, recovery of fees and expenses, etc.), but they do not affect the determination of the validity of the Lease.

While Chase did not object to this order (Pet. 11, 21, 25), it has consistently maintained that the allegations of burdensomeness presented no valid defense and that no evidence to support them should be received. (e.g. see IV R. 1331-2.)

stated in the City's own language, as to which the City complains it has not had its day in court (Pet. 11). This is a much narrower issue than that to which the City refers in its petitions (Pet. 10-11) and, as we shall see (*infra*, p. 93), the fact is that the City did not reject an assignment of the Lease, so that there was no occasion to determine whether it had the right to do so.

However, whether the questions as to burdensomeness were as broad as the City contends or as narrow as we contend, the City had ample opportunity to be heard both in the District Court and in the Circuit Court of Appeals on the broad question of law whether burdensomeness would be a valid defense.

(a) The City Had Ample Opportunity to be Heard in Both Lower Courts on the Question Whether Burdensomeness Would be a Valid Defense—Moreover the Hearing in the District Court Was Not Essential to Due Process of Law.

In the District Court plaintiff filed a motion to strike from the City's answer and counterclaim all the allegations asserting that the Lease was burdensome, thereby squarely raising the issue whether the alleged burdensomeness would be a valid defense if proved (II R. 317). This motion was denied (II R. 320). In its appeal plaintiff assigned as error the District Court's failure to strike out these immaterial allegations (Points 1 and 2, III R. 1196), and this question was fully argued in the briefs in the Court of Appeals. It is, therefore, clear that the City has in fact had its day in court on this question of law, both in the District Court and in the Court of Appeals. The Court of Appeals concluded, *as a matter of law*, that the City's allegations of "burdensomeness" presented no defense.

The City had ample opportunity *in both lower courts* to present its views as to the validity of the defense of

burdensomeness. Moreover, even if this question of law had not been considered by the *District Court*, the requirements of due process of law would have been fully satisfied. The City's proposition that "The City was entitled to a trial in the District Court on all questions of *fact and law*" (Pet. 13,* 14, emphasis is the City's) is clearly unfounded. The cases cited to support this proposition (Pet. 14, 23-5) hold that due process necessitates a judicial determination or review of *relevant* questions of fact as well as questions of law. None of them holds that there must be a determination of all questions of law and fact *by a trial court* and these cases are, therefore, not germane to the question here presented.

American Surety Co. v. Baldwin, 287 U. S. 156 (1932), completely refutes the City's proposition that due process of law requires a hearing of all questions of law and fact *in the trial court* and that a hearing of either type of question *in the reviewing court* only is not adequate. In that case the Surety Company sought relief from a judgment entered against it by an Idaho state court on a supersedeas bond. This bond was given on an appeal from a judgment against Singer Company and its employee, Anderson. After the bond had been given the state Supreme Court affirmed the judgment in plaintiff's favor against the defendant, Anderson, but reversed it as to the defendant, Singer Company. When the case came back to the trial court, that court entered judgment against the Surety Company, without notice to that company.

The Surety Company attacked the judgment against it on the ground that its bond had not stayed the judgment as to Anderson, that it was not subject to judg-

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* This statement appears in the two petitions as follows: Cause 421 at p. 13, Cause 422 at p. 14.

ment upon Anderson's failure to pay and that, since the judgment was entered without an opportunity for a hearing as to the construction and effect of its bond, the judgment was void under the due process clause of the Fourteenth Amendment. This Court held that there was no denial of due process, since the state procedure afforded the Surety Company opportunity to be fully heard on appeal. Thus, this Court said (p. 168):

> "* * * Due process requires that there be an opportunity to present every available defense; but *it need not be before the entry of judgment.* [citing cases] An appeal on the record which included the bond afforded an adequate opportunity. Thus, the entry of judgment was consistent with due process of law."

The rule announced in the above case—that an opportunity for a hearing on appeal, after judgment has been entered, fully satisfies the requirements of due process of law—is especially applicable to the case at bar. This case is a federal equity case and the Court of Appeals hears such a case *de novo*, with full power to adjudicate all questions of law and fact.

Alexander v. Redmond, 180 Fed. 92, 93, 96 (C. C. A. 2nd, 1910);
Lyon v. Union Gas & Oil Co., 281 Fed. 674, 67[illegible] (C. C. A. 6th, 1922);
Uukle v. Wills, 281 Fed. 29, 34 (C. C. A. 8th, 1922).

Thus it is apparent that the City had an opportunity to be heard in both lower courts on the question whether burdensomeness would be a valid defense. Beyond that, it is entirely clear that no constitutional right of the City would have been violated if the Court of Appeals had been the first court to pass on that question.

(b) The Decision of the Circuit Court of Appeals that the Alleged Burdensomeness Would Not be a Valid Defense is Obviously Correct.

The City does not complain that the decision of the Court of Appeals on the question of law as to the validity of the defense of burdensomeness is erroneous, but does complain that this question should have been referred to the District Court for rehearing there (Pet. 11, 13-14). Thus there is no issue in this Court as to the correctness of the decision by the Court of Appeals that the alleged burdensomeness is not a valid defense.

The City's statement (Pet. 11) that the Court of Appeals held "that if the lease were in fact burdensome Citizens Gas, as initial trustee, had no authority to execute the same, * * *" is not supported by the record. The Court of Appeals did say in passing (IV R. 1300) that the beneficiaries of a trust may set aside "a lease which is unreasonable under the circumstances." This was far from holding that the allegations of burdensomeness asserted by the City for the first time 22 years after the Lease was made could be a valid ground of defense to a Lease which was executed "with the full consent and approval of the City," after the Public Service Commission had determined that the Lease "was advisable and in the public interest." It is clear that the Court of Appeals actually held that Citizens Gas *did* have authority to make the Lease (IV R. 1300) and that the City's allegations of burdensomeness constituted no valid defense. Indeed, the City admits that the Court made the latter holding (Pet. 25).

The record discloses ample reasons why this decision by the Court of Appeals is sound.

1. The issue of burdensomeness is moot and wholly immaterial.

As we have seen (*supra*, p. 46), the only issue, so far as the validity of the Lease is concerned, upon which the taking of evidence was deferred was whether [illegible]

"had the right as such successor trustee *to refuse and reject an assignment of such lease* on the ground that such lease was burdensome." Actually, the City did not "refuse and reject an assignment of such lease." The Circuit Court of Appeals so held, and that holding is not challenged by the City's petitions for writs of certiorari.

The City affirmatively elected to take over the entire trust property, including the leasehold estate and its accompanying obligations (*infra*, pp. 98-107). In addition, the City accepted the assignment of the Lease and had it recorded and has been in possession of the leased property ever since (II R. 330, 350, 467-8; Stip. 6(c), II R. 622-3). Under such circumstances it is wholly immaterial whether the City had the right "to refuse and reject an assignment of such lease," since it not only did not exercise this supposed right, but affirmatively elected to take the trust property *in toto*, including the Lease.

2. The decision of the Indiana Public Service Commission forecloses the question of burdensomeness.

When the Lease was made in 1913 it was expressly approved by the Public Service Commission of Indiana as being in the public interest, after prolonged hearings and careful consideration of the objections made by Fishback, a beneficiary of the public charitable trust (see pp. 6-8, *supra*). The City was a party to the proceedings before the Commission and the Lease was made, as the City formally admitted in the *Cotter* case, "with the full consent and approval of the City of Indianapolis" (PX 89, III R. 569, offered, II R. 334, III R. 1057).

With reference to the Commission's approval of the Lease, the City says (Reply Br. 8):

> "Petitioners are cognizant of the rule that where the Commission has jurisdiction to decide questions of fact and enter an order thereon, and acts within its jurisdiction, *its decision is conclusive on the courts in a*

collateral action. But the order of the Commission approving the lease went no further, and could go no further, than *to determine upon the facts adduced, whether it was advisable and in the public interest* that the property of Indianapolis Gas be leased to Citizens Gas on the terms stated in the Commission's order."

Thus the City admits that this determination of the Public Service Commission—that the Lease "was advisable and in the public interest," and hence not burdensome to the trust of which the members of the general public were the beneficiaries—is conclusive on the courts in this collateral action. Moreover, it is the settled law of Indiana that such decisions of the Public Service Commission are conclusive on the courts in a collateral action.

Public Service Commission v. Indianapolis, 193 Ind. 37, 43; 137 N. E. 705, 707 (*infra*, pp. 90-1).

In the present case the City is demanding the right to make a collateral attack upon the Commission's decision that the Lease "was advisable and in the public interest."

3. The Williams case forecloses the question of burdensomeness.

In the *Williams* case (see pp. 14-16 above) Williams alleged that the Lease was part of a conspiracy "to destroy said Public Charitable Trust" (PX Stip. 35, Par. (20), II R. 777-8, Offered, II R. 328), that it was burdensome (II R. 780), and that it should be removed as "an unlawful cloud upon the title of said Public Charitable Trust" (II R. 790). The Supreme Court of Indiana held, among other things, that the Public Service Commission was authorized to approve the Lease and that the Lease would be valid and binding even if it were proved to be burdensome. *Williams v. Citizens' Gas Co.*, 206 Ind. 448, 188 N. E. 212, 215-16 (1934).

This decision of the Indiana Supreme Court that the trust could not be relieved from the obligations of the Lease on the ground that those obligations were burdensome is

binding in the case at bar because it was (1) a conclusive adjudication between the parties to this case,* all of whom were parties to the *Williams* case, and (2) an authoritative statement of the law of Indiana.

The City complains that it was not heard in the trial court as to whether the decision in the *Williams* case is *res judicata* (Pet. 14, Par. (b)). As a matter of fact, it was fully heard on this question, both in the trial court and in the reviewing court. All the pleadings in the *Williams* case are in evidence (Stip. 14(g), II R. 632) and the record contains *all the available facts* as to the proceedings in that case. Also, the legal effect of that case was fully argued (e.g. see IV R. 1331, 1332-3), and indeed the City obtained a ruling by the District Court that the *Williams* case is not *res judicata* here (III R. 1178, No. 40; III R. 1190, No. 2).

4. Obligations incurred by contract or lease cannot be avoided on the ground that they are burdensome.

Under well settled rules of law, in the state of Indiana as elsewhere, neither a party to nor an assignee of a contract or lease can escape its obligations thereunder by showing that they were burdensome in the first instance or have become burdensome during the period of the contract or lease. This rule is peculiarly applicable to this case, where the Lease was made "with the full consent and approval of the City of Indianapolis."

Hamilton v. Hamilton, 162 Ind. 430; 70 N. E. 535, 537 (1904);

Warner v. Marshall, 166 Ind. 88; 75 N. E. 582, 592 (1905);

Indianapolis v. Indianapolis Gas-Light & Coke Co., 66 Ind. 396, 407 (1879);

Terre Haute v. Terre Haute Waterworks Co., 94 Ind. 305, 307 (1884).

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*The effect of the *Williams* case as *res judicata* is fully discussed at pages 75-90 below.

The City seeks comfort from the statement of the Court of Appeals that a trustee must act with prudence when making a long term lease and that otherwise the lease may be set aside at the suit of the beneficiaries (Pet. 22). Any such rights in the beneficiaries must, of course, be promptly asserted and are subject to the equities of the other parties to the lease, who are to be treated fairly under all the circumstances. The fact is that the beneficiaries of this particular trust have been fully heard with respect to the alleged burdensomeness of the Lease here in question, before the Public Service Commission before the Lease became effective and subsequently in the *Fishback* and the *Williams* cases. The City is in no position to make this collateral attack on these decisions by the Commission and the Indiana Supreme Court, particularly after receiving all the benefits of the Lease for a period of 22 years (1913 to 1935) without raising any question as to its validity (see pp. 129-32, *infra*).

We have already pointed out (*supra*, pp. 6-7) the opinions expressed by the officers and directors of Citizens Gas in 1913 and 1914 as to the extraordinary advantages accruing to that company and the community from the Indianapolis Gas Lease. *There has never been a suggestion throughout this case that the officers and directors of Citizens Gas were guided by anything but the highest motives in making the Lease here in question.* Their contemporaneous opinions, the authoritative determination of the Public Service Commission, and the decision in the *Williams* case should set at rest forever the bogy which counsel for the City attempt to raise in asserting that the Lease is burdensome.

(c) The Circuit Court of Appeals Having Correctly Determined That Burdensomeness Would Not Be A Valid Defense, Its Direction to Enter Final Judgment Was in Full Accord With Due Process of Law.

As we have already seen, the Court of Appeals concluded, *as a matter of law*, that the City's allegations of "burdensomeness" presented no defense. The City claims that its constitutional rights have been violated because it was not given an opportunity to prove these immaterial allegations. This claim is without substance. It is the universal practice for a court upon sustaining a demurrer, a motion to strike, or a similar attack upon a cause of action or defense, to refuse to allow a party to prove facts which would constitute no cause of action or defense if they were proved.

United States v. Metropolitan Body Co., 79 F. (2d) 177 (C. C. A. 2nd, 1935);
Sarasota County v. American Surety Co., 68 F. (2d) 543 (C. C. A. 5th, 1934).

This universal practice must be proper, for the right to prove facts which would constitute no defense if proved cannot be a requisite element of due process of law. The Court of Appeals having determined, *as a matter of law*, that the alleged burdensomeness would be no defense, there was no occasion for a further hearing on that question, or for the presentation of evidence in support of this ineffectual defense.

In the case now before this Court, the City has had its hearing on the issue of burdensomeness just as truly as a party has had his day in court when a demurrer to his pleading is sustained and a final judgment entered. The Court of Appeals having properly determined that this defense would be wholly ineffectual, there is no basis for the City's demand that the case be sent back to the trial court,

either to receive the evidence on this ineffectual defense or to secure a second expression of the views of the District Court as to the validity of this defense.

III. THE CIRCUIT COURT OF APPEALS WAS CORRECT IN HOLDING THAT CITIZENS GAS HAD THE POWER TO EXECUTE THE LEASE AND MAKE IT BINDING UPON THE PUBLIC CHARITABLE TRUST FOR THE FULL TERM OF THE LEASE.

The City asserts that Citizens Gas did not have authority to make the Lease. In this connection, however, the City admits (I R. 145-6):

> "* * * *said lease although conceded for the purpose of this litigation to be valid* for the period of said franchise contract and *until the property for which the Citizens Gas Company was Trustee was conveyed to the City of Indianapolis* as Trustee was *ultra vires*, invalid and void after the expiration of the term of the trusteeship of the Citizens Gas Company * * *."

Thus the City concedes the authority of Citizens Gas to make the Lease effective for the term of its own trusteeship, but contends that the Lease would have to terminate whenever Citizens Gas was replaced as trustee. The theory that a trustee's contract, admittedly valid when made, becomes a nullity when his successor takes his place as trustee is clearly unsound, and, as we shall now show, Citizens Gas had in fact ample authority to execute the Lease and make it binding upon the trust for its full term of 99 years.

(a) Citizens Gas Had Express Statutory Authority to Make the Lease For 99 Years.

The City's contention that the right of Citizens Gas to execute the Lease "was based solely on implied power" (Pet. 15) completely disregards the express statutory authority of Citizens Gas to make this Lease.

Prior to 1913 it was generally considered that the Indiana anti-trust laws forbade the consolidation of com-

peting utilities, either by lease or otherwise. Section 95½ of the Public Service Commission Law (Chapter 76, Acts of 1913*) was passed in 1913, for the obvious purpose of avoiding the prohibitory language of the anti-trust legislation. It read as follows:

> "Sec. 95½. That with the consent and approval of the commission but not otherwise, any two or more public utilities, furnishing a like service or product and doing business in the same municipality or locality within this state, or any two or more public utilities whose lines intersect or parallel each other within this state may be merged and may enter into contracts with each other that will enable such public utilities to operate their lines or plants in connection with each other; and *any public utility may also*, with the consent of the holders of three-fourths of the capital stock outstanding, *purchase or lease the property, plant or business or any part thereof of any other such public utility* at a price and on terms fixed by the commission. Any such public utility may, with the consent of three-fourths of the holders of the outstanding stock, sell or lease its property or business or any part thereof to any other such public utility at a price and on terms fixed by the commission upon paying in cash to nonconsenting stockholders the appraised value of their stock as fixed by the commission."

It is significant that this statute does not limit the period for which a lease may be taken. The statute provides for consolidations or mergers, whether by lease or otherwise, and authorizes the lease of a utility's entire assets upon a three-fourths vote of the stockholders. Obviously a merger effected by such a lease is not meant to be limited to a short period of time. As the court said in *Dickinson v. Consolidated Traction Co.*, 119 Fed. 871, 872 (C. C. A. 3rd, 1903), in sustaining the validity of a lease

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* The pertinent parts of Chapter 76 of the Acts of 1913 are set forth in "Appendix A" to this brief *infra*, p. 142.

of public utility property for a term of 999 years (p. 872):

> "* * * as corporation leases for 999 years were well known when, by the statutory provisions to which we have referred, *the power to lease was broadly and unqualifiedly given, we are not at liberty to assume that the exercise of that power was intended to be restricted to leases for a term not to exceed some limited, but wholly undefined and indeterminate, period.*"

Citizens Gas and Indianapolis Gas were, in the language of the statute, "furnishing a like service or product and doing business in the same municipality or locality," and therefore came within the express provisions of this statute. Citizens Gas was an Indiana public utility, as it was required to be by its Franchise from the City (I R. 82), and as such it had express statutory authority to enter into this Lease for a term of 99 years.

(b) The Franchise and Charter Powers of Citizens Gas Included the Power to Execute the Lease and Make It Binding Upon the Trust For the Full Term of the Lease.

The City contends that the right of Citizens Gas to execute the Lease was based solely on an "implied power" and that in the case of a grant made by a municipality "nothing is to be taken by implication against the public" (Pet. 15). The cases cited on the latter proposition (Pet. 15, 30) all deal with grants of rights to use public property, whereas the question at issue here is the nature and extent of the powers of Citizens Gas under its contract with the City.

This distinction was clearly pointed out in *City of Vincennes v. Citizens' Gaslight Co.*, 132 Ind. 114, 31 N. E. 573 (1892). The plaintiff in that case sued the city to recover for gas supplied for lighting the streets. The plain-

tiff relied on an ordinance which granted it the right to use the streets to supply coal gas and which also contained an agreement by the city to purchase gas from the plaintiff for lighting its streets. The defendant city presented the same argument and relied upon the same Indiana case as the City of Indianapolis is relying upon in the case at bar. In response to that argument the Indiana Supreme Court said (pp. 575-6):

> "* * * *In addition to the grant above referred to, the ordinance embodies a contract between the city and the company* for the supply of gas. * * * The ordinance was in effect an offer by the city, the acceptance of which by the company created a contract between the parties, measured, like any other contract, by the terms and conditions of the writings. *We see no reason why the contract thus formed should not be construed and interpreted like any other written contract.*"

Similarly, in the case at bar the Franchise in question contained both a grant to use the City streets and a contract between the City and Citizens Gas. While *the grant* may be subject to the strict construction for which the City contends, *the contract* thus formed is to be "construed and interpreted like any other written contract."

As a matter of fact, neither the Franchise contract between the City and Citizens Gas nor its Articles conferred any specific authority to buy property, to hire employees, or to do any of the things necessarily incidental to carrying on its business, except as such powers were implied from the provisions of the Franchise and Articles stating that the company was to supply the City of Indianapolis and its inhabitants with gas for light, heat, and power. Thus Section 1 of the Franchise authorizes the use of the City streets to maintain, operate, and repair the pipes required "for the distribution and supply of gas to said city, and the inhabitants thereof, * * *." (I R. 82, lines 6 and 7). Similarly, Section III of the Articles provides:

> "The object of the promotion of this company shall be to supply the city of Indianapolis and its inhabitants with light, heat and power." (I R. 95.)

Beyond this, Section 17 of its Franchise required Citizens Gas "to so extend the various lines and mains of said plant that *all the inhabitants of said city* may be supplied with gas" (I R. 89).

Plainly, it is just as absurd to argue that Citizens Gas had no power to lease property because such power was not expressly conferred as it would be to argue that it had no power to acquire any property or hire any employees because no such powers were specifically conferred. The City's concession that the Lease was valid "until the property for which the Citizens Gas Company was Trustee was conveyed to the City" (I R. 145) necessarily involves the further concession that Citizens Gas had authority to take leases of property and that its powers were not limited to those specifically conferred by its Articles.

Clearly, Citizens Gas had all the power of any public utility to buy, lease, or construct the plant and system, or any part thereof, required to carry out its purposes, that is to furnish artificial gas to the City and *all* its inhabitants. Although Citizens Gas started out by purchasing the property of the Consumers' Gas Trust, there was no requirement in the Franchise or otherwise that it should acquire that particular property. Following that acquisition it purchased other property and mortgaged its plant from time to time in order to secure additional property or to extend its facilities or expand its plant (*infra*, p. 65). There is no reason why it was not as much within its power to lease the plant of Indianapolis Gas as it was to purchase the plant of the Consumers' Gas Trust.

In determining the extent of the charter powers of Citizens Gas, we are confronted with the question: *What is the charter of an Indiana corporation?* We find a most

illuminating answer to this question by the Supreme Court of Indiana in *Westport Stone Co. v. Thomas*, 175 Ind. 319, 94 N. E. 406 (1911). In that case the Stone Company brought suit to condemn a right-of-way for a lateral railroad over the lands of the defendant. The defendant insisted that it would be *ultra vires* for the Stone Company to build and operate a railroad. The Stone Company was organized under the Indiana laws governing the incorporation of manufacturing and mining companies, as was Citizens Gas, and claimed the right to condemn the defendant's property under the provisions of the *general statutes* of Indiana authorizing the construction of lateral railroads and granting the power of eminent domain. It is important to observe that the authority upon which the Stone Company relied was not contained in the statutes providing for the incorporation of manufacturing and mining companies, but *in the general laws dealing with lateral railroads*. In disposing of the defendant's contention, the court said (p. 410):

> "It is next contended by appellee that, if appellant actually constructed said road and sought to exercise the powers of a common carrier, such acts would be *ultra vires*, since by its articles of incorporation it is organized only for the purpose of mining, quarrying, producing, manufacturing, and dealing in stone. It may be admitted that such are the powers of the corporation as shown by its articles of incorporation, and that a corporation can exercise no powers nor engage in any business not authorized by its charter. But *it is well settled that the charter of a corporation formed under a general law consists of its articles of incorporation and the laws governing such corporation. Bent. Rec., v. Underdown*, 156 Ind. 516, 519, 60 N. E. 307; *State v. Anderson*, 31 Ind. App. 34, 42, 67 N. E. 207; 1 *Cook on Corporations*, (6th Ed.) § 2; 1 *Thompson on Corporations* (2d Ed.) § 172. This being true sections 5398 *et seq.*, Burns 1908, *enter into and become a part of appellant's charter* and

confer upon it the right to construct and operate said railroad. Any other construction would nullify the effect of said statute."

Thus, the Supreme Court of Indiana held that the general statutes of Indiana, providing for the construction and operation of lateral railroads, became part of the charter of the Stone Company, although there was no authority to build or operate railroads contained in its articles and it is doubtful whether such authority could have been implied from its general purposes.

It is also well settled law in Indiana that the state legislature has the reserved power to add to or change the powers of Indiana corporations previously incorporated, and that it can make such changes by a general statute, without changing the corporation's articles of association themselves.

Denny v. Brady, 201 Ind. 59, 163 N. E. 489 at 490 (1928).

The Franchise provided that it should be assigned to an Indiana corporation and be carried out by that corporation (§ 1, I R. 82). Consequently it must have been contemplated that the corporation to be formed would have powers as extensive as those which were then or should thereafter be conferred upon public utility corporations of Indiana. Under the rule stated in *Westport Stone Co. v. Thomas* and in *Denny v. Brady*, § 95½ of the *Public Service Commission Law* became part of the charter of Citizens Gas as soon as it was enacted, and thereafter its charter powers included the *express authority* to enter into the Lease for its full term of 99 years.

(1) The possibility that the City would succeed Citizens Gas as trustee did not limit the right of Citizens Gas to make the Lease binding on the trust for the full term of the Lease.

The City concedes that the Lease in question was valid during the trusteeship of Citizens Gas (I R. 145). The mere change of trustees in 1935 did not make voidable the Lease recognized to be valid during the preceding 22 years. In other words, the possibility that the City would succeed Citizens Gas as trustee did not limit the authority of Citizens Gas to execute the Lease and bind the trust thereto for the full term of the Lease.

In this connection it is vital to remember that the term of the trusteeship of Citizens Gas was of very uncertain duration, although the trust itself was to be perpetual. The City was entitled to succeed Citizens Gas as trustee whenever the Citizens Gas certificate holders had received the face amount of their certificates and a 10% per annum return thereon in any one of five different ways: (1) payment by Citizens Gas itself (I R. 84, Par. (g)); (2) payment with the proceeds of a mortgage on the Citizens Gas property, after August 30, 1930 and upon demand by the City (I R. 84, Par. (i)); (3) payment by the City, after August 30, 1930 (I R. 93, § 22); (4) payment by the City, in case of the insolvency of Citizens Gas (I R. 93, § 23); and (5) by mortgage or by payment by the City, in the event Citizens Gas charged more than a stipulated rate for gas (I R. 88, § 14).

Obviously, none of these events was certain to occur. With the exception of event (1), all of them depended upon the City's exercise of its rights, and this was an uncertain matter because the exercise of those rights involved the raising of funds and the assumption of substantial obligations. Event (1) was particularly uncertain because it depended upon Citizens Gas earning enough to pay a 10% per annum return on its stock and also to

retire all its stock. This might take place within a few years or it might never occur.

There was, therefore, no assurance that the City would ever succeed Citizens Gas as trustee. Citizens Gas necessarily proceeded on the assumption that it might be in business indefinitely and that it should do everything any other public utility would do to increase its capacity to serve the public and earn an adequate return for its certificate holders. On the other hand, there was no assurance that Citizens Gas would remain as trustee for any definite period, and its term of office might soon come to an end.

The powers conferred by the Franchise and Articles must be interpreted in the light of the indefinite term of the trusteeship of Citizens Gas. No one would deal with Citizens Gas if his contract with Citizens Gas were subject to an early end upon the termination of the trusteeship of Citizens Gas at an unknown date in the future. Citizens Gas could not, however, remain idle and wait for its successor to take action, for it could not tell when, if ever, the City would succeed to its position as trustee. Hence Citizens Gas necessarily had to have power to make contracts which would bind the trust in the hands of the successor trustee.

It is clear under the authorities that a trustee has power to make a contract or lease which may extend beyond his term of office and that the obligations so created will bind his successor in office.

City of Richmond v. Davis, 103 Ind. 449, 3 N. E. 130 (1885);

Greason v. Keteltas, 17 N. Y. 491, 494-5, 497 (1858).

This general rule that trustees have power to enter into agreements binding upon their successors in office is especially applicable here in view of the nature of the trust property, the perpetual duration of the trust, and the indef-

inite term of office of the initial trustee. It was clearly contemplated that Citizens Gas would enter into obligations which would carry over into the period of the City's trusteeship, and that when the City took over the trust property it would have to do so subject to all such obligations. Thus both the Franchise and the Articles provided that in certain events Citizens Gas should mortgage its property to pay off its certificate holders and should then convey its plant to the City "subject to such obligations *and other legal obligations against said company*" (I R. 85, 93, 99).

As a matter of fact, one of the first things Citizens Gas did was to acquire outright title to the property of another gas company. This necessarily involved the assumption of burdens such as taxes, insurance, maintenance, etc., which would continue indefinitely, unless Citizens Gas or the City disposed of the property. In 1912, in order to expand its business, Citizens Gas gave a mortgage upon its property which was not to mature until 1942, and from time to time additional bonds were issued under that mortgage (Stip. 16 (b), II R. 634; PX Dep. 10, II R. 607, Offered II R. 420, 564). Beyond that, from time to time Citizens Gas issued additional stock, either common or preferred, in order to extend its business or for other similar corporate purposes (PX Dep. 7, II R. 599, Offered II R. 420, 561); PX 90, III R. 879, Offered, II R. 356). Later on Citizens Gas entered into a lease for office space in the Majestic Building. This lease was still in force when the City took over the trust property, and yet the City took all of the Citizens Gas property, including the assignment of the Majestic Building lease (PX Stip. 56, III R. 835, Offered, II R. 327), thus recognizing the right of Citizens Gas to impose burdens of this character upon the trust estate.

If, in 1913, Citizens Gas had bought the Indianapolis Gas property outright and either given a purchase money mortgage or mortgaged all of its property, or had issued

additional stock to pay the purchase price, the City would apparently admit the validity of such a transaction and would pay the mortgage bonds or the stock, as it has paid off the bonds and stock of Citizens Gas. As a matter of fact, it was a far more advantageous arrangement from the public point of view and from the point of view of the Citizens Gas stockholders to make the Lease in question than it would have been to issue Citizens Gas stock in a sufficient amount to pay for the Indianapolis Gas property. The major part of the investment in the Indianapolis Gas property (the Bonds) has received a return of only 5% during the period since 1913, and the maximum return (on the stock) has been 6%, whereas the issuance of Citizens Gas stock for the purpose of buying the property outright would have required an annual dividend rate of 10%, in accordance with the terms of its Articles and Franchise. Since there is no dispute as to the right of Citizens Gas to acquire the title in fee to real estate or the absolute title to other property, all of which entails the assumption of burdens and obligations which may extend beyond the actual trusteeship of Citizens Gas, it must be clear that Citizens Gas also had authority, subject to the approval of the Public Service Commission, to enter into leases which might extend beyond the term of its trusteeship.

(c) The Express Statutory Power of Citizens Gas to Effect a Merger by Making the Lease For 99 Years Overrode the Limitations, If Any, Arising From the Public Charitable Trust.

Citizens Gas had ample authority under its Articles and its Franchise to make the Lease, but even if we assume that the public charitable trust involved some limitation of the authority of Citizens Gas in this respect, its power as a public utility to effect a merger by making such a Lease (conferred by §95½ of the Public Service Commission Law

of 1913, *supra*, p. 57) would override any such limitation.

The power of the state of Indiana over Citizens Gas as a public utility transcended the rights of the beneficiaries of the public charitable trust. This principle was conclusively established by the *Williams* case. The plaintiff in that case challenged the validity of the act of Citizens Gas in surrendering its Franchise and accepting an indeterminate permit from the state. This attack was unsuccessful. The Supreme Court of Indiana pointed out that the action taken by Citizens Gas was authorized by the Public Service Commission Law (§§ 100, 101, quoted in Appendix A, pp. 145-6 below). The court then said (188 N. E. 215):

> "* * * Granting the existence of a trust relationship between the Citizens' Gas Company and a class of persons of which appellant is representative, *that relationship cannot qualify the power of control of the state over the Citizens' Gas Company as a public utility*; nor can it limit the power of the Citizens' Gas Company to voluntarily relinquish any contractual or franchise privilege which a public utility may relinquish under the law; nor can any beneficial interest of appellant and members of his class in the property or business of the Citizens' Gas Company preclude the state from exercising all control over the affairs of the Citizens' Gas Company which the state has the power to exercise by reason of the fact that the Citizens' Gas Company is a public utility. In short, *the class of beneficiaries of which appellant is a member hold whatever interest they may have in the Citizens' Gas Company subject to the power of the state to control the Citizens' Gas Company as a public utility.*"

The rights of the City as trustee of this public charitable trust can rise no higher than the rights of the beneficiaries whom it represents. When the Indiana Supreme Court held that the rights of those beneficiaries were "subject to the power of the state to control the Citizens' Gas

Company as a public utility," it necessarily held that this power was predominant over the rights of the City.

This principle established in the *Williams* case is, of course, binding upon the federal courts, and, as a matter of fact, the federal courts have approved and followed it. For example, *Todd v. Citizens' Gas Co.*, 46 F. (2d) 855 (see pp. 13-14 above) presented the issue whether the surrender of the Citizens Gas Franchise completely terminated the public charitable trust. On that subject the Court of Appeals said (p. 868):

> "We are not dealing with the question of the power which the state might have exercised with respect to vested property rights created in the public interest as an inducement to the grant, if it had seen fit to do so. *The supreme authority of the state over both proprietary and governmental functions of its agency, the municipality, is not to be gainsaid.*"

We are now dealing with the power which the state has in fact exercised by authorizing the making of the Lease. The supreme authority of the state of Indiana over the activities of Citizens Gas and the City in conducting the business of a public utility "is not to be gainsaid."

Section 95½ of the Public Service Commission Law (quoted above, p. 57) was a grant of authority from the state authorizing competing utilities to merge or make leases, but a competing utility could be leased only "at a price and on terms fixed by the commission." Thus the Commission was clothed by the state with power to determine when, at what price, and upon what terms public utilities could merge or make long term leases. As the court said in the *Williams* case, speaking of the Lease here in question (188 N. E. 216):

> "* * * Further it was within the jurisdiction of the public service commission to consider and approve the lease and the complaint discloses that the public service commission did approve it."

Hence the Commission's approval of the Lease was, in the language of the *Williams* case, an exercise of "the power of the state to control the Citizens' Gas Company as a public utility." This exercise of the state's supreme power gave Citizens Gas authority to execute the Lease, without regard to any limitations (in fact there were none) arising from the public charitable trust.

(d) The Williams Case Conclusively Determined That Citizens Gas Had Power to Execute the Lease and Make It Binding Upon the Trust For the Full Term of the Lease.

After all, the question whether Citizens Gas had power to execute the Lease and make it binding on the public charitable trust for the full term of the Lease was conclusively determined in the *Williams* case (see pp. 14-16 above) and is no longer open to discussion. In his complaint Williams alleged that the Lease (II R. 790):

> "* * * was *ultra vires* said Citizens Gas Company, its officers and representatives, and is unlawful and should be determined and adjudged in this suit to be, and to have been *ab initio*, void and said pretended lease should herein be determined and adjudged to constitute an unlawful cloud upon the title of said Public Charitable Trust and should be removed by the proper decree of this court in this suit."

The Indiana Supreme Court sustained the validity of the Lease and refused to remove this alleged "unlawful cloud upon the title of said Public Charitable Trust." Thus, the court said (188 N. E. 215-16):

> "[7, 8] In respect to the alleged invalidity of the lease executed between the Citizens' Gas Company and the Indianapolis Gas Company, it appears from the complaint that *the lease was one which the Citizens' Gas Company and Indianapolis Gas Company had the power to execute* and one which would result in great advantage to the Citizens' Gas Company,

> * * * Further it was within the jurisdiction of the public service commission to consider and approve the lease and the complaint discloses that the public service commission did approve it. *The complaint does not make out a case for any relief on the basis of invalidity of the lease* or of the action of the commission in approving the same."

Even if this decision were not binding on all parties to this litigation as *res judicata* (as we shall see, p. 75 below, there can be no doubt that this decision is *res judicata*), this decision is an authoritative statement of the law of Indiana and is a binding precedent in all federal courts.

(e) The Practical Construction of the Franchise and Articles by the City and Citizens Gas Shows That Those Instruments Gave Citizens Gas Power to Execute the Lease and Make It Binding Upon the Trust For the Full Term of the Lease.

We have seen that the City was duly represented in the proceedings before the Public Service Commission at which the Lease was approved, that the Lease was executed "with the full consent and approval of the City," and that in the *Fishback* case the City formally denied all of Fishback's allegations attacking the validity of the Lease, which denial was maintained from 1913 to 1921, when the case was finally disposed of and the City dismissed as a party defendant (*supra*, pp. 8-10, 13). Likewise, both the City and Citizens Gas resisted the attack on the Lease in the *Williams* case (*supra*, p. 14). As late as June 2, 1931, *after* (Stip. 13(j), II R. 630) the *Todd* case had established the City's right to have Citizens Gas comply with its demand for a transfer of all the trust property (*supra*, pp. 12-14), the City, Citizens Gas, and others joined in a motion to strike large portions of Williams' complaint (Stip. 14(b), II R. 631; PX Stip. 37, II R. 804, Offered, II R. 328). This motion asserted (II R. 807):

> "Third. It appearing that *the lease so approved by the Public Service Commission has been in full force and effect for nearly 17 years* and that many millions of dollars have been expended in reliance upon its validity, *all persons including plaintiffs* (if they have any standing under any circumstances) *are estopped to question the validity of the same.*"

Concerning the allegations that the Lease was part of a conspiracy to destroy the trust, the motion said (II R. 808):

> "Second. The lease of the property of the Indianapolis Gas Company to the Citizens Gas Company *having been validly made*, the actions of any individuals leading up to such lease are wholly immaterial."

We have discussed elsewhere (*supra*, pp. 10-11, 16-20; *infra*, pp. 104-6, 120-9) the sale of the City's Revenue Bonds in 1935 and some of the other acts and representations which estop both the City and Citizens Gas from denying that the Lease is valid and enforceable for its full term. Thus, during a period of over 22 years (May, 1913 to July, 1935) both Citizens Gas and the City insisted, before the Public Service Commission, in the *Fishback* case, in the *Williams* case, and in many other ways, that the Lease was a valid and binding Lease for 99 years. This conduct constitutes *a practical construction* of the Franchise and Articles of Citizens Gas and the related documents having to do with the public charitable trust. The parties to the trust instruments have themselves, for a period of more than 22 years, interpreted those instruments as conferring authority on Citizens Gas to execute the Lease and make it binding for its full term.

The familiar rule that the practical construction of a contract by the parties thereto is of great, if not controlling, importance in ascertaining the proper interpretation of the contract is well established in the State of

Indiana. Thus, in *City of Vincennes v. Citizens' Gaslight Co.*, 132 Ind. 114, 31 N. E. 573 (1892), *supra*, page 58, the Indiana Supreme Court said (p. 576):

> "* * * That it is the duty of a court, where the language of a contract is indefinite or ambiguous, to adopt the construction and practical interpretation which the parties themselves have put upon the contract, and to enforce that construction, has been so often asserted by this and other courts that no doubt of its soundness can be entertained."

See also:

Board of Commissioners v. Gibson, 158 Ind. 471, 63 N. E. 982, 987 (1902);

Roush v. Roush, 154 Ind. 562, 55 N. E. 1017, 1019 (1900);

Vandalia R. R. Co. v. Terre Haute Vitrified Brick Co., 183 Ind. 551, 108 N. E. 953, 955 (1915).

The statement of the Indiana Supreme Court in the *City of Vincennes* case, quoted above, is directly applicable here. The Franchise contract between the City and Citizens Gas is "indefinite" as to the powers of Citizens Gas. It is, therefore, the duty of the court "to adopt the construction and practical interpretation which the parties themselves have put upon the contract, and to enforce that construction."

This well established rule that the practical construction of an instrument by the parties thereto has great, if not controlling, influence is so familiar as to require no further discussion. This rule is, of course, applicable to various kinds of written instruments and, in particular, to trust instruments.

Lowrey v. Hawaii, 206 U. S. 206, 222 (1907);

In re Sandford's Estate, 277 N. Y. 323; 14 N. E. (2d) 374, 376 (1938);

Wallace v. Wallace, 168 Va. 216; 190 S. E. 293, 296 (1937);

In re Leupp, 108 N. J. Eq. 49; 153 Atl. 842, 845 (1931).

In *Lowrey v. Hawaii*, just cited, this Court said (pp. 222-3):

"* * * In *Brooklyn Life Insurance Co. v. Dutcher*, 95 U. S. 269, it was said: '*There is no surer way to find out what parties meant than to see what they have done.*' So obvious and potent a principle hardly needs the repetition it has received.

"* * * We hence see that not only the immediate practice of the government construed the agreement as contended for by appellants, but the practice of over fifty years proclaimed the same meaning—proclaimed it without question and against a suggestion and agitation to reject it. *It is somewhat staggering to be told that such continuity of practice is not a legal interpreter of the meaning of the parties and that the only criterion can be a precise and isolated form of words* which, at the end of half a century of contrary admission and declaration, one of the parties finds it convenient to bring forward.

"*It is no defense that the government's policy has changed. It cannot so release itself from its engagements.*"

This Court's quotation from the *Brooklyn Life Insurance Company* case, "There is no surer way to find out what parties meant than to see what they have done," is peculiarly applicable here. Certainly there is no surer way of ascertaining what the parties meant in the instruments having to do with the public charitable trust than to see what they did under those instruments. Their practices for a period of 22 years proclaimed that Citizens Gas had authority to enter into this 99-year Lease. When this authority was challenged by Fishback and later by Williams, both Citizens Gas and the City proclaimed this inter-

pretation of the trust instruments—"proclaimed it without question and against a suggestion and agitation to reject it." The City's policy changed in the summer of 1935, but: "It is no defense that the government's policy has changed. It cannot so release itself from its engagements."

The significance of the uniform interpretation of the trust instruments as conferring power upon Citizens Gas to enter into the Lease is perhaps best revealed by paraphrasing this Court's rebuke of the government in the above case:

> It is somewhat staggering to be told that such continuity of practice for a period of 22 years is not a legal interpreter of the meaning of the parties and that the only criterion can be whether the trust instruments conferred specific power to execute the Lease, a test which, at the end of 22 years of contrary admission and declaration, the City now finds it convenient to bring forward.

Citizens Gas had express statutory and charter power to enter into the Lease for its full term and this fact is borne out by the practical interpretation of the Articles and Franchise by Citizens Gas and the City for a period of 22 years.

IV. THE VALIDITY OF THE LEASE AND ITS BINDING EFFECT ON THE PUBLIC CHARITABLE TRUST HAVE BEEN CONCLUSIVELY ESTABLISHED BY THE JUDGMENT IN THE WILLIAMS CASE AND OTHER DECISIONS.

The decision by the Circuit Court of Appeals was based primarily on its own independent conclusion that the Lease is valid and binding. This decision is fully supported by the law and facts, without resorting to any prior adjudications. It is not clear whether the Court of Appeals relied on any prior decisions as being *res judicata*, as distinguished from being controlling statements of Indiana law.

but it is clear that the Court of Appeals would have been justified in holding that the validity and binding effect of the Lease on the public charitable trust had been conclusively established by the *Williams* case and other decisions. As the Court of Appeals said (IV R. 1300): "No amount of verbal magic resorted to by counsel for the City will avail to brush aside the barrier these cases present to him."

(a) The Judgment in the Williams Case Conclusively Determined that the Lease is Binding on the Public Charitable Trust, on Citizens Gas as Initial Trustee, and on the City as Successor Trustee.

We have already pointed out that all the parties to the case at bar were also parties to the *Williams* case and that the complaint in that case quoted in full the Franchise and Articles of Citizens Gas and its Lease from Indianapolis Gas (*supra*, pp. 14-16). In that case Williams sued as a beneficiary of the public charitable trust, in behalf of the trust, and the original trustee (Citizens Gas) and the successor trustee (the City) were parties defendant (*infra*, pp. 84-5). As we have already shown (*supra*, pp. 15-16), this attack on the Lease was unsuccessful and the Indiana Supreme Court held that the trust could not be relieved from this alleged "unlawful cloud" on its title. Thus the court conclusively determined that the Lease is binding on the public charitable trust, on Citizens Gas as initial trustee, on the City as successor trustee and on the trust property, and this determination is *res judicata* as to all parties to this litigation.

None of the arguments by which the City seeks to avoid the decision in the *Williams* case is sound. We shall discuss those arguments briefly.

1. The City has raised no issues as to the binding effect of the Lease on the trust which were not adjudicated in the Williams case.

In its attempt to escape from the decision in the *Williams* case the City asserts: "The issues in the *Williams* case were essentially different from the issues in this case" (Reply Br. 9). As a matter of fact, the City is attacking the binding effect of the Lease on the public charitable trust on the very same grounds as those relied on by Williams.

The only alleged new issues in this case to which the City refers are "The enforceability of the lease against the City and the right of the initial trustee (Citizens Gas) to bind the City to the terms of the lease" (Reply Br. 9). However, the fact is that these issues were squarely presented by Williams in his complaint.

Williams challenged "the right of the initial trustee (Citizens Gas) to bind the City to the terms of the lease." This right was challenged by allegations such as the following (II R. 780-1):

> "* * * that said pretended lease of October 1, 1913, * * * impairs the charter of said Citizens Gas Company and *it impairs, also, the said contract* of August 25, 1905, by and between the City of Indianapolis by and through its Board of Public Works, and Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, * * * *wherein and whereby said Public Charitable Trust was created;*"

and allegations such as (II R. 790):

> "That the said pretended agreement of lease * * * *was ultra vires said Citizens Gas Company*, its officers and representatives, and is unlawful and should be determined and adjudged in this suit to be, and to have been *ab initio*, void *and said pretended lease should herein be determined and adjudged to constitute an unlawful cloud upon the title of said Public Charitable Trust* and should be removed by the proper decree of this court in this suit."

Williams attacked "the enforceability of the lease against the City" by his assertions *that the City was then entitled to receive the trust property*, free and clear from any obligations under the Lease. Thus, he alleged that (II R. 771):

> "* * * said trust is **now** entitled to have made the formal and final transfer, accordingly, of all the property and franchises of said Citizens Gas Company to said Municipal City of Indianapolis as the active trustee of said Public Charitable Trust for the use and benefit of the inhabitants and taxpayers of said city, among whom are these plaintiffs."

It should be noted here that when Williams filed his suit (March, 1930; Stip. 14(a), II R. 630) the City had already demanded the transfer of all the trust property (*supra*, p. 12). Also, Citizens Gas had expressly recognized the trust and had indicated its willingness to comply with the City's demand (PX Stip. 23, II R. 672, Offered, II R. 327), but the suit by Todd had prevented it from doing so (Stip. 13(a), II R. 628). Moreover, by the time the *Williams* case was heard the *Todd* case had been decided and the right of the City to take over the trust property had been established. (Stip. 13(j), 14(h), II R. 630, 632).

Williams contended, not only that the City was then entitled to receive the trust property, but also that the Lease would not be enforceable against the City after it had succeeded Citizens Gas as trustee. In this connection he alleged that the Lease and the other acts complained of constituted (II R. 772):

> "* * * *an unlawful cloud upon the title of said Municipal City, as trustee*, * * *."

Williams also contended that a receiver should be appointed for Citizens Gas who should (II R. 795):

> "* * * pay all determined debts and thereupon *deliver said Citizens Gas Company, clear and free from any obligation whatsoever*, through the administrative agency

> of this court in this suit, *to said City of Indianapolis as trustee of said Public Charitable Trust,* * * *."

In another connection the City asserts that "the question of the burdensomeness of the lease to the City was not in issue" in the *Williams* case (Reply Br., 10). Here, too, is a supposed new issue in the case at bar which was in fact fully presented in the *Williams* case. Williams' allegations as to the supposed burdensomeness of the Lease were fully as vigorous and far-reaching as any such allegations by the City in the case now before this Court. In Section (20) of his complaint (II R. 777-8) he alleged that a conspiracy had been formed "to *destroy* said Public Charitable Trust" and that the conspirators had accomplished certain things to their advantage which would be described in the succeeding sections of the complaint. He then described the making of the Lease as one of the accomplishments of the conspirators (II R. 779-80). He also tabulated the sums paid by Citizens Gas under the Lease and asserted (II R. 780):

> "That said payments with interest thereon in their aggregate *are more than ten times the entire value of all the property of said Indianapolis Gas Company* * * *."

It clearly appears that Williams was relying on the alleged burdensomeness of the Lease *to the City* as successor trustee. The theory advanced throughout the entire complaint was that Citizens Gas was through and that the City was then entitled to receive the trust property, without the alleged burdens of the Lease. As we have already noted, Williams contended that the Lease and the other acts described in his complaint constituted "*an unlawful cloud upon the title of said Municipal City, as trustee*," and that the object of the suit was to remove such "unlawful cloud" (II R. 772).

It is, therefore, clear that "the question of the burdensomeness of the lease to the City," "the enforceability of

the lease against the City" and "the right of the initial trustee (Citizens Gas) to bind the City to the terms of the lease" (Reply Br., 10) were in fact all put in issue in the *Williams* case. When the Indiana Supreme Court refused to remove this "unlawful cloud upon the title of said Municipal City, as trustee," that court conclusively determined these various questions adversely to the City's *present* contentions.

2. The judgment in the Williams case would be conclusive even if the City were relying on new grounds of attack.

We have just shown that the City has raised no issues as to the binding effect of the Lease upon it as successor trustee which were not adjudicated in the *Williams* case. Furthermore, even if the City were now attacking the Lease on different grounds than those presented in the *Williams* case, that fact would have no legal significance. Williams attacked the Lease in behalf of the public charitable trust and it was incumbent upon him, or upon the defendants who were present in the interests of the trust (both Citizens Gas and the City) to present in that case all the grounds for the alleged invalidity of the Lease. If the City thought that Williams was not making an effective attack on the Lease and was omitting proper grounds of attack which should have been urged upon the court, it had the opportunity to join in the attack and present any additional grounds it wished to present. This opportunity was, however, limited solely to the *Williams* case. The validity of the Lease was presented for determination and under well-settled rules of law that question had to be determined once and for all in that case. As a matter of fact, the City contended that the Lease was valid and binding and resisted Williams' attacks on its validity (*supra*, p. 15; *infra*, pp. 104, 119).

Under well-established rules of law, the defendants are precluded from asserting in this case any grounds for

the alleged invalidity of the Lease which they might have asserted in the *Williams* case. For example, in *Werlein v. New Orleans*, 177 U. S. 390 (1900), the City of New Orleans sued to recover land which had been taken from it on execution. The defendant claimed through the purchaser at the execution sale and relied upon the adjudication in an earlier case in which the city had attempted to enjoin the execution sale. The city relied upon the fact that the property in question had been dedicated to public use as a public square and that this fact had not been relied upon in the earlier action. This Court admitted that *the defense tendered by the city would be a valid one if there had been no prior adjudication*, but held that the prior judgment was binding on the city.

In disposing of the contention that the city was presenting new facts or new grounds bearing upon the invalidity of the execution sale, this Court, speaking through Mr. Justice Peckham, said (p. 399):

> "The fact now alleged would have furnished in the chancery suit but another ground or reason upon which to base the claim of the city, that Klein had no right to sell the property under his writ. * * * and we think *it was the duty of the city to set up in that suit and to prove any and all grounds that it had to support the allegation that Klein had no right to seize or sell the property.*"

See also to the same effect:

> *United States v. California and Oregon Land Co.*, 192 U. S. 355, 358 (1904);
>
> *Northern Pacific Railway Co. v. Slaght*, 205 U. S. 122, 130-3 (1907).

The law in Indiana is in complete accord with these decisions by the United States Supreme Court.

Elwood v. Bogmer, 100 Ind. 504 (1884), was an action for partition in which the appellant, Vashti Elwood, by

cross complaint claimed complete title to the property adversely to the other parties to the suit. The other parties alleged that one David Elwood had previously brought suit for partition of land which included the land in controversy, and that it was there decreed that David Elwood and the appellant each owned only a one-third interest in the land. (David's one-third interest was set off to him in the prior suit and he was not a party to the second suit.) The appellant urged that the prior suit was not *res judicata because all the parties to the second suit had been defendants* in the suit by David Elwood. The Indiana Supreme Court replied that it was incumbent upon the appellant to present her contentions by cross complaint in the first suit and ruled that the claims presented by her in the case then before it had been conclusively determined against her in the prior suit. Thus, the Court said (p. 509):

> "* * * Sixty years ago, in *Fischli v. Fischli*, 1 Blackf. 360, this court said: 'Whenever a matter is adjudicated, and finally determined by a competent tribunal, it is considered as forever at rest. This is the principle upon which the repose of society materially depends; and it therefore prevails, with a very few exceptions, throughout the civilized world. *This principle not only embraces what actually was determined, but also extends to every other matter which the parties might have litigated in the case.*' The doctrine of the case cited, upon the point now under consideration, is the recognized law of this State, and has been approved and followed, without doubt or question, in many of the more recent decisions of this court."

See also *Griffin v. Hodshire*, 119 Ind. 235, 21 N. E. 741, 743 (1889), and *Cannon v. Castleman*, 162 Ind. 6, 69 N. E. 455, 456 (1904).

Even if it should appear (*as it does not*) that the City relies on different grounds of attack on the validity of the Lease than were presented in the *Williams* case, such circumstance would have no legal significance.

3. The mere transfer of the trust property did not affect the conclusiveness of the decision in the Williams case.

The City's second proposition as to the binding effect of the *Williams* case is that "The Transfer to the City of the trust *res* on September 9, 1935, creates a situation which so alters the rights of the parties as to prevent a successful assertion of *res adjudicata*." (Reply Br. 10.) This argument ignores the well established principle that a transferee of property is bound by any judgment which affected the property in the hands of his transferor.

> *Skelton v. Sharp*, 161 Ind. 383; 67 N. E. 535, 536 (1903);
>
> *Long v. Schowe*, 181 Ind. 13; 103 N. E. 785, 787 (1914).

Also, as we have already pointed out (*supra*, pp. 76-9), the question of the enforceability of the Lease *against the public charitable trust* was put in issue in the *Williams* case, and the binding effect of the Lease on the trust was established by the decision in that case. The necessary effect of that decision—that the Lease is a binding obligation of the trust—is that the Lease is binding on the trust property, whoever is trustee. Obviously, the judgment against Citizens Gas in the *Williams* case would be binding upon the City, as transferee of Citizens Gas and successor trustee, even if the City had not been a party to that case. The fact is, moreover, that the City was expressly made a party to the *Williams* case in its capacity as successor trustee of the public charitable trust (*infra*, p. 85).

The fact that the City had not yet become successor trustee at the time of the *Williams* case is wholly immaterial. That fact could not prevent the court from adjudging the Lease to be a binding obligation of the trust and the trust could not thereafter avoid that obligation merely by changing the trustee. Furthermore, when the

Williams case was decided the City had already asserted its rights as successor trustee and had procured a judicial determination of its right to receive the trust property.

When in December, 1933 the Indiana Supreme Court held that the Lease was binding on the trust estate, it did not hold that it was binding only for a short period between its decision and the City's taking over of the trust property. Any such interpretation of its decision would completely disregard the surrounding circumstances and is in the teeth of the fact that the plaintiff in that case was seeking to have the Lease removed as "an unlawful cloud upon the title of said Municipal City, as trustee" (II R. 772). Williams was asking that the alleged cloud be removed, not for the few months remaining until the City should become trustee, but for all time. This relief would have been far more significant than a decree that the Lease either was or was not binding for the few months remaining while Citizens Gas still held the trust property. The binding effect of the Lease cannot be divided into various periods of time, as the City contends, and the decision in the *Williams* case necessarily means that the Lease is binding on the trust for its full term of 99 years.

Clearly the City's proposition that the decision in the *Williams* case is not conclusive because the City was not then the successor trustee and received title to and possession of the trust property at a later date is without substance.

4. Since Williams sued in behalf of the trust, the judgment binds the trust and any trustee thereof, although defendants presented no issues to the trustee and prospective successor trustee, their co-defendants.

The City's third proposition on the question of *res judicata* is that the decision in the *Williams* case is not conclusive here because the parties to this case were all co-defendants in the *Williams* case and presented no

issues between themselves in that case (Reply Br. 11). This fact has no significance. Williams sued in behalf of the trust and for the purposes of the suit he replaced the trustee as the representative of the trust. It makes no difference, therefore, what issues, if any, were raised between the trustee itself (the City) and its co-defendants. The law is well settled that in a suit by a beneficiary of a trust in behalf of the trust, in which the trustee is made a defendant, the judgment binds the trust and any trustee thereof, without regard to the issues, if any, raised between the trustee and his co-defendants. The City has never cited any authority denying this well established rule.

The rule just stated fits the *Williams* case precisely. In the first place, Williams sued as a beneficiary of the trust. Thus, in describing themselves, the plaintiffs in the *Williams* case (originally there were two) said (II R. 762):

> "That the plaintiffs Allen G. Williams and Harold L. Bartholomew, each is an inhabitant and taxpayer of the City of Indianapolis in the State of Indiana, and as such bring this suit in the right and behalf, and for the use and benefit, of themselves and of all other inhabitants and taxpayers of said City, similarly situate, any of whom may join as plaintiffs herein."

And again (II R. 764):

> "That *the plaintiffs* are inhabitants and taxpayers of said City of Indianapolis and as such *are cestuis que trustent of the Public Charitable Trust herein defined.*"

As a beneficiary, Williams was entitled to sue in behalf of the trust, the City itself, as Williams alleged (II R. 782-3), having neglected to take action. It is well established that a trustee represents the trust estate and in ordinary circumstances has the exclusive right to prose-

cute or defend actions affecting the rust. However, as stated in 4 *Bogert on Trusts* (§ 870, pp. 2533-4):

> "If the trustee cannot or will not enforce the cause of action running to him for the benefit of the *cestui*, a practical difficulty arises which compels the courts to vary their usual rules as to parties. * * * In the emergency the court permits a suit in equity by the *cestui* to enforce the cause of action running to the trustee, in which the third party and the trustee should be made parties defendant. The *cestui* is not enforcing his own cause of action, but *is acting as a temporary representative of the trust* in order to effect a recovery which will go to the trustee or his successor for the benefit of the *cestui*."

It is clear that Williams was in fact "acting as a temporary representative of the trust." Thus Williams alleged (II R. 770):

> "* * * That said Public Charitable Trust is of the nature of a corporation sole with its beneficiaries the real parties in interest and the equitable owners thereof, and it may be dealt with accordingly in this suit and this right in its behalf these plaintiffs herein now claim and they ask that their said claim be determined and adjudged by this court in this suit."

The court upheld Williams' right to appear for the trust, went into the merits of his claims, and decided the case against him *on the merits.*

Furthermore, the City was expressly made a party to the *Williams* case in its capacity as successor trustee. Williams alleged (II R. 763):

> "That the defendant City of Indianapolis is a municipal corporation and a city of the first class of the State of Indiana and *it is, also, the trustee of said Public Charitable Trust hereinafter described and in each of these capacities it is made a party herein.*"

Thus the *Williams* case was a suit by a beneficiary of the public charitable trust, in behalf of the trust, in which

the origina' trustee and the successor trustee were parties defendant, a: the decision in that case binds the trust and every trustee thereof.

In *Corcoran v. Chesapeake & Ohio Canal Co.*, 94 U. S. 741, this Court disposed of the very contention now advanced by the City. Corcoran was one of several trustees for the benefit of bondholders and was himself a large holder of the bonds. He filed this suit in behalf of all the bondholders to collect payment of interest due and unpaid for many years. This Court said that one of the two issues to be determined was whether the bondholders could recover interest on their overdue interest coupons from the dates of their respective maturities. On this issue the Canal Company, the mortgagor, relied on a prior suit brought by a bondholder, to which suit Corcoran and his co-trustees were parties defendant, as was the Canal Company itself.

In the prior suit the plaintiff therein (the State of Virginia) claimed interest on the coupons which it held, which were of the same class as those upon which Corcoran later sued. The court determined that although interest might be recovered on unpaid interest, such interest was not included in the lien of the mortgage (see 32 Md. 501, 547). In the *Corcoran* case this Court said that the prior suit decided the very point in controversy before it, and that this matter was therefore *res judicata*. Thus the Court said (pp. 744-5):

> "It is said that Corcoran and his co-trustees, the canal company, and the State of Maryland, were all defendants to that suit, and that as between them no issue was raised by the pleadings on this question, and no adversary proceedings were had.
>
> "The answer is, that in chancery suits, where parties are often made defendants because they will not join as plaintiffs, who are yet necessary parties, it has long been settled that adverse interests as between co-defendants may be passed upon and decided, and

if the parties have had a hearing and an opportunity of asserting their rights, they are concluded by the decree as far as it affects rights presented to the court and passed upon by its decree. It is to be observed, also, that the very object of that suit was to determine the order of distribution of the net revenue of the canal company, and that *the Corcoran trustees were made defendants for no other purpose than that they might be bound by that decree.* And, lastly, as the decree did undoubtedly dispose of that question, its conclusiveness cannot now be assailed collaterally on a question of pleading, when it is clear that the issue was fairly made and was argued by Corcoran's counsel, as is shown by the third head of their brief, made a part of this record by stipulation."

The principles applicable to the present situation are the same principles which apply in stockholders' suits brought in the right of the corporation. Thus, in *Dana v. Morgan*, 232 Fed. 85 (C. C. A. 2nd 1916), a stockholder's action had first been brought in a state court to set aside a certain contract on the ground that it was *ultra vires* the corporation. The judgment in the first suit upheld the validity of the contract. Subsequently another stockholder brought a similar action in a federal court to set aside the same contract on the ground that it was procured by fraud. In holding the first judgment a bar to the second action, Judge Rogers said (p. 89):

"* * * And as in such suits the wrong to be redressed is the wrong done to the corporation and as the corporation is a necessary part [party] to the suit, it inevitably follows that *there can be but one adjudication on the rights of the corporation.* And it is undoubted law that the judgment in the state court is an estoppel and a finality *not only as to all matters actually litigated in the suit but also as to all matters which were not but might have been presented to the court and passed upon therein.*"

The similarity between (1) the above suit by a stockholder to set aside the contract between his corporation

and the third party defendant, and (2) the suit by Williams, as a beneficiary of the public charitable trust, to set aside the Lease between the trustee of his trust and the third party defendant (Indianapolis Gas), is apparent. In the above case the court said that "there can be but one adjudication on the rights of the corporation." Likewise, in the instant case there can be but one adjudication on the rights of the trust.

See also:

Ferris v. Udell, 139 Ind. 579, 38 N. E. 180, 186;

Cherry v. Howell, 66 F. (2d) 713, 716 (C. C. A. 2nd. 1933);

Secor v. Singleton, 41 Fed. 725, 727-8 (C. C. Mo. 1890).

In this connection *Elwood v. Beymer*, 100 Ind. 504 (*supra*, p. 80), is of interest. The appellant in that case claimed that (p. 510) "the parties to this record were all defendants, and therefore not, as to each other, adversary parties in the former suit." However, the Indiana Supreme Court ruled that the issues sought to be raised were *res adjudicata*, saying (p. 510):

> "* * * It is none the less true, however, that the appellant might have filed her cross complaint in the former suit, and might then have litigated every matter which she seeks, by her cross complaint in this case, to litigate with the appellees."

In the *Williams* case the issues concerning the validity of the Lease were presented to Citizens Gas and the City, as well as to Indianapolis Gas and the Mortgage trustees, *by the plaintiff Williams*, not by the defendants, and they were all required to take their position with respect to those issues in that case. In fact, as we have seen (*supra*, p. 15), both the City and Citizens Gas took the position that the Lease was binding. They cannot now avoid the binding

effect of the decision in that case merely because they were in agreement with their co-defendants therein and succeeded in procuring a decree adverse to the contentions presented by Williams in behalf of the trust.

5. The Williams case is an authoritative statement of the law of Indiana as to the binding effect of the Lease on the trust and, under the rule of Erie R. R. Co. v. Tompkins, is controlling in all federal courts.

Entirely aside from any questions of *res judicata*, it is clear that the decision in the *Williams* case conclusively settles the law of Indiana as to the very facts which are here presented to this Court. The *Williams* case has conclusively settled, as a matter of Indiana law which is controlling in the federal courts:

(1) That Williams was entitled to maintain his suit in behalf of the public charitable trust.

(2) That the trust and the interests of the beneficiaries therein are "subject to the power of the state to control the Citizens' Gas Company as a public utility" (*supra*, p. 66).

(3) That the action of the Public Service Commission in approving the Lease was a valid exercise of the state's power to control Citizens Gas as a public utility.

(4) That the Lease was within the powers of Citizens Gas.

(5) That the Lease was valid and binding on the trust, on Citizens Gas as initial trustee, and on the City as successor trustee.

(6) That proof of any allegations that the terms of the Lease are burdensome to the lessee would not affect the binding effect of the Lease on the trust and on the City as successor trustee.

We submit that the determination of these questions of Indiana law in the *Williams* case completely disposes of the contentions advanced by the City in the case at bar.

(b) The Order of the Public Service Commission Conclusively Determined That the Lease Is in the Public Interest (Consequently in the Interest of the Trust Also) and in Fulfillment of the Duties of Citizens Gas as a Public Utility.

As previously set forth (*supra*, pp. 6-8), the Lease was approved by the Public Service Commission after extended hearings and an attack on the validity of the Lease by one Fishback, both in the original proceedings and on his petition for a rehearing, in which attack Fishback set forth substantially all the objections to the Lease on which the City now relies. Then Fishback brought suit to set aside the order of the Public Service Commission approving the Lease, in which he reiterated the objections which he had made before the Commission (*supra*, pp. 8-10). The Indiana courts refused to disturb the Commission's order and that order still remains in full force and effect. *Fishback v. Public Service Commission*, 193 Ind. 282; 138 N. E. 346; 139 N. E. 449.

The order of the Public Service Commission approving the Lease (Bill, Exhibit D, I R. 116-22, Offered, II R. 327) is binding as to everyone and cannot be collaterally attacked.

> *Public Service Commission v. Indianapolis*, 193 Ind. 37, 43; 137 N. E. 705, 707 (1922);
>
> *Batesville Telephone Co. v. Public Service Commission of Indiana*, 38 F. (2d) 511, 515 (1930).

In the first case cited the Indiana Supreme Court said (p. 707):

> "If the Commission had jurisdiction and kept within it, and its action was not vitiated by fraud, its deci-

> sion of all questions of fact as to the value of the properties, the sufficiency of the income to pay interest and dividends on the bonds and stocks authorized, *the petitioner's qualifications as a purchaser*, and all other questions which it was required to decide as preliminary to taking action in the matter, is conclusive upon the courts in a collateral action."

In the *Williams* case, speaking of the Lease here in question, the court said (188 N. E. 216):

> "* * * Further *it was within the jurisdiction of the public service commission to consider and approve the lease* and the complaint discloses that the public service commission did approve it. The complaint does not make out a case for any relief on the basis of invalidity of the lease or of the action of the commission in approving the same."

Plaintiff does not contend that the order of the Public Service Commission is conclusive *as to all issues* in this case. Plaintiff *does* contend, however, that the order is a conclusive determination of two matters of fundamental importance (1) that the Lease is in the public interest and consequently in the interest of the beneficiaries of the trust, and (2) that the Lease is in fulfillment of the duties of Citizens Gas as a public utility.

The City admits the first of these contentions when it says that a decision by the Public Service Commission "is conclusive on the courts in a collateral action" and that the Commission determined whether the Lease "was advisable and in the public interest" (Reply Br. 8).

The other matters determined by the Commission upon which plaintiff relies—that the Lease was in fulfillment of the duties of Citizens Gas as a public utility, and that Citizens Gas was such a public utility as the state statute authorized to enter into such a Lease—are of vital significance. These facts were among those which the Commission "was required to decide as preliminary to taking ac-

tion in the matter" of the Lease, and which were, therefore, conclusively established by the Commission's order.

As previously pointed out (*supra*, p. 57), the express statutory authority for public utilities to make leases required that they be made "at a price and on terms fixed by the commission." The price and terms of the Lease were, therefore, expressly subjected to the Commission's control. When the Commission approved the price and terms of the Lease, the power of Citizens Gas, as a public utility, to enter into the Lease superseded any limitations (in fact, as we have seen, *supra*, pp. 58-66, there were none) which might have been involved in the existence of the public charitable trust. In other words, the Commission's order, plus the statute, are conclusive as to the power of Citizens Gas to enter into the Lease.

(c) The Fishback Case.

As we have seen (*supra*, pp. 8-10), in his effort to have the Lease declared void and of no effect, Fishback presented substantially every ground of attack now relied on by the City. The Indiana courts sustained the validity of the Lease and denied Fishback any relief. Plaintiff does not rely on this decision as a binding adjudication between it and the City, but it is a binding adjudication between Indianapolis Gas and Citizens Gas.

The primary importance of this case lies in the conduct of both Citizens Gas and the City in upholding the validity of the Lease during the eight years that the *Fishback* case was pending (*supra*, pp. 9-10). This is compelling evidence in support of plaintiff's claims relating to laches, estoppel and practical construction by the parties (*supra*, p. 70; *infra*, pp. 120, 124, 129).

V. THE CITY HAD AMPLE AUTHORITY TO ACCEPT THE TRUST AND ITS OBLIGATIONS, INCLUDING THE OBLIGATIONS UNDER THE LEASE, AND TOOK THE NECESSARY ACTION TO EXERCISE THAT AUTHORITY.

The City asserts that (Pet. 13):

> "4. Sections 85 and 254 of the Acts of the Indiana General Assembly of 1905* expressly prohibit any such lease for more than 25 years and prohibit its execution without municipal sanction."

This assertion is the basis for the City's argument that in sustaining the validity of the Lease the Circuit Court of Appeals "refused to follow the Indiana decisions that a municipal corporation cannot be bound by a contract made in violation of the Indiana statutes" (Pet. 16).

In the argument which follows we shall show that these statutes have no application to this case, that the City had ample authority to take over the public charitable trust and all its accompanying obligations, including those under the Lease, and that the City took the proper steps to exercise that authority.

(a) The City Had Ample Authority to Accept the Trust and Its Accompanying Obligations, Including the Obligations Under the Lease.

The City appears to contend that the Lease is "a contract made in violation of the Indiana statutes" (Pet. 16). However, since the statutes on which the City relies deal solely with the powers and duties of *municipal corporations*, it is clear that the City's argument relates to some supposed prohibition against the City (the powers of *Citizens Gas* in respect of the Lease have already been fully argued, *supra*, pp. 56-74). Furthermore, we are not concerned with the question whether the City itself could have entered into the Lease, for it did not purport to do so.

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* These sections are quoted in full in "Appendix B" to this brief, *infra*, p. 147.

Thus, the question presented here is whether the City had the power to take over the public charitable trust, subject to the obligations under the Lease.

The statutes on which the City's argument is based are part of the Cities and Towns Act of 1905 (Chapter 129 of the Acts of 1905), but the argument fails to take into account the provisions of Section 53 of the same Act. Clause 6 of Section 53 expressly authorizes cities to accept public trusts and to agree to the conditions and terms accompanying them. The pertinent portion of that section has always read (*Burns Indiana Statutes*, 1933, § 48-1407):

> "The common council of every city shall have power to enact ordinances for the following purposes: * * * Sixth. *To receive* gifts, donations, bequests and public *trusts and to agree to conditions and terms accompanying the same and bind the corporation to carry them out.*"

The City itself relied on this very statute in the *Todd* case, in support of its right to receive the public trust involved in the case at bar. In that case the City correctly interpreted this statute, but gave it an interpretation which is directly contrary to the argument it is now advancing.

In the *Todd* case the plaintiff alleged that under Sections 93 and 249 of the Act of 1905 the City could not acquire the property of Citizens Gas without a popular vote of the electors (PX Stip. 30, II R. 677, 706-8; Offered, II R. 328). To this the City replied (PX Stip. 31, II R. 718, 737, Par. (1); Offered, II R. 328):

> "* * * These defendants admit that said Sections are now in force, but allege that *they have no application whatever to the acquisition by the City of Indianapolis of the plant and property of the Citizens Gas Company* of Indianapolis.
>
> "These defendants say that under the terms of Section 53 of the aforesaid Act of 1905 the Common Council of *said City had power by ordinance to receive and accept public trusts and to agree to conditions and*

terms accompanying the same and bind such City to carry them out, and said defendants further allege that independently of statutory authority said City had power to accept and execute public trusts."

The Court will observe that the City advanced substantially the same argument in the *Todd* case in support of its authority to take over the trust property as that on which we are relying. The City was clearly right in its argument that its trust powers are not subject to the limitations of the Act of 1905. The Circuit Court of Appeals adopted this argument and held that the City had authority to accept the public charitable trust here in question and that its power to do so was not subject to the limitations on its ordinary governmental powers. *Todd v. Citizens' Gas Co.*, 46 F. (2d) 855, 865-6. While the sections of the Act of 1905 involved in the *Todd* case are not the same sections of that Act upon which the City now relies, the rule of law there urged by the City and adopted by the court—that the City's trust powers are not subject to the limitations upon its ordinary governmental powers—is equally applicable to all limitations of the Act of 1905.

There can be no doubt that the City, in taking over the trust property in 1935, was attempting to comply with and claim the advantages of clause 6 of Section 53 of the Act of 1905, as well as the legalizing acts of 1929. This is shown by the language of General Ordinance No. 82—1935, ratifying and approving the steps taken in the acquisition of the trust property. The first section of that ordinance closes with language which parallels very closely the language of clause 6 of Section 53 (quoted above, p. 94). Thus Section 1 of the ordinance concludes (DX 8, III R. 1018-19, Offered, II R. 429):

"* * * and that the public charitable trust in all such plant and property so delivered to and as accepted by said Board of Directors for Utilities be and is hereby received and accepted, and *the City of Indianapolis hereby agrees to the conditions and terms accompany-*

ing such trust and acknowledges itself bound to carry them out."

In addition to the powers conferred by the Cities and Towns Act of 1905, it is clear that the City had the express power to take over the Citizens Gas property, including the Lease, in March, 1929, when it elected to accept the outstanding offer from Citizens Gas, and at all times thereafter. The validating acts of 1929,* prepared by counsel for the City for this very purpose (*infra*, pp. 101-3), leave no doubt on this question.

Section 3 of Chapter 77, Acts of 1929, conferred the following powers, among others, on the Board of Directors for Utilities of the City:

> "(7) *To take over, adopt and assume the performance of the provisions of any lease under which any utility property may be held at the time of the acquisition of any utility by any such city*, and to take any and all steps necessary to perform and fulfill the terms of any such lease, and to obtain and preserve the benefits therefrom, *and in event there be any outstanding open mortgage upon the property covered by any such lease so taken over under the provisions of which bonds may be withdrawn from the trustee under such mortgage* for the purpose of paying all or part of the cost of additions to the property covered by such mortgage, to do and perform all things necessary in order to secure the benefit of such mortgage provisions * * *."

In view of the provisions of the Lease here in question (I R. 58) and the provisions of the "outstanding open mortgage upon the property covered" by the Lease (I R. 28), under which provisions "bonds may be withdrawn from the trustee under such mortgage for the purpose of paying all or part of the cost of additions to the property covered by

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* The pertinent portions of Chapter 77 of the Acts of 1929 and all of Chapter 78 of the Acts of 1929 are quoted in "Appendix C" to this brief, *infra*, p. 150. These chapters are frequently referred to as the "validating acts."

such mortgage," there can be no doubt that this statute was prepared and its enactment secured for the purpose of setting at rest any doubt as to the power of the City to take over the Citizens Gas property, *including the Lease*.

Likewise, in Section 1 of Chapter 78, Acts of 1929, the provisions of the Citizens Gas Articles of Incorporation giving the City the right to take over the Citizens Gas property were "legalized and declared to be valid and binding," and this section further provided:

> "Said municipal corporation shall be authorized to accept, hold and own all the property of such corporation so transferred to it, * * * *and any right, title or interest such transferring corporation may have in any lease upon other property.*"

Thus it clearly appears that the acts of the City in taking over the Citizens Gas property subject to all the obligations of Citizens Gas, including those under the Lease, were fully authorized. This exercise of the City's power to accept trusts was not subject to the limitations set forth in the statutes on which the City's *present* argument is based. In addition, the validating acts of 1929 gave the City express power to do these things, and in fact were prepared by the City's counsel for the very purpose of removing any doubt as to the City's powers in this respect (*infra*, pp. 101-3).

The City had full authority to accept the Citizens Gas property, subject to all the obligations under the Lease, and it took proper action to exercise that authority. The latter fact is important because of the City's frequent assertions to the contrary and because it reveals the futility of giving the City the opportunity it demands to present evidence on the "reserved issue" as to whether the City "had the right as such successor trustee to refuse and reject an assignment of such lease on the ground that such lease was burdensome" (*supra*, pp. 50-51).

The City's frequently repeated assertion that "the lease had no municipal sanction of any kind" (Pet. 13, Par. 4; also pp. 7, 16, 31) is wholly immaterial if it refers to the execution of the Lease in 1913,* and is contrary to the facts if it refers to the City's acceptance of the Citizens Gas property subject to all the obligations under the Lease. As we shall now see, the proper representatives of the City took the necessary action to make the Lease binding on the City by (1) taking over all the trust property, including the leasehold, (2) accepting the assignment of the Lease and taking possession of the leased property, and (3) taking over all the property of Citizens Gas, subject to all its obligations, and executing an agreement indemnifying Citizens Gas against all its liabilities.

(b) The City's Acceptance of the Trust Property Included the Acceptance of the Leasehold Estate and the Obligations Under the Lease.

The City's acceptance of the public charitable trust here in question necessarily involved its acceptance of the leasehold estate. It could not select those parts of the trust estate which were most advantageous to hold and reject those parts which it deemed to be burdensome, particularly after the initial trustee had been in control of the trust property for a period of thirty years. The Circuit Court of Appeals was clearly right when it held that (IV R. 1296-7) "the City is a successor trustee and as such *must accept or disclaim the entire res,*" and the City makes no complaint of that holding.

There can be no doubt that the City did in fact accept the entire trust *res*. Thus, the City expressly admits in the case at bar (I R. 243):

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* As noted above (p. 13), the City admitted in the *Cotter* case that Citizens Gas "*with the full consent and approval of the City of Indianapolis*, entered into a contract whereby it leased from the Indianapolis Gas Company all its plants and property *for a period of ninety-nine years*" (III R. 859).

> "* * * that defendant Citizens Gas Company of Indianapolis conveyed and transferred *all of its property* to the City of Indianapolis subject to all outstanding legal obligations of that Company * * *."

It is also clear that the Court of Appeals correctly analyzed the situation in this case when it said (IV R. 1296):

> "* * * Therefore, if the lease in question is valid, two conclusions follow: (1) the subject-matter of the lease contract is an asset and becomes part of the trust *res*; (2) the lease obligation binds the trust and is not discharged by a mere substitution of trustees."

The City itself recognized the validity of the first of these two conclusions when it said in the *Williams* case "If the lease is valid the leasehold interest created thereby constitutes a part of the public charitable trust" (II R. 808, quoted more fully p. 104, *infra*). This fact is vitally significant in view of the further fact that in the case at bar the City concedes "for the purpose of this litigation" that the Lease was valid "until the property for which the Citizens Gas Company was Trustee was conveyed to the City" (I R. 145). During this twenty-two year period in which the City says that the Lease was valid it must have been a binding obligation *of the trust estate*, for, as the City admits, the operation of the leased property by Citizens Gas during this period "was as the Trustee of a Public Charitable Trust" (I R. 155, Par. 11). The conclusion inevitably follows that the Lease was a valid and binding obligation of the trust estate, that the leasehold was part of the trust *res* taken over by the City and that the mere change in trustees did not relieve the trust from the obligations under the Lease.

There is no controversy as to whether the City took over the public charitable trust and no doubt the City will not contend that it did not take the proper steps to receive the trust property from Citizens Gas. The record in this case clearly shows that the City did in fact take the proper

steps to accept *the entire trust estate, including the leasehold and its accompanying obligations.* In March, 1929 the City gave notice that it was exercising its right to take over the trust property, and it is clear that at that time it elected to take all the trust property. Thus, on March 20, 1929, the Board of Public Works of the City of Indianapolis adopted a resolution (PX Stip. 22, II R. 670, Offered, II R. 327) which stated that the City (II R. 670):

> "* * * hereby asserts, claims and demands *all rights, title, interests and ownership, of whatever nature or character* granted, reserved, transferred or vested in and to said City *in and to the gas plant, mains and property* of said Citizens Gas Company * * *."

The resolution also stated (II R. 670-71):

> "* * * and demand be and is hereby made upon said Citizens Gas Company * * * that *the plant, property and assets* of said company be conveyed to said City of Indianapolis in accordance with the premises * * *."

The Board of Directors of Citizens Gas responded by a resolution acknowledging "the right of the City of Indianapolis to take over *the property and assets of said Company*" (PX Stip. 23, II R. 672, at 673, Offered, II R. 327). The Board of Trustees of Citizens Gas unanimously approved this resolution by the Board of Directors (Stip. 12(b), II R. 628). These acts by Citizens Gas are significant as showing its interpretation of the City's resolution demanding the transfer of the trust property. The Citizens Gas resolution was brought to the City's attention by the *Todd* case (filed April 30, 1929), if not before (II R. 692, § XV).

Thus the City elected to take over all the property of Citizens Gas and, having made that election, its "power to choose" was exhausted and there could be no withdrawal or change in the terms of the acceptance of the trust property.

Castle Creek Water Co. v. City of Aspen, 146 Fed. 8 (C. C. A. 8th, 1906);

Slocum v. City of North Platte, 192 Fed. 252 (C. C. A. 8th, 1911).

In the first case cited the city had elected to exercise its right to purchase certain water works. The court held that the water works company was entitled to specific performance of the city's agreement to buy its property. Thus the court said (p. 10):

> "* * * *The city had but one option. When it had exercised it, its power to choose was exhausted. An election once made estops the elector. He may not revoke his choice and select another alternative.*"

If there could be any doubt as to the interpretation of the City's resolution exercising its right to take over the trust property, any such doubt would be set at rest by the surrounding circumstances and the City's subsequent conduct in recognizing the Lease as a binding obligation on the trust for its full term and as part of the trust estate which it was requiring the initial trustee to convey to the City.

On March 11, 1929, just nine days before the adoption of the City's resolution demanding the transfer of the trust property, Chapters 77 and 78 of the Acts of 1929* became effective. As we have seen (*supra*, pp. 96-7), these statutes gave the City express authority to take over the leasehold estate and its accompanying obligations, in connection with the taking over of the trust property. As to Chapter 78, the City admitted in its answer in the *Todd* case that (PX Stip. 31, II R. 718, at pp. 729-30, Offered, II R. 328, 333):

> "* * * *said bill was prepared by the legal department and special counsel of the City of Indianapolis* employed for the purpose of bringing about a transfer of the plant and property of the defendant Citizens

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* The pertinent portions of Chapter 77 of the Acts of 1929 and all of Chapter 78 of the Acts of 1929 are quoted in "Appendix C" to this brief, *infra*, p. 150.

Gas Company of Indianapolis to the City of Indianapolis; that *said bill was passed in the exact form prepared and submitted by said counsel for the defendant City* without change or amendment of any kind or character, and that it was introduced in the House of Representatives of the General Assembly by members residing in the City of Indianapolis and elected from Marion County;"

Chapter 78 had an express provision authorizing the City to accept the leased property. Thus it provided:

> "Said municipal corporation shall be authorized to accept, hold and own all the property of such corporation so transferred to it, * * * *and any right, title or interest such transferring corporation may have in any lease upon other property.*"

An examination of Chapter 77 shows that it was prepared in the same way and that it too was enacted for the purpose of authorizing the City to take over *all* the Citizens Gas property, including the Lease. Thus, Chapter 77 applies only to cities "having a population of not less than 300,000," and the City of Indianapolis is and was then the only city having such a population (Stip. 23, II R. 638). Moreover, paragraph 7 of Section 3 of that Chapter (quoted more fully p. 96, *supra*) expressly authorized the board of directors of any utility district:

> "To take over, adopt and *assume the performance of the provisions of any lease* under which any utility property may be held at the time of the acquisition of any utility by any such city, and to take any and all steps necessary to perform and fulfil the terms of any such lease, * * *."

and also authorized such board of directors to operate under any mortgage to which the leased property might be subject.

Thus, in the legislation prepared as a forerunner to the resolution of March 20, 1929, counsel for the City expressly provided for authority to take over, adopt and assume the

performance of any lease held by Citizens Gas. Obviously, these provisions were inserted for the purpose of authorizing the City to take over and assume the obligations of the Lease from Indianapolis Gas to Citizens Gas. This was an unmistakable indication of the City's intentions as expressed nine days later in its demand for the transfer of the trust property. It is evident that the City intended to take over all of the property of Citizens Gas, including the leasehold estate in the Indianapolis Gas property.

In June, 1929 the City filed its answer in the *Cotter** case in which it admitted that Citizens Gas had leased the property of Indianapolis Gas "for a period of ninety-nine years" and "with the full consent and approval of the City of Indianapolis" (PX 89, III R. 859; quoted more fully *supra*, p. 13). The City also recognized the Lease as part of the Citizens Gas property by its answer in the *Todd* case. Thus, it admitted (II R. 719) the following allegation in subdivision IV of the *Todd* complaint (II R. 680):

> "* * * Defendant Company [Citizens Gas] also *is the owner of a certain leasehold estate in and to the property of the Indianapolis Gas Company*, as created by a certain contract of lease dated September 30, 1913, and recorded in Miscellaneous Record 78, pages 257-278, inclusive, of the records in the Recorder's office of Marion County, State of Indiana."

The City also recognized the Lease as part of the trust property by joining in the stipulation filed in the *Todd* case (PX 139, III R. 941, 943; quoted *supra*, p. 14). It is plain that no such admissions as these would have been made if the City had intended in 1929 to take only part of the Citizens Gas property and to reject the Indianapolis Gas Lease.

Again, in the *Williams* case, in June, 1931 the City joined with Citizens Gas and a number of the individual

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* *Todd v. Citizens' Gas Company, et al.; Cotter v. Citizens' Gas Company, et al.*; 46 F. (2d) 855 (C. C. A. 7th, 1931).

defendants (officials of Citizens Gas or the City) in a motion to strike parts of the complaint (Stip. 14(b), II R. 631). In moving to strike certain portions of the complaint directed against the Lease, the City and these other defendants said (PX Stip. 37, II R. 804, at 808, Offered, II R. 328):

> "*Second.* The lease of the property of the Indianapolis Gas Company to the Citizens Gas Company *having been validly made*, the actions of any individuals leading up to such lease are wholly immaterial.
>
> "*Third.* The validity of the public charitable trust set up in the complaint is in no wise affected by the validity of such lease. *If the lease is valid the leasehold interest created thereby constitutes a part of the public charitable trust* and is subject to be administered in the same way as property owned by the Citizens Gas Company in its own right. If for any reason the lease is invalid, it would fall without the scope of the trust."

These evidences of the City's consistent construction of its election in March, 1929 to take over the leasehold estate together with the other property and assets of Citizens Gas are of great significance. The City consistently adhered to this construction of its election during the entire period from the preparation of the validating acts in 1929 down to July, 1935, after the City's sale of its Revenue Bonds.

In its resolution offering the Revenue Bonds (quoted pp. 16-17, *supra*), the City's Board of Directors for Utilities described the property to be acquired with the proceeds of the bonds as that "owned by Citizens Gas Company of Indianapolis and or in which it has an interest," and also as "the property operated by Citizens Gas Company of Indianapolis." The form of bond, which was included in the resolution, stated that payment would be secured "by a charge upon all the revenue from the operation of all of the gas system owned and or operated by the City of Indianapolis." When the City referred to the property owned

by Citizens Gas Company "and/or in which it has an interest," to "*the property operated by Citizens Gas*," and to the revenue from the operation of "the gas system owned and/or operated by the City," there can be no doubt that it was describing the entire property of Citizens Gas, including that under lease from Indianapolis Gas.

In the prospectus which it issued to prospective bidders for its Revenue Bonds the City said that "*the system operated by Citizens Gas Company* * * * is in part owned by Citizens Gas Company and *in part is leased by it from Indianapolis Gas Company* * * * The lease is *for a term of 99 years* from October 1, 1913 * * *" (quoted *supra*, pp. 17-18). The prospectus described the leased property and summarized the terms of the Lease and the amounts paid thereunder (II R. 535-6), information which would not have been included if the Indianapolis Gas property were not to be taken over by the City under the Lease. The prospectus also contained this significant statement (II R. 536):

> "The covenants of the lease are for the parties, their successors and assigns."

Thus, the Court of Appeals was clearly correct when it said (IV R. 1291):

> "The unescapable impression, however, from reading the context of the prospectus is that *the leased property was treated as being a part of the utility property subject to the trust.*"

The advertising circular for the Revenue Bonds, approved by the City's counsel, and the brokers' advertisements printed in 45 different newspapers contained the same representations as to the property to be taken over by the City as those in the resolution and the prospectus (see pp. 18-19, *supra*).

In the prospectus, in the resolution authorizing the issuance of the Revenue Bonds, in the form of the bonds itself, in the Halsey-Stuart circular approved by counsel

for the City, and in the newspaper advertisements there were repeated representations that the gas system to be taken over included the property of Indianapolis Gas. Now it is inconceivable that the City of Indianapolis, the members of its Board of Directors for Utilities, and its distinguished counsel were attempting to perpetrate a fraud, either upon Halsey, Stuart & Company or upon the members of the public to whom the bonds were to be sold. The conclusion is inevitable that those representations were made because as late as July 1, 1935, the date of the advertising circular, the City, the Board of Directors for Utilities, and its counsel fully expected to take over the leased property as part of the Citizens Gas system. This conclusion is further supported by the fact that on July 23, 1935 counsel for the City wrote to Indianapolis Gas notifying it that the City would "early in September, take over the property which has been *operated* by Citizens Gas Company" (PX Stip. 58, III R. 836, Offered, II R. 329).

Thus we have at least two official acts of the City of Indianapolis by which it became liable for the obligations under the Lease: (1) The first official act was the resolution of the Board of Public Works demanding the transfer of **all** the trust property, including the Lease. During the period from the preparation of the validating acts early in 1929 down to July, 1935 there were many official acts (*supra*, pp. 101-5) by which the City construed this resolution of March 20, 1929 as an election to take the entire trust estate, *including the Lease*. (2) Another vitally significant official act was that of the Board of Directors for Utilities in September, 1935 in carrying out the resolution of March 20, 1929, by accepting the transfer of *all the trust property* (II R. 467-8; Stip. 17, II R. 635). This act necessarily included the acceptance of the leasehold estate and its accompanying obligations (see pp. 98-9, *supra*).

We shall now discuss another official act by which the City became liable for the obligations under the Lease,

namely, the act of the Board of Directors for Utilities in accepting the assignment of the Lease, having it recorded and taking possession of the leased property.

(c) The City Accepted the Assignment of the Lease, Took Possession of the Leased Property and is Liable by Privity of Estate For the Obligations Under the Lease.

On September 9, 1935, at a meeting of the City's Board of Directors for Utilities, the Board received an assignment of the Lease here in question (Bill, Exhibit F, I R. 127, Offered, II R. 327), sent it to the recorder's office, and had it recorded (II R. 330, 467-8). At the same time the Board took possession of the leased property and has operated it ever since as an integral part of the Citizens Gas system (II R. 350; Stip. 6(c), II R. 622). These facts clearly establish that the City is the assignee of the Lease.

The City's contention that it rejected the assignment of the Lease (Pet. 9) is based on the single fact that when it received the assignment, had it recorded and took over the leased property, it also adopted an *ex parte* resolution *saying* that it rejected the assignment. The significance of this *ex parte* resolution, as contrasted with the affirmative acts taken by the City to accept the Lease, must be judged in the light of the maxim that "actions speak louder than words."

There are many analogous situations in the law where the courts have refused to allow parties to adopt one course by their actions and deny the adoption of such course by some declaration simultaneously made. An example may be found in the law as to accord and satisfaction. It is clear that, when there is a bona fide dispute between a creditor and a debtor as to an unliquidated claim, the acceptance by the creditor of a check designated as payment in full will amount to a full satisfaction, no matter what he says as to his intention in accepting such check.

Neubacher v. Perry, 57 Ind. App. 362; 103 N. E. 805 (1914);

Neher v. Kerr, 70 Ind. App. 363; 123 N. E. 467 (1919);

Fuller v. Kemp, 138 N. Y. 231, 33 N. E. 1034 (1893);

Seeds, Grain & Hay Co. v. Conger, 83 O. S. 169; 93 N. E. 892 (1910).

An attempt by an assignee of a lease to do one thing and say another was presented to the Supreme Court of Illinois in a case which is in that respect strikingly similar to the one at bar. In *Leiter v. Pike*, 127 Ill. 287; 20 N. E. 23 (1889), a lease had been made for 20 years with an option in the lessee to renew for a further period of 20 years at a rental equal to 6% of the appraised value. The assignee of the lease, Pike, notified the assignee of the lessor, Leiter, that he exercised his right to renew the lease. Leiter replied that the city had condemned part of the property but that Pike could renew as to the remainder of the property if he cared to do so. Appraisers were appointed who appraised the remainder of the property at $300,000.

After negotiations as to the terms of the new lease, Leiter forwarded a lease to Cherry (who was acting for Pike). Cherry retained this lease, made a copy thereof, signed it, and returned it to Leiter with a letter in which he said (pp. 25-6):

> "* * * Now, therefore, I give you notice that I accept the lease signed by you, * * *; and I further give you notice that *in accepting such lease I do not agree to pay the sum of eighteen thousand dollars ($18,000) per annum*, being six (6) per cent. interest on the sum of three hundred thousand dollars, but shall claim that I am entitled to an abatement therefrom of the fair rental value of the west twenty-seven (27) feet of said lots as described in the original lease."

In holding that this was a valid acceptance of the lease by Pike the appellate court said, in language quoted and approved by the Supreme Court (p. 29):

> "* * * His most solemn and deliberate acts evince an acceptance; his words are said to be inconsistent therewith. But saith my Lord COKE: 'When the words are contrarie to the act which is the deliverie, the words are of none effect, *non quod dictum est, sed quod factum est, inspicitur.*' 1 Co. Litt. 36, A. And in *Leake on Contracts*, at page 13, it is said: 'In judging of intention from a person's words and conduct, where his acts are inconsistent with his words, the former are, in general, accepted as a more reliable guide to the intention than the latter; and the conduct may in some cases determine the intention, even in opposition to the words.' Under this rule, which is based on sound reason, it is very clear that Cherry's conduct proves an acceptance of the lease by him, even allowing that the words of his letter to Leiter indicate a contrary intent."

The Supreme Court affirmed the judgment of the appellate court, holding that Cherry had accepted the new lease and that the parties were bound by such acceptance. As to the effect of Cherry's retention of the lease and his simultaneous declaration that he would not agree to pay the rent fixed by the terms thereof, the Supreme Court said (p. 32):

> "* * * The case, then, is precisely as if A., on executing and delivering his bond to B., whereby he obligates himself to pay B. $1,000 at a day named, were to say, 'I shall not consider myself bound to pay you $1,000.' *It is the doing of one thing to which the law attaches a particular effect, and declaring that he intends directly the reverse*, or something which is in legal effect materially different. *That in such case the accompanying declaration is of no legal effect whatever is well settled.*"

The Court will observe the close parallel between Cherry's attempt to keep the lease and repudiate its obli-

gations and the attempt by the City in the present case to repudiate its obligation under the assignment of the Lease, although accepting the assignment, recording it, and taking possession of the property covered thereby. It must be clear that the City's *ex parte* declarations in the resolutions adopted by the Board of Directors for Utilities can have no more effect than the *ex parte* declarations of Cherry to which the Supreme Court of Illinois referred. We submit, in the language of Lord Coke quoted by the Illinois court, "*non quod dictum est, sed quod factum est, inspicitur*," or, in other words, "*not what is said, but what is done, is regarded.*"

The City's assertion (Pet. 9) that Indianapolis Gas consented to the City's taking possession of and operating the leased property is wholly unsupported by the record, except for the period subsequent to March 2, 1936. The earliest *agreement* of any sort between Indianapolis Gas and the City was contained in two letters exchanged between them on September 30, 1935 (DX Stip. 64, 65, III R. 968-9, Offered, II R. 384-5). These letters said nothing whatever about the taking possession of or the operation of the property. They merely referred to certain payments being made and to be made by the City to Indianapolis Gas and said (DX Stip. 64, III R. 968-9):

> "* * * We will make *these payments* without prejudice to our position or rights and you may accept the same without prejudice to your position or rights * * *."

Certainly, these letters, written three weeks after the City took possession of the leased property, cannot be tortured into a consent to the City's *taking possession* of the property three weeks earlier, or to the City's *operation* of the leased property, except in the capacity of an assignee of the Lease. On the contrary, since in these letters the City assured Indianapolis Gas that "you shall be at full liberty to assert, as we understand you do, that said lease is an obligation binding on the City of Indi-

anapolis" (DX Stip. 64, III R. 968), they preserved the rights which had vested in Indianapolis Gas and its Bondholders on September 9, when the City accepted the assignment of the Lease and took possession of the leased property.

Thus, it plainly appears that the City had no right to take possession of the leased property on September 9, 1935, except as assignee of the Lease. The City, by accepting and recording the assignment of the Lease and taking possession of the leased property, made an ineluctable election to become an assignee of the Lease. Neither its *ex parte* resolutions and protestations nor the letters exchanged between the City and Indianapolis Gas three weeks later (which had nothing to say as to the effect of the City's acts on September 9) can relieve the City from the obligations which it incurred on September 9th, when it became an assignee of the Lease.

(d) The City Became Liable, as Successor Trustee, for All the Obligations of Citizens Gas, Including the Obligations Under the Lease.

Among the official acts of the City by which it accepted the trust property subject to all the obligations of Citizens Gas and became liable for all those obligations in its capacity as successor trustee are:

(1) The City accepted instruments of transfer which provided that the property was transferred subject to all the obligations of Citizens Gas, and the property remained subject to those obligations.

(2) The City executed an Indemnity Agreement (Bill, Exhibit J, II R. 306; Offered, II R. 327) by which it agreed to indemnify Citizens Gas against all *liabilities*, thus, in effect, agreeing to pay any liabilities which should be established against Citizens Gas.

(3) The City took all the Citizens Gas property and paid all the consideration to the stockholders and

bondholders, leaving no assets for creditors, and thus became liable for all obligations of Citizens Gas.

We shall discuss each of these official acts briefly.

We have already noted the City's admission in this case (I R. 243):

> "* * * that defendant Citizens Gas Company of Indianapolis conveyed and transferred all of its property to the City of Indianapolis *subject to all outstanding legal obligations of that Company* * * *."

We have also referred to the City's concession that the Lease was valid "until the property for which the Citizens Gas Company was Trustee was conveyed to the City" (I R. 145). In addition, since Citizens Gas has not sought a review of the judgments of the Circuit Court of Appeals establishing the present binding effect of the Lease on Citizens Gas (IV R. 1307-8), the decision of the Court of Appeals that the Lease is binding on Citizens Gas for its full term has become final and conclusive. It necessarily follows that the obligations of the Lease were included when the City took all the Citizens Gas property "subject to **ALL** outstanding legal obligations of that Company."

Thus, one of the official acts by which the trust property was subjected to, or remained subject to, all the obligations of Citizens Gas was the act of the City's Board of Directors for Utilities, in meeting assembled, in accepting the instruments transferring the Citizens Gas property (II R. 467-8), all of which were made expressly subject to all the obligations of Citizens Gas. The deed of the real estate (PX Stip. 55, III R. 833, Offered, II R. 327) recites that the conveyance is made subject to the mortgage to the Bankers Trust Company "and to all other existing liens, incumbrances and assessments of any nature whatsoever." The *next paragraph*, which follows immediately after the language just quoted, reads (III R. 834):

"This conveyance is made *subject also to all other legal obligations* of the Citizens Gas Company of Indianapolis."

The assignment from Citizens Gas to the City of the lease on space in the Majestic Building contains substantially identical language (PX Stip. 56, III R. 835-6, Pars. 2 and 3, Offered, II R. 327). Since one paragraph in each of these two documents specifically provided that the conveyance was subject "to all other existing liens, incumbrances and assessments of any nature whatsoever," it is perfectly apparent that the next paragraph, providing that the conveyance was made subject "*to all other legal obligations of the Citizens Gas Company,*" was not mere surplusage, but was intended to subject the property to **ALL** legal obligations of Citizens Gas.

Moreover, the instrument of transfer and assignment of personal property (Bill, Exhibit E, I R. 122, Offered, II R. 327) states (I R. 125):

"4. This transfer and assignment also are made subject to all other legal obligations of said Company, *including the legal obligations of said Company, if any, under each of the leases hereinafter mentioned.*"

Section 5, which immediately follows the language just quoted, refers to the fact that separate instruments of assignment were being "executed and delivered contemporaneously with this instrument," assigning the 99-year Lease from Indianapolis Gas to Citizens Gas, and the lease on the space in the Majestic Building.

No one disputes that the City accepted the delivery of the deed to the real estate, the assignment of the Majestic Building lease and the instrument of transfer of the personal property and that the City also took over the property covered by those instruments of conveyance. In view of the language contained in those instruments of conveyance as quoted above, there can be no doubt that the transfer and assignment of the Citizens Gas prop-

erty was made subject to *all* the legal obligations of Citizens Gas, including its obligations under the Lease.

It is clear under the law of Indiana, as elsewhere, that anyone who accepts a conveyance of property is bound by all the terms and conditions set forth in such conveyance, and no amount of protestations or reservations can avoid such terms and conditions, if the property covered by the conveyance is accepted.

Haines v. Weirick, 155 Ind. 548; 58 N. E. 712 (1900);
Leach v. Rains, 149 Ind. 152; 48 N. E. 858 (1897);
Midland Railway Co. v. Fisher, 125 Ind. 19; 24 N. E. 756 (1890);
State ex rel. Lowry v. Davis, 96 Ind. 539, 543 (1884);
Louisville N. A. & C. Ry. Co. v. Power, 119 Ind. 269; 21 N. E. 751, 752 (1889);
Cudahy Packing Co. v. City of Omaha, 277 Fed. 49, 53 (C. C. A. 8th, 1921).

An official act by which the City in effect expressly assumed all the obligations of Citizens Gas was the act of its Board of Directors for Utilities in executing and delivering the Indemnity Agreement to Citizens Gas. On September 9, 1935, the Board of Directors and the Board of Trustees of Citizens Gas each adopted resolutions authorizing the transfer of the property of Citizens Gas to the City. As a part of these resolutions each Board required that "prior to making delivery of the foregoing instruments [i.e., the instruments of conveyance] to the said City of Indianapolis, the said officers shall take and receive from the said City an indemnity agreement in the words and figures as follows, to wit: * * *." (Stip. 21(a), II R. 638; PX Stip. 86, 87, III R. 844-5, Offered, II R. 327.) Each resolution then set forth the terms of the indemnity agreement which was required. In pursuance of the requirements contained in these resolutions the City, acting by its Board of Directors for Utilities, executed and delivered to Citizens Gas an

Indemnity Agreement, a copy of which is attached to the Bill as Exhibit J (Stip. 21 (b), II R. 638). That Indemnity Agreement reads in part (II R. 307, Offered, II R. 327):

> "Now, THEREFORE, in consideration of the premises and the conveyance, transfer and assignment as aforesaid, it is agreed by the City of Indianapolis, * * * that it will hereafter well and sufficiently save, defend, keep harmless and indemnify the said Citizens Gas Company of Indianapolis, its officers, Directors and Trustees, from any and all loss, damage, costs, charges, *liability* or expense on account of any pending actions or suits which have heretofore been instituted against said Company *and on account of any actions or suits which may hereafter be brought against said Company, arising from any and all acts or actions or omissions to act* on the part of said company of *any nature whatsoever.*"

The Court will observe that the City expressly agreed to "save, defend, keep harmless and indemnify" Citizens Gas from all *liability* arising from *any* acts or omissions to act on the part of said company. There is a well settled distinction in the law between an agreement to indemnify against "loss or damage," on the one hand, and an agreement to indemnify against "liability" on the other. When the agreement is to indemnify against loss or damage, the liability of the indemnitor does not accrue until the indemnitee has actually had to pay the loss or damage in question. On the other hand, when the agreement is to indemnify against *liability*, the indemnitor becomes liable immediately upon the recovery of a judgment against the indemnitee.

Iroquois Underwriters v. State, 211 Ind. 463; 5 N. E. (2d) 908, 910 (1937);

Campbell v. Maryland Casualty Co., 52 Ind. App. 228; 97 N. E. 1026, 1028 (1912);

Ohio Casualty Insurance Co. v. Beckwith, 74 F. (2d) 75, 77 (C. C. A. 5th, 1935).

The Indemnity Agreement protected Citizens Gas against "any and all" *liability*, so that the City becomes liable at once upon the recovery of any judgment against Citizens Gas. It is also clear that the Indemnity Agreement covers the obligatioas of Citizens Gas under the Lease. The Agreement by its express terms covers "*all* acts or actions or *omissions to act* on the part of said company *of any nature whatsoever.*" Obviously, these unlimited provisions covered the omission of Citizens Gas to fulfill its obligations under the Lease.

The City also became liable in equity for all the obligations of Citizens Gas as a consequence of its action in taking all the property of Citizens Gas and paying the entire consideration therefor to the stockholders and bondholders of Citizens Gas. The consideration for the transfer of the Citizens Gas property was given by the City directly to the stockholders and bondholders of Citizens Gas (Stip. 16, II R. 634-5), leaving Citizens Gas with no assets out of which to satisfy its obligations (Stip. 17(e), II R. 635). As a matter of law, the City thereby became responsible for all the liabilities of Citizens Gas.

> *Central Improvement Co. v. Cambria Steel Co.*, 210 Fed. 696, 706, 708-9 (C. C. A. 8th, 1913)—affirmed by the Supreme Court under name of *Kansas City Southern Ry Co. v. Guardian Trust Co.*, 240 U. S. 166 (1916);
>
> *Louisville N. A. & C. Ry. Co. v. Boney*, 117 Ind. 501, 20 N. E. 432, 433-4;
>
> *C. C. C. & St. L. Ry. Co. v. Prewitt*, 134 Ind. 557, 33 N. E. 367 (1893);
>
> *Seattle Investors Syndicate v. West Expendable Stores*, 177 Wash. 125, 30 P. (2d) 956, 957 (1934).

Still another official act by which the City became subject to the obligations under the Lease is the act of the

City Council in enacting "General Ordinance No. 82-1935" (DX 8, III R. 1017, Offered, II R. 429). By this Ordinance the Council formally ratified and approved all that the Board of Directors for Utilities had done in connection with the transfer of the trust property (III R. 1018). The Ordinance also stated that the public charitable trust (III R. 1019) "is hereby received and accepted, and the City of Indianapolis *hereby agrees to the conditions and terms accompanying such trust* and acknowledges itself bound to carry them out."

Among the "conditions and terms accompanying such trust" which the City Council thus formally accepted and agreed to were:

> (1) The acceptance of the conveyances subject to **ALL** obligations of Citizens Gas.
>
> (2) The execution of the Indemnity Agreement.
>
> (3) The payment of all consideration for the property to the stockholders and bondholders of Citizens Gas, thus leaving no assets for creditors.

By this express acceptance of these "conditions and terms" the City Council necessarily agreed that the City as successor trustee was assuming the obligations of Citizens Gas and was accepting the trust property subject to all those obligations.

The various acts of the City's counsel, its Board of Public Works and its Board of Directors for Utilities, and this Ordinance leave no doubt that the proper municipal authorities have taken the requisite action to make the Lease binding on the City as successor trustee. Clearly, the City's statement that "*no municipal authority* having the power to do so ever authorized the execution of the lease, ratified it or *agreed to be bound by its terms*" (Pet. 7) is directly contrary to the facts established by the record.

VI. THE CONTINUED ACQUIESCENCE IN THE VALIDITY OF THE LEASE BY CITIZENS GAS AND THE CITY FOR 22 YEARS, THEIR ACCEPTANCE OF THE BENEFITS UNDER THE LEASE, AND THEIR REPRESENTATIONS AS TO ITS BINDING EFFECT ON THE TRUST PRECLUDE BOTH OF THEM FROM ATTACKING THE LEASE.

One of the grounds on which the City relied for the allowance of writs of certiorari was its assertion that the Court of Appeals "refused to follow the Indiana decisions set out below on estoppel of a City" (Pet. 15). The fact is that the Court of Appeals made no decision on the question of estoppel *in pais*. In both of its petitions for rehearing in that court the City admitted, as to the estoppel of the City, that "there is no express holding to that effect" (IV R. 1313, Par. 7; IV R. 1351, line 1). The Court of Appeals can hardly have disregarded the Indiana decisions on a question as to which it made no holding.

The Court will notice that the City has made no reference to the importance of the conduct of Citizens Gas and the City during the 22-year period from 1913 to 1935 as

(a) showing the **practical construction** of the Articles and Franchise of Citizens Gas;

(b) showing the **practical construction** of the City's exercise in 1929 of its rights under those instruments; and

(c) creating a situation which precludes Citizens Gas and the City from denying the validity of the Lease because of their **laches.**

It is apparent that City's counsel ignore these facts because the conclusion is inescapable that the City and Citizens Gas construed the Franchise and Articles of Citizens Gas as giving it the power to enter into the Lease for 99 years (*supra*, pp. 70-74) and construed the City's resolution of March 20, 1929 as an election to take *all* the Citizens Gas property, including the leasehold estate (*supra*, pp. 101-06).

Likewise, the City ignores the fact that for a period of 22 years Citizens Gas accepted the benefits of the Lease and the City and the beneficiaries of the trust had all the benefits derived from the operation of the leased property as an integral part of the trust property (*infra*, pp. 129-30). This fact and the further fact that the *status quo* cannot be restored are of vital importance with respect to the claim that the Lease was beyond the powers of Citizens Gas. Even if we suppose for the purposes of argument that the Lease was *ultra vires* Citizens Gas, the facts just referred to would preclude both the City and Citizens Gas from denying their liability under the Lease. It is well settled law in Indiana that a corporation which has had the benefits of a contract and which cannot restore the *status quo* cannot refuse to perform its part of the bargain on the ground that the contract was beyond its powers.

Wright v. Hughes, 119 Ind. 324, 21 N. E. 907, 909 (1889);

Huntington Brewing Co. v. McGrew, 64 Ind. App. 273, 112 N. E. 534, 536-7 (1916);

Frank Bird Transfer Co. v. Massachusetts Bonding & Ins. Co., 86 Ind. App. 259, 153 N. E. 816, 818-19 (1926).

The City was clearly right and correctly interpreted the Indiana decisions when, in its capacity as successor trustee, it said in the *Williams* case (PX Stip. 37, II R. 807, Offered, II R. 328):

> "Third. It appearing that the lease so approved by the Public Service Commission has been in full force and effect for nearly 17 years and that many millions of dollars have been expended in reliance upon its validity, *all persons* including plaintiffs (if they have any standing under any circumstances) *are estopped to question the validity of the same.*"

This statement was even more applicable five years later, when the City first asserted that the Lease was not binding

for its full term. The City's *present* contentions are directly contrary to those advanced by it in the *Williams* case. It was right in the *Williams* case; it is wrong now.

Although the Court of Appeals made no express holding on the question of estoppel, it would have been fully warranted in holding that both Citizens Gas and the City are estopped to deny that the Lease is valid for its full term. We shall first discuss the estoppel against Citizens Gas, which is equally binding upon the City.

(a) Citizens Gas is Estopped by its Conduct From Denying That the Lease is Valid for its Full Term.

It should be noted here that it is not essential to the City's liability that *it* be estopped by its own conduct or that *it* be precluded by the acceptance of benefits under the Lease, since it became liable for all the obligations of Citizens Gas (*supra*, pp. 111-17). The liabilities of Citizens Gas, predicated on its own laches or the estoppel against it, are among those liabilities to which the trust property is subject in the hands of the City. This same result follows as a matter of law from the fact that the City, as successor to Citizens Gas as trustee, is in privity with Citizens Gas and is, therefore, bound by any laches of or estoppel against Citizens Gas and by the adjudications to which Citizens Gas was a party.

Northern Pacific Ry. Co. v. Slaght, 205 U. S. 122, 128 (1907);

Bedon v. Davie, 144 U. S. 142 (1892);

Knerals v. Florida Central & P. R. Co., 66 Fed. 224, 233 (C. C. A. 5th, 1894); *certiorari* denied 159 U. S. 257;

Mull v. Orme, 67 Ind. 95, 98 (1879);

Roller v. Catlett, 118 Va. 185; 86 S. E. 909, 910 (1915).

Perhaps the most compelling reasons that estop Citizens Gas to deny the validity of the Lease for its full term

arise from the various adjudications of the validity of the Lease in proceedings to which Citizens Gas was a party and in which it insisted upon the validity of the Lease. Before the Public Service Commission, in the *Fishback* case, and in the *Williams* case Citizens Gas insisted that the Lease here in question was valid and that it had power and authority to make such a Lease. In each instance this contention was sustained. There are, however, other equally compelling reasons why Citizens Gas is estopped to deny that the Lease is valid for its full term of 99 years.

We have set forth above (pp. 10-11) some of the representations made by Citizens Gas through Blodget & Company in connection with the sale of Indianapolis Gas Bonds. Without duplicating those quotations we call the Court's attention to a few other instances in which Citizens Gas asserted that it had leased the Indianapolis Gas property for 99 years for a rental which included payment of the interest on the Bonds.

In 1916 the following representation was made through Blodget & Company (PX Dep. 9, II R. 694, Offered, II R. 420, 563):

> "* * * In October, 1913, with the consent of the Public Service Commission of Indiana, the Indianapolis Gas Company was leased to the Citizens Gas Company *for 99 years*, whereby the latter company controls the entire gas business of Indianapolis. As a part of the lease, the Citizens Gas Company guaranteed the interest on the Indianapolis Gas Company bonds, their refunding at maturity and 6% dividends on its $2,000,000 capital stock."

Beyond this, the excerpts from Poor's and Moody's Manuals (PX 95A-98A, 99-110, III R. 905-922, Offered, II R. 358-9) show a continuous representation during all the period from 1915 to 1935 that Citizens Gas had leased the property and business of Indianapolis Gas for 99 years, and that by the terms of the Lease Citizens Gas paid the

interest on the Bonds. For example, Poor's Manual of Public Utilities for 1922 states (PX 96-A, III R. 907):

> "By the terms of the merger the Citizens Gas Co. leases the property of The Indianapolis Gas Co. *for a period of 99 years* and pays the interest on $4,833,000 Consolidated Mortgage bonds, and will pay the interest on such additional bonds as may be issued from time to time for extensions to the leased property. * * *"

Moody's Manual of Public Utilities for 1923 states (PX 98-A, III R. 912-13):

> "By the terms of the lease, the Citizens' Gas Co. leases the property of the Indianapolis Gas Co. *for a period of 99 years* and pays the interest on $4,833,000 Consolidated Mortgage bonds, and will pay the interest on such additional bonds as may be issued from time to time for extensions to the leased property. * * *"

A statement substantially identical with the one just quoted appeared in Moody's Manual each year from 1924 to 1934, inclusive (PX 99-109, III R. 915, Offered, II R. 359).

The various representations that the Lease was valid and binding for its full term were so widespread and so continuous over a period of more than 21 years that they must have come to the attention of any of the investing public who were at all interested. The public purchased Indianapolis Gas Bonds which were issued after the making of the Lease (Stip. 3 (e), II R. 619-20; 10 (a), II R. 627) and marketed upon representations that Citizens Gas had a 99 year Lease and had guaranteed the payment of interest and the refunding of the Bonds. There can be no doubt that the investing public was not only induced to buy but was induced to continue to hold the Bonds of Indianapolis Gas as a result of the representations made by Citizens Gas continuously over a period of more than 21 years.

Having sold the Indianapolis Gas Bonds on the representation that Citizens Gas had a 99 year Lease and would pay the interest on the Bonds during that period,

and having made the same representation to the investing public through Poor's and Moody's Manuals over a period of more than 20 years, and having insisted, whenever the question arose in litigation, that the Lease was valid for its full term and binding on itself and the beneficiaries of the trust, it is clear that Citizens Gas is estopped from denying that the Lease is a binding obligation over the entire 99 year period of the Lease.

The City asserts (Pet. 12) that plaintiff did not prove that any Bondholders relied on the representations concerning the Lease. However, the rule is well established that where representations have been made in the course of a transaction, *it is assumed in the absence of facts showing the contrary* that the representations were relied on. In other words, *the defendant* bears the burden of showing that the representations were *not* relied upon.

Section 1515 of the recent edition of *Williston on Contracts* contains the following statement (5 *Williston*, p. 4229):

> "* * * *Where representations have been made in regard to a material matter and action has been taken, in the absence of evidence showing the contrary,* **it will be presumed** *that the representations were relied on.*"

This statement is fully substantiated by the following authorities, among others:

Restatement of the Law of Contracts, Section 479;

Hicks v. Stevens, 121 Ill. 186; 11 N. E. 241, 243 (1887);

Wilson v. Carpenter's Administrator, 91 Va. 183; 21 S. E. 243, 245 (1895);

Anderson v. Donahue, 116 Minn. 380, 133 N. W. 975, 976 (1911);

Batson v. Alexander City Bank, 179 Ala. 490; 60 So. 313, 316 (1912);

Holbrook v. Burt, 22 Pick. 546, 552 (Mass. 1839).

The application of these authorities to the situation here before the Court is clear. Over a period of many years Citizens Gas in selling its Indianapolis Gas Bonds represented that it had a 99 year Lease on the mortgaged property and that it had guaranteed the payment of the interest and the refunding of the principal on the Bonds. It is difficult to imagine any representations which could have been more material in inducing prospective purchasers to buy these Bonds. Under these circumstances it was not incumbent upon plaintiff to produce any Bondholders to state expressly that they had relied on these representations. On the contrary, the burden was upon the City and Citizen Gas to show that these representations were *not* relied upon. No attempt has been made to sustain this burden.

(b) The City is Estopped by Its Own Conduct From Denying That the Lease is Valid for Its Full Term.

The City is estopped by its own conduct, as well as that of Citizens Gas, from denying that the Lease is valid for its full term. We have already discussed the City's conduct in the proceedings before the Public Service Commission, in the *Fishback* case, in the *Todd* and *Cotter* cases, and in the *Williams* case (*supra*, pp. 6-16). We have also shown that from the time of the resolution of March 20, 1929 demanding the transfer of the trust property, until July, 1935, the City openly took the position that the Lease was valid and part of the trust estate and showed by its conduct that it was intending to take over the leasehold as part of the trust property (*supra*, pp. 101-06).

As stated above (p. 8), all defendants in the case at bar have admitted (I R. 137, 149, 223) the allegations in subdivision 8 of the Bill that (I R. 9-10):

> "In all of the proceedings before the Public Service Commission * * * the defendant, the City of Indianapolis, was duly served with notice to appear and

through its duly appointed and authorized counsel did in fact appear and participate therein. *No objection* by petition to said Commission or otherwise *was ever made by said City of Indianapolis either to the execution of said lease or to the orders made by said Commission*, * * *."

With reference to the *Fishback* case plaintiff alleges in subdivision 9 of the Bill (I R. 11):

"Before said cause came on to be heard the defendant, the City of Indianapolis, through the Board of Public Works thereof had formally accepted and recognized said lease by requiring extensions to be made in the lines and mains of The Indianapolis Gas Company, as provided in subsection 6 of section 27½ of said lease, *which provision had been inserted in said lease at the instance of the City of Indianapolis*, * * *."

Indianapolis Gas and Citizens Gas admit this allegation in its entirety (I R. 137, 224). The City admits all the facts thus pleaded (I R. 151), but denies the inference that such facts amounted to an acceptance and recognition of the Lease (II R. 320-1). The fact that this admission by the City was deliberate and carefully considered is shown by the fact that this denial was first made by an amendment filed more than 2 years after the answer, at which time the original admission was no doubt closely scrutinized (II R. 320-21).

In its answer in the *Cotter* case, filed June 4, 1929, the City admitted that the Lease was made "with the full consent and approval of the City" (PX 89, III R. 847, at 859, Offered, II R. 334, III R. 1057). In this answer the City also admitted (III R. 860):

"* * * that since 1913 the Citizens Gas Company *with full knowledge and consent of the City* has operated the combined properties under the provisions specified by the Commission * * *."

(These admissions are quoted more fully at pages 13-14 above.) In other words, the City admitted that at that time Citizens Gas had operated under the Lease for nearly sixteen years "with full knowledge and consent of the City."

It therefore appears by the City's own admissions that it participated in the proceedings before the Public Service Commission, that the Lease was entered into "with the full consent and approval of the City"; that at least one provision "had been inserted in said lease at the instance of the City"; that the City soon required compliance with this provision; that the City never made any objection to the execution of the Lease; that it has never sought to prevent the order of the Public Service Commission approving the Lease from being carried into effect; and that, on the contrary, "since 1913 the Citizens Gas Company with full knowledge and consent of the City has operated the combined properties under the provisions specified by the Commission * * *."

The City asserts that no Bondholder "relied on or was influenced by any acts of the City" (Pet. 29). Our answer to this same contention with respect to the estoppel against Citizens Gas (*supra*, pp. 123-4) is equally applicable here. Furthermore, the representations concerning the Lease were sufficiently important and widespread and continued over such a long period of time that the City owed the duty to speak if it had any intention to disavow those representations or to repudiate the Lease. The City could not blind its eyes to these representations as though it had no interest in the public charitable trust and the conduct of Citizens Gas in the management of its affairs. As prospective trustee and as the representative of the inhabitants of the City, the beneficiaries of the trust, the City was interested in the conduct of Citizens Gas and the obligations it incurred, particularly since the City might later become subject to those very same obligations. As

we have seen, the City on numerous occasions did in fact state its position concerning the Lease and in each case, over a period of more than 22 years, it took the position that the Lease was a valid and binding obligation for its full term.

The only other argument by which the City seeks to avoid the estoppel against it is that the estoppel "cannot be founded upon acts done by municipal officers in excess of their authority" (Pet. 29). The acts of the municipal officers which estop the City to deny the validity of the Lease are in complete accord with the various official acts of the duly authorized representatives of the City by which the City incurred the obligations of the Lease (*supra*, pp. 98-117). Also, the City has never questioned the authority of any particular officer to do any of the acts upon which plaintiff's claim of estoppel is based, either in the case at bar, or, so far as we are advised, in any other case or at any other time. The City's only contention in this respect has been that the various acts in question were not authorized because they were prohibited by certain statutes. This contention has already been shown to be wholly devoid of any foundation (*supra*, pp. 93-8).

The case of *Illinois Trust & Savings Bank v. Arkansas City*, 76 Fed. 271 (C. C. A. 8th, 1896) is of peculiar interest in connection with the City's efforts to avoid an estoppel. The trustee of a mortgage by a water company brought a suit to foreclose, in which it also sought to recover from the city on its liability to pay hydrant rentals. The District Court denied recovery against the city and the trustee appealed. The city had contracted for the erection of the water works, which contract included certain terms as to its payment of hydrant rentals. In 1887 the city council formally approved the water works plant, acknowledging that it had been properly finished and put in operation. Thereafter the money was loaned to the water company and the mortgage deed pledged the company's rights

against the city under the contract to pay hydrant rentals. In 1891 the city attempted to repudiate the contract and claimed that the ordinance was invalid because it was to continue in effect for a period of 21 years and because it was not approved by the necessary majority of the council. In denying these arguments and holding that the city was estopped to deny its liability after bonds had been sold to the public in reliance upon the statements and representations of the city, Judge Sanborn, speaking for the court, said (p. 293):

> "There is another and a conclusive reason why this city cannot maintain any of the defenses it has interposed in this suit. It is that it cannot accept the benefits and repudiate the burdens of its contract. It is that *it cannot be heard to deny the truth of the representations of the existence and of the execution of this contract, which its records and its conduct have constantly made, and in reliance upon which,* the gas company and the water company constructed and extended the waterworks, and the *bank and the bondholders loaned their money.* No principle is more universal in the jurisprudence of civilized nations, no principle is more equitable in itself, or more salutary in its effects, than that no one may, to the damage of another, deny the truth of statements and representations by which he has purposely or carelessly induced that other to change his situation. * * *
>
> "In a business transaction like that of procuring the construction of waterworks and the use of water for itself and its inhabitants, *a municipality is subject to this principle to the same extent as a private corporation. The same rules govern its business transactions that govern the negotiations of private individuals and corporations.*"

Language more closely applicable to the facts of the case here before the Court could hardly have been written if Judge Sanborn had had our precise situation before him. Over a period of 22 years both Citizens Gas and the City joined in insisting before the Public Service Com-

mission, in the *Fishback* case, in the *Williams* case, and in many other ways, that Citizens Gas had a 99-year Lease of the property of Indianapolis Gas and that the Lease was valid and binding for its full term.

We submit, to use Judge Sanborn's language, that neither the City nor Citizens Gas can "be heard to deny the truth of the representations of the existence and of the execution of this contract, which its records and its conduct have constantly made, and in reliance upon which * * * the bondholders loaned their money."

(c) The City is Precluded by Its Own Laches and the Laches of Citizens Gas From Denying That the Lease is Valid and Binding For Its Full Term.

The laches of Citizens Gas and the City which preclude the City from denying that the Lease is binding on the public charitable trust for its full term are demonstrated by the following facts:

1. Citizens Gas operated under the Lease for substantially 22 years, during all of which time Citizens Gas and the beneficiaries of the trust enjoyed all the benefits from the use of the leased property. These benefits included not only the income derived, but also the unquestioned public benefit flowing from the elimination of competition and the duplication of facilities. Upon the execution of the Lease Indianapolis Gas abandoned its operating personnel and ceased its efforts to expand its system. Citizens Gas has greatly improved its competitive situation as a result of the Lease and it has so unified the plants and systems of the two companies that it would be difficult, if not impossible, for Indianapolis Gas to resume independent operations at this time (II R. 349-50). This increasingly disadvantageous situation of Indianapolis Gas is of vital concern to the Bondholders, to whom Indianapolis Gas now owes more than $8,500,639, and is important to plaintiff as trustee of the security for that indebtedness.

It is impossible to estimate at this time the full extent of the benefits accruing to the public charitable trust from the elimination of competition, for it is impossible to say what extensions Indianapolis Gas might have made if it had been left free to expand and extend its operations. The facts affirmatively appear, however, that the competition of Indianapolis Gas was regarded as "dangerous to the company and the community" (*supra*, pp. 6-7); that Indianapolis Gas was in the course of building new by-product coke ovens when the Lease was executed (Lease, § 9, I R. 60-1; PX 91, III R. 886, at 894); and that the anticipated profits to Citizens Gas and the community from the proposed Lease were very substantial (PX 91, III R. 886, at 889-93, Offered II R. 342).

2. The loss of available evidence and witnesses is one of the well established grounds for invoking the defense of laches. The facts as they existed in 1913 are necessarily difficult if not impossible to establish at this time. This is borne out by the fact that even the pleadings before the Public Service Commission have disappeared and cannot be found (PX 88, III R. 846, Offered, II R. 331) and most, if not all, of the evidence submitted at that time is no longer available. Mr. Forrest, who acted as General Manager of Citizens Gas during all of this critical period, had died before the trial and was unavailable as a witness. His testimony alone would have been invaluable to the plaintiff. There is no reason to doubt that he would have substantiated on the witness stand the statements which he made to the stockholders of Citizens Gas (PX 91-94, III R. 886-904, Offered, II R. 342), to The Union Trust Company of Indianapolis (PX 90, III R. 879, Offered, II R. 356) and to Blodget & Company (PX Dep. 10, II R. 607, Offered, II R. 420, 564). The significance of these statements clearly appears from the representative excerpts therefrom quoted above (pp. 6-7).

3. The City was a party to proceedings in which the effect of the Lease on the public charitable trust was fully presented and in which it was incumbent on the City to speak if it had any intention of ever repudiating the Lease. This was the situation in the Public Service Commission proceedings and in the *Fishback* case, before the City demanded the transfer of the trust property. In March, 1929 the City notified Citizens Gas that it was exercising its right to take over the trust assets. From that time on the City had an even more direct and immediate interest in the question whether the Lease was binding on the trust. In March, 1930 Williams sued in behalf of the public charitable trust to remove the Lease as "an unlawful cloud upon the title of said Municipal City, as trustee" (II R. 772). In that suit, where the rights of the City itself as successor trustee were directly involved, the City asserted that the Lease was valid and that the question of its validity was foreclosed by the decision of the Public Service Commission and by the failure to raise the question over a period of 17 years (II R. 806-8).

From the time of the initial proceedings before the Public Service Commission, the City had numerous opportunities to speak and assert the supposed rights now set up, and in each instance the City either failed to speak or took the affirmative position that the Lease was valid and binding on the public charitable trust. Plainly, on each of these occasions, every consideration of justice required the City to speak or forever after hold its peace.

In *Ryason v. Dunten*, 164 Ind. 85; 73 N. E. 74 (1905), the Indiana Supreme Court quoted with approval the following statement of Mr. Justice Brewer* (p. 77):

> "'No doctrine is so wholesome, when wisely administered, as that of laches. It prevents the resur-

* This quotation is taken from an opinion written by Mr. Justice Brewer when sitting on Circuit. *Naddo v. Bardon*, 51 Fed. 493, 495 (C. C. A. 8th, 1892).

rection of stale titles, and forbids the spying out from the records of ancient and abandoned rights. It requires of every owner that he take care of his property, and of every claimant that he make known his claims. It gives to the actual and longer possessor security, and induces and justifies him in all efforts to improve and make valuable the property he holds. It is a doctrine received with favor, because its proper application works out justice and equity, and often bars the holder of a mere technical right, which he has abandoned for years, from enforcing it when its enforcement will work large injury to many.' "

The attempt of the City to *attack* the validity of the Lease after the lapse of 22 years during which it not only *acquiesced in* but *insisted upon* the Lease being held valid, presents a case in which, in the language of Chief Justice Fuller, "The hour-glass must supply the ravages of the scythe, and those who have slept upon their rights must be remitted to the repose from which they should not have been aroused." *

VII. THE RULE OF ERIE RAILROAD COMPANY v. TOMPKINS REQUIRED THE DECISION MADE. THE CIRCUIT COURT OF APPEALS AND THE COURT FULLY COMPLIED WITH THAT RULE.

The rule of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, required the result reached by the Circuit Court of Appeals. Every Indiana decision bearing upon the validity of the Lease compels the conclusion that it is valid for its full term. The City's *present* contentions as to the validity of the Lease were all conclusively negatived, *as a matter of Indiana law*, in *Williams v. Citizens' Gas Co.*, 206 Ind. 448, 188 N. E. 212 (see p. 89, *supra*). Entirely aside from the question of *res judicata*, that decision conclusively established the law of Indiana which the Court of Appeals was bound to follow.

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* *Hammond v. Hopkins*, 143 U. S. 224, 274 (1892).

The City's assertion that "The Circuit Court of Appeals wholly disregarded the applicable Indiana law in four important particulars" (Pet. 12) is wholly unfounded. Let us examine briefly the respects in which the Court of Appeals is alleged to have disregarded the applicable Indiana law:

(1) *Estoppel against the City* (Pet. 12, 15). The Court of Appeals made no holding on the question of estoppel *in pais*, although it would have been fully warranted in doing so (*supra*, pp. 120-9). That court cannot have disregarded the Indiana law on a question as to which it made no holding.

(2) *Res judicata* (Pet. 12, 15). The City admits (Reply Br. 8) that the decisions of the Public Service Commission are "conclusive on the courts in a collateral action" and that the Commission decided that the Lease "was advisable and in the public interest." In addition, the *Williams* case conclusively determined all the issues here presented as to the validity of the Lease. The City's arguments—that the applicable Indiana cases demonstrate that the decision in the *Williams* case is not *res judicata*—have been shown to be wholly unfounded (*supra*, pp. 76-89).

(3) *Construction of grants by a municipality* (Pet. 13, 15). The decision of the Court of Appeals that Citizens Gas had power to execute the Lease and make it binding on the public charitable trust for its full term is fully supported by the facts and by the law applicable thereto (*supra*, pp. 56-74). That decision is in complete accord with the decision of the Public Service Commission in 1913, the decision in *Fishback v. Public Service Commission*, 193 Ind. 282, 138 N. E. 346 (1923), the decision in *Williams v. Citizens' Gas Co.*, 206 Ind. 448, 188 N. E. 212, 215-16 (1934), and the uniform practical construction of the Franchise and Articles by Citizens Gas and the City over a period of 22 years. None of the cases relied upon by the City have

any tendency to indicate that Citizens Gas did not have full authority to make the Lease.

(4) *The alleged statutory prohibitions* (Pet. 13, 16). The statutes on which the City relies do not apply to its power to receive trusts and "to agree to conditions and terms accompanying the same" (*supra*, pp. 93-5). Beyond that, the validating acts of 1929 remove any possible doubt as to the authority of the City to take over this particular trust, including the leasehold estate and its accompanying obligations (*supra*, pp. 96-7).

It is, therefore, clear that in upholding the validity of the Lease for its full term the Circuit Court of Appeals followed the controlling Indiana decisions and thereby conformed to the rule laid down by this Court in *Erie R. R. Co. v. Tompkins*.

VIII. THE CIRCUIT COURT OF APPEALS PROPERLY HELD THAT PLAINTIFF'S JUDGMENT SHOULD INCLUDE INTEREST ON THE COUPONS AFTER THEIR MATURITY AND INTEREST ON THE JUDGMENT ITSELF, BUT IN EACH CASE THE RATE OF INTEREST SHOULD BE SIX PER CENT.

The fact that the Circuit Court of Appeals awarded plaintiff interest on the unpaid coupons from the dates of their respective maturities and interest on the judgment itself was not urged as a ground for allowing a writ of certiorari in this case. Also, the City did not argue these questions in the Court of Appeals, either in its original briefs or in either of its petitions for rehearing (IV R. 1309, 1343). Thus, under the well settled procedure of this Court, plaintiff's right to interest on interest and to interest on the judgment itself is not open to dispute in this Court.

Kessler v. Strecker, 307 U. S. 22, 34 (1939);
General Talking Pictures Corp. v. Western Electric Co., 304 U. S. 175, 177-9 (1938);

Connecticut Ry. & L. Co. v. Palmer, 305 U. S. 493, 496 (1939).

Furthermore, plaintiff's right to interest both on the unpaid and overdue coupons and on the judgment itself clearly appears. Each Bond bears a coupon with the blanks appropriately filled in but otherwise reading as follows (I R. 27):

"COUPON.

$25.00.

"THE INDIANAPOLIS GAS COMPANY will pay to the bearer, at the office of the Trust Company of America in the City of New York, Twenty-five dollars in gold coin of the United States of America, on the first day of ....., being six months' interest on its First Consolidated Mortgage Five Per Cent. Gold Bond No. .....

.....

Treasurer."

It is clear under the law of Indiana, as it is throughout the country, that such coupons bear interest after maturity at the legal rate of interest. In *City of Jeffersonville v. Patterson*, 26 Ind. 15 (1866), the Supreme Court of Indiana, speaking through Chief Justice Gregory, expressly held that coupons bear interest after maturity at the rate of 6% per annum. Thus the court said (p. 16):

> "We think that the interest warrants in question, according to commercial usage, and under our statute, bear interest from maturity."

Similarly, in *Gelpcke v. Dubuque*, 68 U. S. (1 Wall.) 175 (1863), this Court said (p. 206):

> "Bonds and coupons, like these, by universal commercial usage and consent, have all the qualities of commercial paper. If the plaintiffs recover in this case, they will be entitled to the amount specified in the coupons, with interest and exchange as claimed."

The Indiana law on this question is clearly stated in *Burns Indiana Statutes*, 1933, § 19-2003, which provides that:

> "On money due on any instrument in writing, * * * interest shall be allowed at the rate of six dollars ($6.00) a year on one hundred dollars ($100.00)."

As to interest on the judgment, Section 966 R. S. (28 U. S. C. § 811) specifically provides that interest shall be allowed on all judgments in civil causes in a district court where, by the law of the state in which the the district court is held, interest may be recovered in a similar action in the state courts. Thus we are remitted to the Indiana law to determine the rate of interest recoverable on the judgment.

The Indiana statutes expressly confer the right to interest "on judgments for money" (*Burns Indiana Statutes, 1933*, § 19-2002, quoted *infra*, p. 137). Therefore, there can be no doubt that the Court of Appeals was correct in awarding plaintiff interest on the overdue coupons and on the judgment itself.

The *rate* of interest allowed by the Court of Appeals in each instance was, however, 5% only, whereas it is apparent that the correct rate in each instance is 6%. The difference between these two rates amounted to over $30,000 as of October 1, 1940. The issue as to the proper rate to be applied to the two situations in question was presented by plaintiff's cross-petition for writs of certiorari (Nos. 423 and 424).

Under the provisions of the Indiana law it is clear that the rate of interest on the overdue coupons should be 6%. The controlling statute provides that interest at the rate of 6% shall be allowed "on money due on any instrument in writing" (*Burns Indiana Statutes, 1933*, § 19-2003, quoted more fully above). Each unpaid coupon is an "instrument in writing" and comes within the express provisions of this statute.

See also *Gale v. Cory*, 112 Ind. 39, 13 N. E. 108 (1887) and the opinion in the same case on petition for rehearing, *Gale v. Cory*, 112 Ind. 39, 14 N. E. 362, at 363.

The Indiana statutes also clearly provide for interest at the rate of 6% on "judgments for money." Thus, the statute which applies to this situation reads:

> "§ 19-2002. *Judgments for money—interest on*—Interest on judgments for money, whenever rendered, shall be from the date of the return of the verdict or finding of the court, until the same is satisfied, at the rate per cent agreed upon in the original contract sued upon, not exceeding eight (8) per cent where the obligor in such contract is a person other than a corporation; and if there be no contract by the parties, then at the rate of six (6) per cent per annum." (*Burns Indiana Statutes, 1933.*)

The overdue interest coupons involved in this case each contain a promise to pay $25 and each coupon constitutes the "original contract sued upon." The coupons, however, are silent as to the rate of interest to be paid *on the coupons* themselves. There is, therefore, no "rate per cent agreed upon" as to the coupons, thus making the express provisions of the above statute directly applicable to this case.

The Circuit Court of Appeals held that the parties had themselves specified the rate of interest to be paid on the overdue coupons and that the contract of the parties on the subject superseded the provisions of these statutes (IV R. 1305-6). This holding that there are contractual provisions which specify the rate of interest is based on (1) the statement in each coupon that the $25 to be paid thereon is "interest on its First Consolidated Mortgage *Five Per Cent.* Gold Bond No. ....." (emphasis is the court's), and (2) the statement in each Bond that Indianapolis Gas agrees to pay the face amount of the Bond "with interest * * * at the rate of five per cent. per

annum" (IV R. 1305). Obviously, the statement that the $25 to be paid on the coupon is the interest on a 5% Bond has nothing to do with the rate of interest to be paid on the $25 itself, after it has become due and unpaid. Similarly, the fact that the Bond contains an agreement by the mortgagor to pay interest *on the Bond* at the rate of 5% is far from being an agreement that the rate of interest *on the coupons* after their maturity shall be 5%.

The fact is that there is no contractual provision as to the rate of interest on the coupons. Therefore, under the express provisions of the Indiana statutes, the rate of interest on the coupons after their maturity is 6% and the rate of interest on the judgment for the overdue and unpaid coupons is also 6%.

CONCLUSION.

There is no reason to doubt the federal jurisdiction of this case. The fact that plaintiff sought and obtained a judgment against Indianapolis Gas which now amounts to more than $1,700,000 is enough without more to prevent the alignment of Indianapolis Gas with Chase as a party plaintiff. The decisions of this Court and the Circuit Courts of Appeals are unanimous in holding that there will be no realignment for jurisdictional purposes when there is a single substantial controversy between the plaintiff and the defendant sought to be realigned.

The City's claim that it has been denied due process of law is without substance. The decision of the Court of Appeals that the City's allegations of burdensomeness presented no valid defense is clearly right, particularly in view of the decision of the Public Service Commission, the decision of the Indiana Supreme Court in the *Williams* case, and the conduct of the City and Citizens Gas in accepting the benefits of the Lease for nearly 22 years and declaring during the same period that the Lease was valid

and binding on the public charitable trust. No constitutional rights of the City were violated when the Court of Appeals refused to give it an opportunity to prove something which would be wholly immaterial and ineffectual as a defense, even if it were proved.

As to the claim that the Court of Appeals failed to follow the Indiana law, the fact is that its decision is in complete accord with the applicable law of Indiana (except as to the rate of interest on the overdue coupons and on plaintiff's judgment), and in particular, that decision is fully supported by every Indiana decision bearing upon the validity of the very Lease here in question. The City's attempt to have this Court overrule the decision of the Indiana Supreme Court in *Williams v. Citizens' Gas Co.*, 206 Ind. 448, 188 N. E. 212 (1934), holding the Lease to be a binding obligation of the public charitable trust, is contrary to rather than in support of *Erie R. R. Co. v. Tompkins*.

The plaintiff is in the fortunate position of being legally right and at the same time sustained by overwhelming equities. In direct contrast with plaintiff's situation there is nothing in the conduct of the City to recommend its position to the conscience of the Chancellor. For 22 years it consistently took the position that the Lease here in question was valid and binding and on two occasions it assisted in defending the Lease against suits by beneficiaries of the public charitable trust. Through all this period the City insisted that the Lease was beneficial; that the making of the Lease was within the power of Citizens Gas; that the Lease did not prevent carrying out the contract between the City and Citizens Gas; that the decision of the Public Service Commission as to the validity of the Lease could not be collaterally attacked by Williams, a beneficiary of the public charitable trust; and, that "It appearing that the lease * * * has been in full force and effect for nearly 17 years * * * all persons * * * are estopped to question

the validity of the same" (PX Stip. 37, II R. 807, Offered, II R. 328). Finally, as late as June 27, 1935 (less than three months before taking over the property of Citizens Gas), the City sold its Revenue Bonds on the representation that it was about to take over the entire gas system operated by Citizens Gas, including that leased from Indianapolis Gas, and that payment of the bonds would be secured by a charge on the revenues from the entire system to be "owned and/or operated by the City."

In such a situation the decision of this Court in *Union Pacific Ry. Co. v. Chicago, etc. Ry. Co.*, 163 U. S. 564 (1896), should be a guiding light. In that case, which had many points of similarity to the one now before this Court, it was argued that a contract between two railroad companies for a period of 999 years was *ultra vires* and invalid, particularly as interfering with the ability of one of the railroads to render adequate service to the public. This Court sustained the validity of the contract and in an opinion written by Chief Justice Fuller quoted from the opinion of Mr. Justice Brewer, in deciding the case on circuit, as follows (p. 604):

> "It is to the higher interest of all, corporations and public alike, that it be understood that there is a binding force in all contract obligations; that no change of interest or change of management can disturb their sanctity or break their force; but that the law which gives to corporations their rights, their capacities for large accumulations, and all their faculties, is potent to hold them to all their obligations, and so make right and justice the measure of all corporate as well as individual action."

We submit that the sanctity of contract obligations should be recognized and that parties should not be allowed to accept all the benefits of a contract over a period of 22 years, at the same time affirmatively insisting upon the validity of that contract, and then to repudiate the obliga-

tions under that contract because they believe it advantageous for them to do so.

Respectfully submitted,

HOWARD F. BURNS,
JOHN ADAMS,
HARVEY J. ELAM,
Counsel for The Chase National Bank of New York, Trustee.

BAKER, HOSTETLER & PATTERSON,
Union Commerce Building,
Cleveland, Ohio,
Of Counsel.

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APPENDIX A.

Excerpts From the Public Service Commission Law.

(The Shively-Spencer Act.)

CHAPTER 76—LAWS OF 1913.

(pp. 167-8, 198-202, 214.)

AN ACT concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission.

[*H. 361. Approved March 4, 1913.*]

Public Service Commission.

SECTION 1. *Be it enacted by the general assembly of the State of Indiana*, That the term "public utility" as used in this act shall mean and embrace every corporation, company, individual, association of individuals, their lessees, trustees or receivers appointed by any court whatsoever, and every city or town, that now or hereafter may own, operate, manage or control any street railway or interurban railway or any plant or equipment within the state for the conveyance of telegraph or telephone messages, or for the production, transmission, delivery or furnishing of heat, light, water or power, or for the furnishing of elevator or warehouse service either directly or indirectly to or for the public.

The term "municipal council" as used in this act shall mean and embrace the common council, the board of trustees or any other governing body of any town, or city wherein the property of the public utility or any part thereof is located.

The term "municipality" as used in this act shall mean any city or town wherein property of a public utility or any part thereof is located.

The term "rate" as used in this act shall mean and include every individual or joint rate, fare, toll, charge, rental or other compensation of any public utility or any two or more such individual or joint rates, fares, tolls, charges, rentals or other compensations of any public utility or any schedule or tariff thereof.

The term "service" is used in this act in its broadest and most inclusive sense and includes not only the use or

accommodation afforded consumers or patrons but also any product or commodity furnished by any public utility and the plant, equipment, apparatus, appliances, property and facility employed by any public utility in performing any service or in furnishing any product or commodity and devoted to the purposes in which such public utility is engaged and to the use and accommodation of the public.

The term "commission" used in this act shall mean the public service commission of Indiana hereby created.

The term "indeterminate permit" as used in this act shall mean and include every grant, directly or indirectly, from the state to any corporation, company, individual, association of individuals, their lessees, trustees or receivers appointed by any court whatsoever, of power, right or privilege to own, operate, manage or control any plant or equipment, or any part of a plant or equipment, within this state, for the production, transmission, delivery or furnishing of heat, light, water or power, either directly or indirectly, to or for the public, or for the transportation by a street railway or interurban of passengers or property between points within this state, or for the furnishing of facilities for the transmission of intelligence by electricity between points within this state, which shall continue in force until such time as the municipality shall exercise its option to purchase, as provided in this act, or until it shall be otherwise terminated according to law. This act shall be commonly known and referred to as the Shively-Spencer Utility Commission Act.

* * * * *

Transfer or Lease of Property.

SEC. 95. No public utility as defined in section one (1) of this act shall transfer or lease its franchise, works or system or any part of such franchise, works or system to any other person, or corporation or contract for the operation of its works or system, without the written consent of the commission after a hearing. The permission and approval of the commission to the assignment, transfer or lease of a franchise under this section shall not be construed to revive or validate any lapsed or invalid franchise or to enlarge or add to the powers and privileges contained in the grant of any franchise or to waive any forfeiture.

No such corporation shall directly or indirectly acquire the stock or bonds of any other corporation incorporated for or engaged in the same or a similar business, or purporting to operate or operating under a franchise from the same or any other municipality unless authorized so to do by the commission. Save where stock shall be transferred or held for the purpose of collateral security, only with the consent of the commission empowered by this act to give such consent, shall a corporation foreign or domestic operating a public utility purchase or acquire, take or hold, more than ten per centum (10%) of the total capital stock issued by a corporation doing the same or a similar business: *Provided*, That a corporation now lawfully holding a majority of the capital stock of any corporation operating a public utility may, without the consent of the commission, acquire and hold the remainder of the capital stock of such corporation or any portion thereof.

Nothing herein contained shall be construed to prevent the holding of stock heretofore lawfully acquired or to prevent upon the surrender or exchange of said stock pursuant to a reorganization plan, the purchase, acquisition, taking or holding of a proportionate amount of stock of any new corporation organized to take over at foreclosure or other sale, the property of any corporation whose stock has been thus surrendered or exchanged. Every contract, assignment, transfer or agreement for transfer of stock, by or through any person or corporation to any corporation, in violation of any provision of this section shall be void and of no effect and no such transfer or assignment shall be made upon the books of any such corporation or be recognized effective for any purpose.

Joint Service—Requirements.

SEC. 951½. That with the consent and approval of the commission but not otherwise, any two or more public utilities, furnishing a like service or product and doing business in the same municipality or locality within this state, or any two or more public utilities whose lines intersect or parallel each other within this state may be merged and may enter into contracts with each other that will enable such public utilities to operate their lines or plants in connection with each other; and any public utility

may also, with the consent of the holders of three-fourths of the capital stock outstanding, purchase or lease the property, plant or business or any part thereof of any other such public utility at a price and on terms fixed by the commission. Any such public utility may, with the consent of three-fourths of the holders of the outstanding stock, sell or lease its property or business or any part thereof to any other such public utility at a price and on terms fixed by the commission upon paying in cash to non-consenting stockholders the appraised value of their stock as fixed by the commission.

* * * * *

Indeterminate Permit.

SEC. 100. Every license, permit or franchise hereafter granted to any public utility shall have the effect of an indeterminate permit subject to the provisions of this act, and subject to the provision that the license, franchise or permit may be revoked by the commission for cause or that the municipality in which the major part of its property is situated may purchase the property of such public utility actually used and useful for the convenience of the public at any time as provided herein, paying therefor the then value of such property as determined by the commission and according to the terms and conditions fixed by said commission, subject to all the provisions as to hearings and appeals set out in section one hundred and five (105) and section one hundred and six (106) hereof. Any such municipality is authorized to purchase such property and every such public utility is required to sell such property at the value and according to the terms and conditions determined by the commission as herein provided. If this act should be repealed or annulled then all such indeterminate franchises, permits or grants shall cease and become inoperative and in place thereof such utility shall be reinstated in the possession and enjoyment of the license, permit or franchise surrendered by such utility at the time of the issue of the indeterminate franchise, permit or grant; but in no event shall such reinstated license, permit or franchise be terminated within a less period than five years from the date of the repeal or annulment of this act.

Existing Franchises—Surrender.

SEC. 101. Any public utility operating under an existing license, permit or franchise shall, upon filing at any time prior to the expiration of such license, permit or franchise and prior to July 1, 1915, with the clerk of the municipality which granted such franchise and with the commission, a written declaration, legally executed, that it surrenders such license, permit or franchise, receive by operation of law, in lieu thereof an indeterminate permit as provided in this act; and such public utility shall hold such permit under all the terms, conditions and limitations of this act.

Effect of Indeterminate Permit.

SEC. 102. Any public utility accepting or operating under any indeterminate license, permit or franchise hereafter granted shall by acceptance of any such indeterminate license, permit or franchise be deemed to have consented to a future purchase of its property by the municipality in which the major part of it is situate at the value and under the terms and conditions determined by the commission as provided in this act, and shall thereby be deemed to have waived the right of requiring the necessity of such taking to be established by the verdict of a jury, and to have waived all other remedies and rights relative to condemnation, except such rights and remedies as are provided in this act and shall have been deemed to have consented to the revocation of its license, permit or franchise by the commission for cause.

* * * * *

SEC. 131. In case any of the provisions of this act shall be held invalid such fact shall not operate to make invalid any other part of this act, and the parts of this act not adjudged to be invalid shall be observed and enforced the same as though the invalid part or parts had not been enacted.

APPENDIX B.

EXCERPTS FROM THE CITIES AND TOWNS ACT OF 1905. (CHAPTER 129—LAWS OF 1905.)

Excerpt From Section 53 of the Cities and Towns Act.

(Laws of 1905, pp. 246-7.)

SEC. 53. The common council of every city shall have power to enact ordinances for the following purposes:

* * * * *

Sixth. To receive gifts, donations, bequests and public trusts and to agree to conditions and terms accompanying the same and bind the corporation to carry them out

Note: Clause 6 of Section 53 of the Cities and Towns Act is now section 48-1407 of Burns Indiana Statutes, 1933. This clause has not been changed since its enactment in 1905.

Section 85 of the Cities and Towns Act.

(Laws of 1905, p. 271.)

Contracts and Agreements—When Void.

SEC. 85. No executive department, officer or employe thereof shall have power to bind such city to any contract or agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of such department; and all contracts and agreements, express or implied, and all obligations of any and every sort, beyond such existing appropriations, are declared to be absolutely void: *Provided*, That the board of public works shall have power to contract with any individual or corporation for lighting the streets, alleys and other public places or for supplying the city with gas, water, steam, power, heat, or electricity, and for the collection, removal and disposal of garbage, ashes or refuse, on such terms and for such times, not exceeding the term fixed by section two hundred and fifty-four of this act, as may be agreed upon; but any such contract shall be submitted to the common council of such city and approved by ordinance before the same shall take

effect, and if so approved shall immediately become effective: *Provided, further*, That nothing herein contained shall prevent any such department from issuing any bond or other obligation expressly authorized by this act and provided for by ordinance.

Note: Section 85 of the Cities and Towns Act is now section 48-1507 of Burns Indiana Statutes, 1933. This section has not been changed since its enactment in 1905.

Section 254 of the Cities and Towns Act—As Amended.

CHAPTER 104—LAWS OF 1911.

(pp. 181 et seq.)

Contract for Public Utilities—Limit—Purchase.

SEC. 2. That section 254 of the above entitled act be, and the same is hereby amended to read as follows: Section 254. Any city or town may enter into contract with any person, corporation or association to furnish such city or town and its inhabitants with water, motive power, heat or light, or drainage or sewerage facilities or to build or extend railroads, interurban or street car lines, telegraph or telephone lines, drainage or sewerage systems, or other public conveniences into or through such city or town; and may provide in such contract the terms and conditions on which such water, motive power, heat, light, drainage, sewerage, railroad, interurban, street car, telegraph or telephone services, or other uses and accommodations of such and other public conveniences may be furnished by such person, corporation or association to such city or town, and to its inhabitants: *Provided*, That no such contract shall be entered into by any such city or town for furnishing such city or town and its inhabitants with water, motive power, drainage, sewerage, heat or light, upon or along the streets of such city or town for a term longer than twenty-five years: *and, Provided further*, That before any such contract shall be made by any city of the first, second, third, or fourth class, such contract shall be first agreed to by the board of public works of such city, after which agreement such board, shall cause a proper ordinance approving and confirming such contract to be presented for adoption by the common council of such city,

For the purpose of aiding in the erection or extension of any such public utilities and conveniences, any city or town is authorized to become a part stockholder by subscribing to the capital stock thereof in any such corporation so contracting to furnish the city or town and its inhabitants with water, motive power, heat, drainage, sewerage, light and other accommodations aforesaid. And such city or town shall have the power to borrow money to pay for the stock so subscribed or to pay the purchase price for any such gas, electric light, heat or power plant, sewerage or drainage system or other public convenience, and the common council of such city or board of trustees of such town may issue the bonds of such city or town payable at such time or times as such common council or board of trustees may direct, and bearing interest at a rate not exceeding six per centum per annum, payable annually or semi-annually, and may negotiate and sell the same at not less than the face value thereof. The proceeds of such bonds shall be applied only to the payment of the stock so subscribed or to the payment of the purchase price of such gas, electric light, heat or power plant, sewerage or drainage system or other public conveniences: *Provided, however*, That the denominations, time and place of payment of and interest on said bonds shall be in accordance with the terms and provisions of section two hundred and forty-nine of this act.

Note: Section 254 of the Cities and Towns Act is now section 48-7302 of Burns Indiana Statutes, 1933. This section has not been changed since its amendment in 1911.

APPENDIX C.

Excerpts from Chapters 77 and 78 of Laws of Indiana of 1929.

CHAPTER 77—LAWS OF 1929.

(pp. 252, 257, 259-260.)

AN ACT supplemental to an act entitled "An act concerning municipal corporations," approved March 6, 1905.

[*H. 132. Approved March 11, 1929.*]

First Class Cities, Utilities Department.

SECTION 1. *Be it enacted by the general assembly of the State of Indiana*, First Class Cities, Utilities Department. In addition to the existing executive departments of cities of the first class, as such cities are defined in an act entitled "An act concerning municipal corporations," approved March 6, 1905, and acts amendatory thereof, there is hereby created in any such city having a population of not less than three hundred thousand (300,000), as shown by the last preceding United States census, a department of public utilities, which shall be under the control of a board of seven (7) members, to be known as the "board of directors for utilities," to be appointed annually by the board herein provided for and designated as the board of trustees for utilities.

* * * * *

Powers and Duties of the Board of Directors.

SEC. 3. Powers and Duties of the Board of Directors. The said board of directors for utilities shall have the exclusive government, management, regulation and control of any water works, gas works, electric light works, heating and power plants, and all property relating thereto, which any such city may heretofore have acquired or may here-

after acquire or construct for the service of the public as consumers, and such board of directors shall be charged with the duty of and shall have all necessary power to make all necessary repairs, renewals, enlargements, extensions or additions to any such plant or property which in the judgment of said board of directors is desirable or necessary for the proper serving of the inhabitants of said city and the adjacent community served with respect to any such utility from any such plant or plants. In connection with the duties devolving upon such board of directors as aforesaid, it shall have power as follows:

* * * * *

(7) To take over, adopt and assume the performance of the provisions of any lease under which any utility property may be held at the time of the acquisition of any utility by any such city, and to take any and all steps necessary to perform and fulfill the terms of any such lease, and to obtain and preserve the benefits therefrom; and in event there be any outstanding open mortgage upon the property covered by any such lease so taken over under the provisions of which bonds may be withdrawn from the trustee under such mortgage for the purpose of paying all or part of the cost of additions to the property covered by such mortgage, to do and perform all things necessary in order to secure the benefit of such mortgage provisions and to enable the escrow bonds held by the trustee under any such mortgage to be taken down and sold in order to defray the cost of any extensions and betterments to such leased property; and, subject to the approval of the public service commission of Indiana, to sell any such bonds so taken down for the purpose of assisting in defraying the costs of any such extensions or betterments to such leased property.

* * * * *

CHAPTER 78—LAWS OF 1929.

(Printed in full.)

(pp. 268-271.)

AN ACT relating to corporations organized before May 1, 1913, for the purpose of furnishing gas for fuel or illuminating purposes, or electric lights or water, or light, heat and power to any town or city or the citizens or inhabitants thereof, and the articles of incorporation of which provide for the transfer of the property of such corporation to such town or city, legalizing certain provisions in the articles of incorporation thereof and authorizing the conveyance of the property of such corporations to such towns or cities and authorizing such towns or cities to accept such conveyance, repealing all laws in conflict therewith and declaring an emergency.

[*H. 133. Approved March 11, 1929.*]

Gas Corporations, Certain—Conveyance of Property to Municipality—Retirement of Stock.

SECTION 1. *Be it enacted by the general assembly of the State of Indiana,* That if in the original articles of incorporation of any corporation organized under the laws of this state prior to May 1st, 1913 (that being the date of the creation of the public service commission of this state), for the purpose of furnishing natural or artificial gas for fuel or for illuminating purposes, or for furnishing electric lights or water to the citizens of any town or city within this state, or to furnish light, heat and power to any town or city, or the inhabitants thereof, provision is made for the transfer or conveyance of the property of such corporation to such town or city, subject to the outstanding legal obligations of said corporation, whenever the holders or owners of shares of stock, stock certificates, or holders or owners of any beneficial interest in such capital stock shall have received the face or par value of such shares of stock, stock certificates or beneficial interest, together with the interest or dividends thereon provided for in such articles of incorporation, such provision in such articles shall be, and is hereby legalized and declared to be valid and binding upon such corporation and upon the holders and owners of any such shares of stock, stock certificates or beneficial interest

therein or their assigns, and said town or city shall be authorized and entitled to accept a transfer and conveyance of any such property in accordance with the terms and conditions of such articles of incorporation, without the question of the acceptance or acquisition of such property being submitted to a vote of the electors of such town or city and without any election being held therein to determine whether such property shall be acquired by such town or city. It shall not be necessary to obtain the consent or approval of the public service commission of Indiana or any other state board, commission or officer for such transfer and conveyance or of the terms and conditions upon which the same is to be made, but such transfer and conveyance shall be valid without any order or approval of such commission, board or officer, and any provisions in such articles authorizing the board of directors, trustees or other officers of said corporation to issue bonds or to mortgage or otherwise encumber such property before such transfer and conveyance for the purpose of borrowing money with which to pay to such holders or owners of such shares of stock, stock certificates or owners of such beneficial interest thereof the face or par value of such shares of stock, stock certificates, together with the interest or dividends provided for in such articles, and authorizing such directors, trustees or other officers to transfer or convey the property of such corporation to such town or city whenever the holders or owners of the shares of stock, stock certificates or any beneficial interest therein have been paid the par or face value of such shares of stock or stock certificates together with the interest or dividends provided for, are hereby legalized and declared to be valid and binding and such directors, trustees or other officers of such corporation shall have the right and power to carry out and perform any such provisions in accordance with the terms of such articles. This act shall apply to any such corporation if organized before May 1, 1913, and in which the aforesaid provisions are contained in the articles of incorporation and which articles have thereafter been amended and in which such amended articles of incorporation such provisions are contained.

Any provisions in either the original articles of incorporation of any such corporation, or in any amendment

thereof, providing for the retirement of the outstanding preferred stock of such corporation before such conveyance is made to any such municipal corporation are hereby legalized and declared valid and binding and said corporation and the officers thereof are authorized to retire such stock in accordance with such provisions and the terms of such preferred stock, and to mortgage such property to secure funds with which to redeem such preferred stock and to pay the holders and owners of the shares of common stock or common stock certificates or of any beneficial interest therein the amounts provided for in such articles, and whenever the outstanding preferred stock in any such corporation shall have been redeemed and the holders and owners of such common stock, common stock certificates or of any beneficial interest therein shall have received the amounts therein provided for in such articles of incorporation, then the property of such corporation shall be conveyed to such municipal corporation in accordance with the provisions of such articles or amended articles of incorporation.

Whenever any instrument of transfer or conveyance shall be executed, transferring or conveying the property, either real or personal, of any such corporation to such town or city the title to such property shall vest in such town or city, subject to all outstanding legal obligations of said corporation: *Provided, however,* That such town or city shall not be liable for any such obligations and the same shall not constitute a debt of such town or city, but all such obligations shall be a charge upon said property so conveyed, and any mortgage or other lien or encumbrance executed by the board of directors, trustees or other authorized officers of such corporation before such transfer shall continue to be a lien on such property to the same extent as before such transfer or conveyance.

Said municipal corporation shall be authorized to accept, hold and own all the property of such corporation so transferred to it, including that located within this state and that located in any other state and any shares of stock or other interest in any other corporation of which said corporation making such transfer shall be the owner, and any right, title or interest such transferring corporation may have in any lease upon other property.

Provided, however, That if in any such municipal corporation there is now or is hereafter created or existing a separate taxing unit or district which shall be subject to taxation to raise money with which to either retire or redeem the stock of any such transferring corporation, or to pay obligations incurred for the benefit of such property, then all such property so transferred to such municipal corporation shall be held thereby in trust for the use and benefit of such separate taxing unit or district, and for the general public.

Repeal.

SEC. 2. That all laws and parts of laws in conflict herewith are hereby repealed.

Emergency.

SEC. 3. An emergency existing for the immediate taking effect of this act, the same shall be in full force and effect from and after its passage.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

CITY OF INDIANAPOLIS, et al.,
Petitioners,

v.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., et al.,
Respondents.

Nos. ~~421-422~~ 10-11

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc.,
Petitioner,

v.

CITIZENS GAS COMPANY OF INDIANAPOLIS, et al.,
Respondents.

Nos. ~~423-424~~ 12-13

BRIEF OF CITIZENS GAS COMPANY OF INDIANAPOLIS, RESPONDENT AND CROSS-RESPONDENT

PAUL Y. DAVIS,
WILLIAM G. SPARKS,
Counsel for Citizens Gas Company of Indianapolis.

DAVIS, BALTZELL & SPARKS,
1100 Hume-Mansur Bldg.,
Indianapolis, Indiana

Of Counsel.

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ABBREVIATIONS

The following abbreviations will be used in this brief:

City of Indianapolis	"City"
The Chase National Bank of the City of New York, Trustee, when referred to alone	"Chase"
Citizens Gas Company of Indianapolis	"Citizens Gas"
The Indianapolis Gas Company when referred to alone	"Indianapolis Gas"
When Chase, Citizens Gas and Indianapolis Gas are referred to collectively	"Respondents"
The Ninety-nine year lease of September 30, 1913, between The Indianapolis Gas Company, Lessor, and Citizens Gas Company, Lessee	"Lease"

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

CITY OF INDIANAPOLIS, et al., *Petitioners*, v. THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., et al., *Respondents*.	Nos. 421-422
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., *Petitioner*, v. CITIZENS GAS COMPANY OF INDIANAPOLIS, et al., *Respondents*.	Nos. 423-424

BRIEF OF CITIZENS GAS COMPANY OF INDIANAPOLIS, RESPONDENT AND CROSS-RESPONDENT

THE OPINIONS BELOW

The District Court made findings of fact (III R. 1160) and conclusions of law (III R. 1190) and wrote an opinion (III R. 1122). The opinion has not been officially reported.

The opinion of the Circuit Court of Appeals for the Seventh Circuit (IV R. 1281-1306) is reported in 113 F.

(2d) 217. Its opinion on the first appeal (II R. 285-293) is reported in 96 F. (2d) 363; certiorari denied 305 U. S. 600.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (43 Stat. 938; 23 U. S. C. A. Sec. 347.)

Writs of certiorari were granted in each of the cases by this Court on October 28, 1940.

STATEMENT OF THE CASE

The facts relevant to the liability of Citizens Gas Company of Indianapolis may be summarized as follows:

(1) Citizens Gas was organized as a quasi-public corporation for the purpose of acting as the original Trustee of a Public Charitable Trust created for the benefit of the gas users of the City. (I R. 246, 250.) The Franchise Ordinance and the Articles of Incorporation (I R. 81) constituted the trust instruments and defined the powers and duties of Citizens Gas.

> *Todd v. Citizens Gas Company, et al.*, 46 Federal (2nd) 855 (C. C. A. 7).

(2) Such trust instruments provided that upon satisfaction of the claims of stockholders, the property of Citizens Gas should be conveyed to the City subject to all the

legal obligations of the Company, and that thereafter Citizens Gas should be wound up (I R. 84, 85, 98, 115).

(3) During its trusteeship, Citizens Gas entered into the lease with Indianapolis Gas (I R. 51-80), pursuant to the authority granted by the statutes of the State of Indiana then in force. Upon joint petition of both parties the lease was approved by the Public Service Commission of the State of Indiana (I R. 116-122). It has been stipulated that the surrender of the franchise and the acceptance of an indeterminate permit under the Public Service Commission Law of Indiana did not have the effect of modifying or rendering nugatory the terms of the Franchise in so far as they created a Public Charitable Trust and defined the terms and conditions thereof and the rights, duties and liabilities of Citizens Gas as original Trustee, of the City as successor trustee, and of the inhabitants of the City as the beneficiaries of the trust (II R. 622).

(4) Section 29 of the lease limited the liability of Citizens Gas as follows:

> "The Lessor and Lessee mutually covenant that they will each look for the carrying out of the obligations of this lease solely to the corporate assets and franchises of the other, and such assets shall not embrace any claim which might under any circumstances be enforcible in any way whatsoever against a stockholder, director or officer, under any statute or other law now or hereafter in force, or against a stockholder by reason of any insufficiency in the payment of capital stock. Any personal, statutory or other liability of any stockholder, director or officer of either the Lessor or the Lessee, whether such liability now exists or hereafter arise, being a part consideration for this lease is hereby expressly waived." (I R. 78.)

(5) Citizens Gas continued in possession and operated the leased property until September 9, 1935, and fully performed the rental covenants of the lease (II R. 627-628).

(6) Prior to September 9, 1935, the claims of stockholders of Citizens Gas had been completely satisfied (II R. 634), and the authority and duty of Citizens Gas to convey and transfer all of its property to the City had been finally adjudicated (*Todd v. Citizens Gas Company, et al.*, 46 Federal (2nd) 855 (C. C. A. 7)).

(7) Thereupon, on September 9, 1935, Citizens Gas conveyed and transferred to the City all of its property subject to all outstanding obligations of the Company, and otherwise in strict accordance with the terms and conditions of the trust instruments (I R. 122, 127; III R. 833, 835). The City reserved its right to contest the validity of the lease (I R. 202-204, II R. 468). After September 9, 1935, Citizens Gas owned and held no property of any description and engaged in no business activity (II R. 466).

(8) In regard to claim of estoppel, reference may be made to pages 54 to 56, inclusive, of the "Brief of City of Indianapolis, et al., Petitioners and Cross-Respondents," for the facts upon which the District Court based its finding against Respondents upon that issue.

ARGUMENT

Citizens Gas Company of Indianapolis conveyed and transferred all of its assets to the City of Indianapolis on September 9, 1935, in the execution of the public charitable trust. The lease in question provides (Section 29) that the liability of Citizens Gas thereunder shall be limited to the corporate assets and franchises (I R. 78). Since the validity of the Public Charitable Trust is admitted (I R. 233, 242, 246, 250), the primary controversy here is whether the assets now in the hands of the City of Indianapolis are liable under the lease for the remainder of the term of ninety-nine years.

Throughout this litigation Citizens Gas has adopted a completely neutral position with reference to that controversy. It affirms the validity of the Public Charitable Trust and asserts the complete performance of its obligations and duties as the original Trustee. On the other hand, it has never denied its power and authority to make the lease in question but has completely performed the lease covenants to the full extent of its legal capacity and authority (II R. 627-628).

The essential factors which define and determine the position of Citizens Gas are as follows:

(1) No party has questioned the validity of the Public Charitable Trust as created and defined in the Franchise Ordinance and the Charter of Citizens Gas (I R. 233, 242, 246, 250). This had been adjudicated prior to the conveyance to the City (*Todd v. Citizens Gas Company, et al.*, 46

Federal (2nd) 855 (C. C. A. 7); *Williams v. Citizens Gas Company, et al.*, 206 Indiana 448, 188 N. E. 212).

(2) The terms and conditions of the Public Charitable Trust defined the powers and duties of Citizens Gas. As stated by the Court in *Todd v. Citizens Gas Company, et al.*, 46 Federal (2nd) 855 (865) (C. C. A. 7): "Provisions for the protection of the public interests were properly included in its charter, and are binding upon its stockholders and directors, who must act in accordance therewith until they are legally abrogated or altered." It is clear that Citizens Gas was created solely to act as original Trustee of the Public Charitable Trust and that all of its corporate assets were trust assets.

(3) Both Indianapolis Gas and the purchasers of its bonds from Citizens Gas had full knowledge of the terms and conditions of the Public Charitable Trust and the obligation of Citizens Gas to convey all of its property to the City and thereafter wind up its affairs (I R. 62; II R. 583-586). Moreover, Indianapolis Gas was notified of the contemplated transfer and of the City's desire to contest the validity of the lease some time before the conveyance was made (III R. 836).

(4) Since Citizens Gas was a public utility as well as the original Trustee of the Public Charitable Trust, the lease in question was made pursuant to the authority of the Public Service Commission Law of Indiana and only after approval had been given by the Public Service Commission of Indiana (I R. 116-122). The propriety of this was adjudicated in *Williams v. Citizens Gas Company, et al.*, 206 Ind. 448, 188 N. E. 212.

(5) Prior to September 9, 1935, it had been adjudicated that neither the enactment of the Public Service Commis-

sion Law by the General Assembly of the State of Indiana nor the granting of an indeterminate permit thereunder to Citizens Gas had affected in any way the terms of the Franchise Ordinance in so far as they created the Public Charitable Trust and defined the terms and conditions thereof (*Todd v. Citizens Gas Company, et al.*, 46 Federal (2nd) 855 (C. C. A. 7)). Moreover, all the parties hereto have conceded that fact (II R. 622).

(6) On September 9, 1935, after the complete satisfaction of the claims of stockholders of Citizens Gas, it conveyed all of its property of every kind to the City *subject* to the legal obligations of the Company. The conveyance and transfer was made in strict accordance with the provisions of the Franchise Ordinance and the Charter of Citizens Gas (I R. 122, 127; III R. 833, 835). Thus Citizens Gas completely carried out and performed its duties as Trustee of the Public Charitable Trust, and as provided in the Franchise Ordinance and its Charter (I R. 84, 85, 98, 115), Citizens Gas had no further duty or obligation except to wind up its affairs.

Throughout its corporate existence Citizens Gas has acted within its authority and duty both as the original Trustee of the Public Charitable Trust and as a public utility. It affirms the validity and binding effect of the lease during the period during which it had the authority and the ability to operate as a public utility in the City of Indianapolis. Citizens Gas also affirms the validity and binding effect of the terms and conditions of the Public Charitable Trust. Whether or not the liability under the lease continues to be a charge upon the trust assets after their conveyance to the City of Indianapolis, it is clear that Citizens Gas has fully performed its duties and obliga-

tions and that its legal capacity and obligation to secure further performance of the lease covenants terminated on September 9, 1935.

PAUL Y. DAVIS,

WILLIAM G. SPARKS,

Indianapolis, Indiana

Counsel for Respondent, Citizens Gas Company of Indianapolis.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1940

CITY OF INDIANAPOLIS, et al.,
Petitioners,

v.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., et al.,
Respondents.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc.,
Cross-Petitioner,

v.

CITIZENS GAS COMPANY OF INDIANAPOLIS, et al.,
Respondents.

10, 11, 12 - 13

Nos. ~~421, 422, 423, and 424.~~

BRIEF OF

THE INDIANAPOLIS GAS COMPANY, RESPONDENT

LOUIS B. EWBANK,
WILLIAM R. HIGGINS,
Counsel for The Indianapolis Gas Company, Respondent.
1311 Fletcher Trust Building,
11 North Pennsylvania Street,
Indianapolis, Indiana.

C. E. Pauley & Co., Inc., Indianapolis

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ABBREVIATIONS

The following abbreviations will be used for convenience throughout this brief:

Articles	The Articles of Incorporation of Citizens Gas Company (I R. 95-100).
Bonds	The First Consolidated Mortgage 5% Gold Bonds of the Indianapolis Gas Company issued October 1, 1902 (I R. 25-27).
Chase	Chase National Bank of the City of New York, Trustee, plaintiff and cross-petitioner herein.
Citizens Gas	Citizens Gas Company of Indianapolis, lessee, defendant and respondent.
City	City of Indianapolis, and the members of its Boards of Trustees and Directors for Utility of said City.
Indianapolis Gas	The Indianapolis Gas Company, defendant below and respondent here.
Cross-petitioner	Chase National Bank of the City of New York, Trustee.
Cross-petitions	Petition for certiorari in Causes Nos. 423, 424 by Chase, plaintiff below.
Coupons	The interest coupons attached to the 5% Gold Bonds of Indianapolis Gas Company.
Franchise	The franchise contract ordinance of August 30, 1905, assigned to Citizens Gas Company May 24, 1906 (I R. 81-95).

Lease	The lease from Indianapolis Gas to Citizens Gas dated September 30, 1913 (I R. 51-80).
Mortgage	Mortgage Deed of Trust from Indianapolis Gas to predecessors of Chase, dated October 1, 1902 (I R. 23-51).
Petition	Petition for writ of certiorari in Causes Nos. 421, 422, by the City, et al., defendants and counter-claimants.
Petitioners	City and the officers of its Department for Utilities, defendants and counter-claimants who joined in the petition in Causes Nos. 421, 422.
Respondents	Chase, Indianapolis Gas and Citizens Gas.
Stipulation	Stipulation that certain "facts are true", including many "Exhibits" as therein stated (II R. 616-639), signed by solicitors for all parties (II R. 639).
Circuit Court of Appeals	Circuit Court of Appeals for the Seventh Circuit.

(Note)

This brief of Indianapolis Gas Company is submitted for all four cases, to wit: 421, 422, 423 and 424.

All emphases in this brief are supplied.

IN THE

Supreme Court of the United States

OCTOBER TERM—1940

CITY OF INDIANAPOLIS, et al., *Petitioners,* v. THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., et al., *Respondents.*	Nos. 421, 422, 423, and 424.
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., *Cross-Petitioner,* v. CITIZENS GAS COMPANY OF INDIANAPOLIS, et al., *Respondents.*	

BRIEF OF

THE INDIANAPOLIS GAS COMPANY, RESPONDENT

A.

THE OPINIONS BELOW

The opinion of the District Court (III R. 1122 to 1159) is not officially reported. The opinion of the Circuit court

of Appeals (IV R. 1281 to 1306) is reported in 113 Fed. (2d) 217.

B.

JURISDICTION

These cases are before this Court upon the granting of the petitions for writs of certiorari of petitioner City and the cross-petition for such writs by Chase National Bank, Trustee under this respondent's mortgage deed of trust. The jurisdiction of the Court was invoked under the provisions of Section 240 of the Judicial Code (28 U. S. C., Sec. 347).

C.

SUPPLEMENTAL STATEMENT OF THE CASE

The statement of the case and the facts thereof as set out in the brief of cross-petitioner and respondent Chase is accurate with the exception of a statement made at page 22 that the agreement of March 2, 1936, between City and Indianapolis Gas was made "in direct violation of the rights of the trustee and of the bondholders". This statement of a legal conclusion is denied here as it was in the District Court and before the Circuit Court of Appeals. Certain corrections are also offered as to statements in City's brief; the facts fully and clearly stated in the briefs of said petitioner and cross-petitioner Chase will not be repeated here but are supplemented as follows:

Certain omitted factual situations surrounding the execution of the 99-year lease by Citizens Gas, original trustee, and Indianapolis Gas, are pertinent for consideration.

Prior to September 30, 1913, Citizens Gas and Indianapolis Gas were competing manufacturers and distributors

of gas in the City of Indianapolis. The former company was operating its properties as a public utility and as trustee of a public charitable trust, subject to the rights of the investors, and at that time owned its gas plant and 184 miles of mains and 11,165 meters in use. Indianapolis Gas was operating a competing gas plant in the same city with 383 miles of main and 41,541 meters (III R. 901; offered II R. 342), and in that year was beginning extensive improvements in its equipment and the methods of manufacturing gas, all of which necessarily would adversely affect Citizens Gas as a competitor. The capital stock of Indianapolis Gas was owned entirely by non-residents of Indiana.

The directors and trustees of Citizens Gas had increased its capital stock, issued mortgage bonds and found that the competition with Indianapolis Gas "has not been without dangers in the past, and may be found to be more dangerous in the future" (III R. 887; offered II R. 342). In this situation the managers of Citizens Gas appealed to one Malott and a group of residents of Indianapolis and urged upon them the acquiring of sufficient of the capital stock of Indianapolis Gas to make possible a merger of the two competing companies under control of Citizens Gas.

This picture is clearly presented in the resolutions of the directors of Citizens Gas adopted at their meeting of February 26, 1913 (II R. 644-5; offered II R. 327).

> "Whereas Volney T. Malott for himself and associates *at the suggestion of persons connected with the management of this Company* has been in negotiation for the purchase of a control of the Indianapolis Gas Company with the sole object of bringing the plants and gas system of said Company under the control of the Citizens Gas Company, and such

negotiations have now reached a point where the said Volney T. Malott must close or abandon the same, and *he is unwilling to close the same except under proper assurances that if he acquires such control a proper lease will be entered into by the Citizens Gas Company, for the taking over of such property;*

"Now therefore be it resolved by the Board of Directors of the Citizens Gas Company of Indianapolis that the President and Secretary of the Company be and they are hereby authorized to execute on behalf of the Company the contract with V. T. Malott this day read at the meeting of the Board, and in event said V. T. Malott and his associates shall acquire control of the Indianapolis Gas Company so as to authorize the execution of the form of lease accompanying said contract, that then the President and Secretary of this Company be and they are hereby authorized to enter into said contract of lease on behalf of this Company, and in connection therewith to consent to any changes in form in said lease which in their judgment do not vary the material rights acquired and obligations incurred by this Company."

The above action was approved and ratified at a meeting of the Trustees of Citizens Gas held at a subsequent hour on the same day (II R. 646). Pursuant to and in reliance upon this agreement, approved in the above resolution, the local Malott group did purchase sufficient of the capital stock of Indianapolis Gas as might make possible a lease effecting the merger of the two utility properties under the unified control of Citizens Gas for the term of 99 years, and a joint petition was filed by both companies with the Public Service Commission of Indiana seeking approval of the lease. Said petition stated, *inter alia* (II R. 652, 653; offered II R. 328):

"4. That the interest of the public generally and of the stockholders of the undersigned companies require that said plants shall be put under a single management, the wasteage of further duplicate service and dual operation terminated, if the same can be done on proper terms and conditions.

"5. That as will be seen from the accompanying copy of its charter, by-laws and franchise from the City of Indianapolis under which it operates, the Citizens Gas Company of Indianapolis is largely a cooperative institution organized for the purpose of affording to the public the benefits of cheap gas with limited dividends to the stockholders, and providing for an ultimate transfer of the property on certain conditions to the City of Indianapolis for the benefit of the entire public; and it is believed that the lease now proposed will promote the realization of the purposes of the organization of said company" (II R. 652, 653; offered II R. 328.)

Following a protracted hearing, at which the City of Indianapolis was represented by its Corporation Counsel (I R. 116; offered II R. 327), the Commission granted the petition and approved the lease with certain modifications which were accepted by the parties and embodied therein.

From October 1, 1913, until September 9, 1935, Citizens Gas, the original trustee of the public charitable trust, operated the leased property as part and parcel of its unified system, and from September 9, 1935, City, as successor Trustee, has continuously operated the same and is now so doing.

The plaintiff below, suing in behalf of bondholders of Indianapolis Gas, sought a judgment declaring the 99-year lease to be valid and also a coercive judgment against all parties defendant for the amount of unpaid bond interest together with interest thereon and also for certain other

relief. Before trial an order was entered by the District Court that the cause should go to trial and

> "That the evidence shall be heard upon the issues whether the lease * * * is binding upon and enforceable against the City of Indianapolis or any of the property acquired by it from Citizens Gas * * * or against Indianapolis Gas or Citizens Gas * * * and whether plaintiff is entitled to judgment for the rental under said lease or for interest on the bonds of Indianapolis Gas Company which has accrued since April 1, 1936, against any of said defendants or said property;"

and that evidence should be deferred on one reason assigned by City of Indianapolis upon which it claimed

> "the right as such successor-trustee to refuse and reject an assignment of such lease on the ground that such lease was burdensome and not advantageous to such trust; reserving the right to make such order or decree as may seem just and appropriate to the court at any stage in the proceeding." (II R. 321, 322.)

As to Statements in City's Brief

In 1905 the contract which became the franchise of Citizens Gas was executed (I R. 81-94, offered II R. 327) and provided that, within 18 months after the sale of the discontinued gas mains of the Consumers Gas Trust Co., it should "*secure, acquire* or *construct*" and put in operation a gas plant with not less than 100 miles of mains (I R. 85).

The contract also contained the provision creating the public charitable trust, providing that upon repayment of the investment of settlors with interest at 10% per annum,

the entire property should, at the expiration of 25 years at the option of City thus be conveyed to City as successor Trustee, subject to legal obligations (I R. 84, (f), (i); offered II R. 327).

By the provisions of the City franchise and the contract, written into the Articles of Incorporation of Citizens Gas, any "benefit to gas users" was expressly made subject to the prior use of all "earnings of said Company" to pay "semi-annually dividends of 10% per annum and any unpaid accrued dividends", and other legal obligations incurred by the Company (I R. 84, (f) 98, 9; offered II R. 327).

The trust *res* was to consist of all rights, property and assets of every kind and character which Citizens Gas might originally or thereafter acquire (I R. 93, 99; offered II R. 327). Citizens Gas was incorporated under the general statutes of Indiana and its sole purpose, as a public utility and as provided by its articles, was to "furnish the inhabitants of Indianapolis with light, heat and power"; this was provided by the franchise to include "all the inhabitants of said City" (I R. 89, 90; offered II R. 327).

The sole purpose of Citizens Gas was to perform such purposes of a public utility, as so provided in its articles, with whatever property it had or might acquire under any characterization of title. By agreement of its stockholders expressed in its articles and stock subscriptions it was the trustee of a public charitable trust. Thus the corporation from its creation was to function as a public utility to supply light, heat and power to all inhabitants of the City of Indianapolis, and subject thereto to function as a trustee.

City, at page 9 of its brief, refers to its letter of July 23, 1935, to Indianapolis Gas and states that Indianapolis Gas agreed on September 30, 1935 "to make an arrangement for temporary use".

This letter (III R. 836; offered II R. 329) is significant in several particulars·

1. In its first paragraph is the unequivocal statement that the City would shortly take over the property "*which has been operated by Citizens Gas Company*".

2. In its second paragraph it narrates the execution of the ninety-nine year lease and its approval by the Commission. No intimation or charge is made that it was or is invalid.

3. In its third paragraph it states that City in acquiring the property of Citizens Gas does not become liable "for the obligations of that company" by virtue of the Act of March 11, 1929.

It will be noted no distinction is made between the lease obligations and any others which were incurred by Citizens Gas in its operations.

The letter can only mean that City did not become directly obligated *as a municipality*, which is correct. It necessarily meant, by referring to the statute, "that the obligations of that company" were to be a charge only upon the property so taken over, which is all this respondent has sought in this litigation.

The letters exchanged on September 30, 1935 (III R. 968, 969; offered II R. 385) do not spell out an agreement on the part of Indianapolis Gas to the use and possession of its property by City. The letters simply provide that by receiving payment from City of certain interest on its

bonds, Indianapolis Gas waived no rights nor did City concerning their separate contentions as to liability under the lease.

The letter of City stated:

> "We ask you to waive no rights of yours by accepting; and you shall be at full liberty to assert, as we understand you do, that said lease is an obligation binding on the City of Indianapolis * * *"
>
> "We will make these payments without prejudice to our position or rights and you may accept the same without prejudice to your position or rights * * *"

And the letter of Indianapolis Gas in reply stated:

> "You making these or future payments referred to without prejudice to your position or rights and we accepting the same without prejudice to our position or rights under said lease or in relation thereto." (III R. 968, 969; offered II R. 384, 385.)

The agreement of March 2, 1936 (I R. 205-207; offered II R. 327) makes no reference to and was not an "extending" of any previous agreement; it was an agreement providing for the use *thereafter* of the property of Indianapolis Gas which should continue pending a settlement or final adjudication of the controversy under which payment of the cash rentals under the lease, including interest on Indianapolis Gas bonds and dividends on its stock, was to be made to a bank as escrow agent without waiver by either party of their respective contentions concerning the validity of the lease. Certain characterizations concerning the acceptance of the assignment of the lease and the City's so-called "resolution of rejection" are subsequently discussed in this brief.

D.

SUMMARY OF ARGUMENT

I

The Circuit Court of Appeals Did Not Impose Any Obligation or Burden Upon the City's Revenues Raised By Taxation But Merely Imposed an Obligation Upon the Trust Property and Upon the City as Trustee

(Brief, pp. 24-26.)

No important public question is here involved such as is stated by the City. The sole obligations imposed upon City, by the judgment here for review, are upon it as a successor trustee of a public charitable trust which consists of the present entire gas system in the City of Indianapolis. The decision of the court of appeals, following express Indiana statutes, precludes any obligation of City to satisfy the judgment through exercise of its municipal power to levy and collect taxes.

The principal question presented is whether the lease obligations of a trust, validly created, acquiesced in and defended by all the parties for 22 years, may be destroyed by the mere substitution of trustees; an obligation created by the trust as a public utility under authority both of its own charter and of an express statute of the state controlling such utilities.

II

The Judgment Correctly Decreed That the Obligation of Indianapolis Gas for Payment of Interest on Its Bonds Was Secondary to That of the Trust, City As Trustee and Citizens Gas; the Latter Being Principal Obligors. Jurisdiction Was Not Defeated or Affected by the Order of Liability Adjudged Against All Defendants

(Brief, pp. 27-29.)

On October 1, 1913, Citizens Gas leased for 99 years all property of Indianapolis Gas and by the terms of said lease agreed to pay all interest on Indianapolis Gas bonds as it accrued. From that date Citizens Gas and City, its successor trustee, have been in possession and operation of the entire property of lessor. Citizens Gas on September 9, 1935 conveyed and assigned to City, as its successor, its entire property, both personal and real and including the lease in question, subject to all its legal obligations. Prior to the day of transfer Citizens Gas, in accord with the lease provisions, had paid all interest as it became due on Indianapolis Gas bonds.

City accepted said conveyance and assignment of all said property, took possession thereof, and by its directors for utilities, declared that neither it was bound to the terms of the lease nor was the trust property it had taken over.

Chase, as sole trustee under the Indianapolis Gas mortgage, brought suit for bondholders against City as successor trustee, Citizens Gas and Indianapolis Gas, seeking declaratory judgment that the lease was a valid obligation

of the trust and of both Citizens Gas and City as trustees, and seeking coercive judgment against all parties defendant in the amount of the unpaid interest coupons.

The validity or invalidity of the lease determined only whether *all* defendants were liable for said delinquent interest or whether the liability was *solely* that of Indianapolis Gas.

The District Court held the lease invalid and entered judgment solely against Indianapolis Gas for $1,032,150, the amount of the unpaid interest coupons, which judgment the Circuit Court of Appeals reversed.

The jurisdiction of the court could not and did not depend upon whether all defendants or only one was liable, or upon the order in which such liability should be borne by the several defendants. The jurisdiction of the District Court was fairly invoked and no realignment of any party defendant could properly have been made.

III

The Decision of the Circuit Court of Appeals Directing Judgment Against All Parties Defendant Without Retrial of the Alleged Issue of Burdensomeness of the Lease Did Not Deprive City of Any Right of Due Process

(Brief, pp. 29-62.)

City in its answer and counterclaim avers, as a ground of alleged invalidity of the lease, that it was burdensome upon it and the public charitable trust and that it therefore did not constitute a part of the *trust res* which it took over as successor trustee, and that in taking over the ad-

ministration of the trust neither it as trustee nor the trust was legally obligated to the fulfillment of the lease undertakings.

The District Court in a pre-trial order provided for trial of the issue whether or not the lease was a valid and enforceable obligation, reserving for future hearing evidence on one reason assigned by City for non-liability, viz: "whether City *had the right to refuse and reject an assignment* of the lease on the ground that said lease was burdensome."

The failure of Circut Court of Appeals to remand the cause to District Court for further hearings upon this issue did not deprive City of any right of due process for the reasons:

1.

City in Fact Accepted Assignment of the Lease and Took Possession of Entire Trust Property and Therefore Any alleged Grounds for Doing Otherwise Becomes Moot.

(Brief, pp. 32-38.)

Every act and statement of City, from the day it elected to succeed Citizens Gas as Trustee until it took over the property, was an unmistakable expression of intent to take over the trust in its entirety, towit: the gas system *operated* by Citizens Gas.

On March 20, 1929 City first elected to exercise its rights of succession by resolution of its Board of Public Works. Said resolution demanded of Citizens Gas that all its property of "whatever nature or character" be conveyed to it, subject to all "legal obligations against said company."

City, on May 7, 1935, by its board of directors for utilities, authorized bonds in the amount of $8,000,000 whose principal and interest were to be payable from and a charge only upon the net revenues derived from the operation of the gas system, described as the property "operated by Citizens Gas Company." In connection with the sale of said bonds, City issued a prospectus describing the gas system as one which consisted of 867 miles of mains and which was owned by Citizens Gas partly in fee and partly in leasehold for 99 years. It described the obligations and terms of the lease in detail, and stated that City would continue operation of the "system." The bonds were purchased by bankers in reliance on said statements, and they in turn sold and distributed them to the public upon similar statements contained in circulars.

With the proceeds of said bond sale City retired all capital stock of Citizens Gas, discharged its bond obligation and thereafter, on September 9th, received from said Citizens Gas separate instruments of conveyance and assignment, transferring all of its title and interest in all its property, including the lease in question. In each of said instruments it was provided that the said property was conveyed subject to all obligations of the grantor. City thereupon entered into possession and operation of all the gas property, including that under the lease, though by its board for utilities it passed the so-called "resolution of rejection" of the lease.

City operated said system, including the leased property, until March 2, 1936 under no authority or right other than as assignee of the lease and successor to Citizens Gas. On that date an agreement was made by City and Indianapolis Gas providing that the former might thereafter operate the leased property under certain stipulations with-

out waiver by either party of their claimed positions relative to the lease.

Having accepted assignment of the lease and possession of the leased property, any reason for not so doing is moot.

2.

That the Lease Was Not Burdensome Was Determined by the Public Service Commission and That It Was Not Invalid Upon Such Ground Was Conclusively Adjudged by the Courts of Indiana, All Binding on the Trust and on the City, Present Trustee.

THE ORDER OF PUBLIC SERVICE COMMISSION

(Brief, pp. 39-45.)

The lease was presented to the Public Service Commission by joint petition of Citizens Gas and Indianapolis Gas and after extended hearing, at which City appeared by counsel, it was ordered approved October 1, 1913 with certain modifications which were accepted. Thereupon Citizens Gas took over the leased property. The Indiana Public Utility Law, then in effect, provided that such leases might be made by utilities "at a price and on terms fixed by the commission." This statute also withdrew from cities the right to grant franchise to utilities and vested such powers in the Commission.

By law of the State the orders of the Commission may not be collaterally attacked in the courts, except on grounds of fraud or lack of jurisdiction in the Commission, neither of which has been charged by City in this cause. The find-

ings and order of the Commission are conclusive on all parties to this cause that the execution of the lease was in the public interest and a proper exercise by Citizens Gas of its power as trustee of a Public Utility.

City may not now collaterally attack the order of the Commission on the ground that "when executed this lease was in fact burdensome." The failure to remand the cause for hearing on this issue does not therefore deprive City of any right of due process of law.

FISHBACK v. PUBLIC SERVICE COMMISSION, ET AL., 193 Ind. 282

(Brief, pp. 45-51.)

During the hearing before the Commission one Fishback, as a resident of Indianapolis, intervened and urged denial of the petition for approval of the lease upon certain grounds substantially the same as those here urged by City. After denial of his original objection and also petition for rehearing, Fishback instituted a class suit for himself and all other citizens in the Marion County Superior Court against Indianapolis Gas, Citizens Gas, City and members of the Commission. He alleged that the order approving the lease was invalid and sought judgment vacating the same, cancelling the lease and also an injunction preventing the contracting parties from carrying it out. The complaint alleged as grounds for relief that the rentals of the lease were excessive, that it would prevent the fulfillment of the contract between Citizens Gas and City and that Citizens Gas had no power to execute the lease. City joined issue by general denial, but seven years later plaintiff dismissed as to it on day of judgment.

The judgment of the trial court is in full force and effect.

The judgment in this case is conclusive upon all matters which were or might have been litigated under the issues, and bind not only Citizens Gas and Indianapolis Gas but also all their successors in title and privies in interest, including City as successor Trustee.

The judgment is conclusive upon all defendants in the present cause that the lease is valid and enforceable against all parties thereto and their "successors and assigns." City is therefore denied no right of due process by failure of the court to order a further hearing upon this issue of burdensomeness already conclusively adjudged.

WILLIAMS v. CITIZENS GAS COMPANY, 206 Ind. 448

(Brief, pp. 51-55.)

Williams brought suit, as a beneficiary of the public charitable trust, against all parties to the present cause and also the Public Service Commission. He urged a judgment cancelling the lease upon grounds that its terms were excessive and burdensome upon the trust and that its execution was *ultra vires* Citizens Gas. All defendants, including City, contested said action and upon their securing judgment, plaintiff appealed. The opinion of the Supreme Court declared the lease to be valid, one which the contracting parties had power to make and one which the Commission had power to approve. The opinion held that obligations of Citizens Gas as a Trustee to the beneficiaries of the public charitable trust were subordinate to those it had as a public utility under the laws controlling and regulating such utilities.

Evidence of the pleadings, issues and determinations in both the Fishback and Williams cases was before the District Court under the issue as to whether said judgments, or either of them, were *res adjudicata* of the issues of the present cause.

The judgment in the Williams case conclusively determines every issue presented by City in this cause as to every party thereto, both *as a declaration of the law of Indiana* and as *res adjudicata.*

City, bound by the order of the Commission holding the lease provision fair and reasonable and by the judgments of two causes declaring the lease valid, is not now deprived of any right of due process by failure of Circuit Court of Appeals to order a fourth hearing on the alleged issue of burdensomeness of the lease.

3.

Both City and Citizens Gas Are Precluded by Laches From Now Asserting Lease is Invalid Upon Any Presented Issue.

(Brief, pp. 56-61.)

City, as successor trustee, may not now assert that the lease is invalid for any reason after the leasehold has been accepted and utilized by the trust and predecessor trustee for a period of 22 years. Such a delay in the assertion of alleged rights constitutes such laches as precludes the granting of the relief sought.

Neither a city nor an individual may accept all the benefits of a contract for 22 years, during which time it

twice defended the same from attacks on its validity, and then, at the expiration of such a period, seek avoidance of its obligations thereunder upon the ground that the consideration either has become or had always been burdensome.

Being precluded by laches from presenting the alleged issue of burdensomeness, City was deprived of no right of due process by the judgment of the Circuit Court of Appeals.

IV.

The Ninety-Nine Year Lease Was Properly Held To Be Valid and Enforceable According to Its Terms Against the Trust, Citizens Gas Former Trustee, and City as Present Trustee.

(Brief, pp. 62-77.)

The power of Citizens Gas to execute the lease is granted in its charter by its incorporation as a public utility under the general laws of Indiana. By no other means than by purchase or lease could it have acquired property with which to perform its corporate purpose of supplying gas to all inhabitants of the City of Indianapolis.

The Public Utility Act of 1913 also gave express power to Citizens Gas as a public utility to execute the lease upon order and approval of the Commission, which it had. Such powers, were not in any degree diminished or affected by the fact that it held its property in the capacity of a trustee of a public charitable trust.

The leasehold when created became part and parcel of the trust *res*.

City had statutory authority to succeed Citizens Gas as trustee of the trust and to take over all its said property "subject to its legal obligations." By the City and Town Act of 1905, power was granted Cities to receive gifts and public trusts and become bound by their conditions and terms. By Chapter 77 and 78 of the Acts of 1929, drafted by the City itself, it was authorized to take over this particular trust and lease and perform all the provisions of the same. It provided that while City should accept said property subject to those obligations, they were only to be a charge upon the property itself and not upon the taxing powers of the municipality.

All acts done by City in succeeding to trusteeship were in compliance with statute, *except* its attempted refusal to accept the legal obligations of its predecessor trustee under the lease.

In succeeding Citizens Gas, City could not accept the trust in part and reject in part. Its acceptance of the trust was in its entirety, including the leasehold.

That City did not sign the lease in 1913 offers it no support. Citizens Gas was at that time sole trustee and empowered to secure for the trust the leasehold. City had not then elected to exercise its rights of succession and it was not known until 1929 that it would do so.

Sections 85 and 254, Chapter 129 of Acts of 1905 are not relevant to any present issues. These relate solely to contracts executed by a city which create a direct liability on the taxing powers of the municipality. Had they purported to relate to such obligations as are incident to the present lease, which they did not, the subsequent Acts of 1929 would have superseded and repealed them.

CITY'S INDEMNITY AGREEMENT

Upon accepting the property of Citizens Gas, City executed an agreement of indemnity to its grantor covering all liability, resulting from any acts of commission or omission of its grantor, and undertook to save it harmless.

This agreement, in view of admitted liability of Citizens Gas under the lease, renders City bound for those obligations even though it had not, as it contends and respondent denies, accepted the assignment of the lease together with the transfer of the other property of the trust.

City's objections to the judgment of the Circuit Court of Appeals are, therefore, without substance.

V.

Decision of the Circuit Court of Appeals Is in Complete Harmony With the Statutes and Decisions of the Courts of Indiana; and the Rule of Erie Railroad v. Tompkins Is in No Wise Violated.

(Brief, pp. 77-79.)

Had the decision rested solely upon *res adjudicata* of the presented issue by the decisions of the Fishback and Williams cases, or on grounds of estoppel, no valid objections could have been raised.

By the law of Indiana, estoppel against a City is denied only where the acts on which it is based are those of an officer or agent which are unlawful or without the scope of authority.

Here, all acts of the City upon which estoppel can be predicated were expressly approved by statutes, and the sole conduct of City which is in violation thereof is its refusal to admit acceptance of the entire trust property subject to its legal obligations.

The Court of Appeals did not rest its decision upon *res adjudicata* or *estoppel* but upon an independent judgment of liability guided and controlled by the decisions of Indiana and the settled interpretation of its statutes.

The decision is in entire harmony with the law of the State of Indiana.

VI.

Present Contentions of City Would Make the Public Charitable Trust Invalid and Fraudulent as Against Creditors, and Thus Violate Decision in Todd v. Citizens Gas.

(Brief, pp. 79-81.)

Under decision in Todd v. Citizens Gas, City had right as successor trustee to succeed Citizens Gas and accept all its property subject to all legal obligations and so operate the "continuing trust."

City contends that it may take part or all of said trust property, free from any charge for the payment of its liabilities, by itself retiring all capital stock of Citizens Gas by paying directly to stockholders their investment plus interest at 10% for the 25 years, leaving the company wholly without assets. Such a construction of the trust or the rights of a successor trustee, were it possible, would render the trust itself invalid.

It is provided by Indiana statute that all deeds or conveyances made in trust for the use of the grantors shall be void against existing or subsequent creditors. Any trust which would purport to have authority to abrogate its liabilities upon the succession of a trustee would be void.

VII.

Circuit Court of Appeals Properly Refused to Order Judgment in Favor of Chase for Interest on Unpaid Bond Interest at More Than Five Per Cent Per Annum.

(Brief, pp. 82-83.)

The unpaid interest coupons sued upon recite that the bonds bear interest at the rate of 5% per annum. Under the Indiana statute bondholders are entitled to interest on unpaid bond interest only at the contract rate. The statute provides that 6% shall be allowed only in the absence from the contract of a specified rate of interest.

The coupons, showing on their face that they are interest at 5%, preclude merit to the cross-petition of Chase seeking an increase in the amount of the judgment.

E.

ARGUMENT

It being a settled rule of this Court, in the consideration of causes the review of which is accepted by certiorari, that it will confine itself to the grounds upon which the writ was asked or granted, argument will here be made only as to such grounds.

I.

The Circuit Court of Appeals Did Not Impose Any Obligation or Burden Upon the City's Revenues Raised By Taxation But Merely Imposed an Obligation Upon the Trust Property and Upon the City as Trustee.

In the fourth reason, relied upon by City for allowance of the writ (Petition p. 16) it is erroneously stated that an important public question is involved and that by the judgment of the Circuit Court of Appeals there is imposed upon City, as a municipal corporation, a continuing obligation for 77 years to pay in the future the total amount of more than 45 million dollars, and that the payment of this obligation is not limited to the revenues arising from the operation of the plant but is also a burden on revenues raised by taxation. The direct contrary is true.

The obligation of the City, resulting from the judgment of the Court of Appeals, is one solely against it as the present trustee of the public charitable trust and operates only as a charge upon the property belonging to the trust

which it has taken over. The language of the Court's opinion (IV R. 1306) and the decree (IV R. 1307) demonstrate this fact. Both state that the judgment is enforceable against "The City as successor Trustee and the Trust property."

All actions taken by the City, relative to the gas system, since its succession to Citizens Gas under statutory authority, have been as a trustee and entirely separate and distinct from its governmental functions as a municipal corporation. In the issuance of the City's revenue bonds it was expressly provided that the payment of their principal and interest was solely a charge upon the revenues derived from the operation of the gas system and should not be an indebtedness of the City payable out of taxes (III R. 826; offered II R. 327).

The decision thus follows the express statute (Indiana Acts of 1929, Chap. 78, Appendix C) providing that the City might accept trusteeship of the trust here involved and that in accepting the transfer and conveyance of said property

> "The title to such property shall vest in such town or city subject to all outstanding legal obligations of such corporations: *provided, however*, that such town or city shall not be liable for any such obligation and the same shall not constitute a debt of such town or city, but all such obligations shall be a charge upon said property so conveyed, and any mortgage or any lien or encumberance executed by the board of directors, trustees, or other authorized officers of such corporation before such transfer *shall continue to be a lien* on such property to the same extent as before such transfer or conveyance."

The City in its brief uses certain figures as argument to destroy the obligations of the trust. The value of the property of Indianapolis Gas as stated in the circulars, under which the City's revenue bonds were sold to the public, was set at $12,730,490 as the cost of reproduction new and at a depreciated value of $9,181,960 (I R. 196; offered II R. 327). The figure of $45,000,000 used by the City is purely a mathematical computation with the accuracy of which we are not here concerned. That the interest on $10,000,000 at 5% per annum will total $10,000,000 in 20 years has no relevancy either to whether the rate of 5% is a lawful rate of interest or whether the obligation was validly assumed.

The statement of City therefore, that an important public question is here involved, because of a judgment against it as a municipality which might presumably impose a burden on revenues raised by taxation, is wholly without foundation.

The principal question presented to the court in the review of these causes is whether or not the obligations of a trust, created by the original trustee in its corporate capacity as a public utility and acquiesced in by the trustee, the trust, and its beneficiaries for 22 years, may be avoided by a succeeding trustee solely by reason of such succession—said obligations furthermore being incidental to a leasehold estate created under express legislative authority by the public utility corporation acting as instant trustee (I R. 80); a leasehold which both the original trustee and the City had on two different occasions joined in successfully defending against charges of invalidity in representative actions by beneficiaries.

II.

The Circuit Court of Appeals By Its Judgment Correctly Decreed That the Obligation of Indianapolis Gas for Interest on the Bonds Was Secondary to the Liability of the Trust Property, the City and Citizens Gas; the Latter Being Principal Obligors. Jurisdiction Was Not Defeated or Affected By the Order of Liability Adjudged Against All Defendants.

Until October 1, 1913, the obligation of Indianapolis Gas to pay interest on the bonds was solely its own. On that date the 99-year lease was executed under authority of statute (Appendex A) and upon order of the Public Service Commission of Indiana (I R. 116-122; offered II R. 327). Thereupon Citizens Gas took over as lessee the possession and operation of all this respondent's property. By the terms of said lease Citizens Gas as lessee agreed and undertook to pay all interest on said bonds as it should become due (I R. 69, No. 21; offered II R. 327) and from 1913 until April 1, 1936 this obligation was fulfilled by Citizens Gas or its successor trustee the City.

The express agreement of the lessee, made for itself, its successors and assigns, including the City or any successor-trustee, to pay and discharge said interest obligations, was a valid and binding consideration for the leasehold estate thus created. The District Court in the trial of the cause held the lease invalid and entered judgment solely against this respondent in the sum of $1,032,150, the amount of the then unpaid bond interest.

The Circuit Court of Appeals properly reversed the District Court and ordered judgment entered against all defendants in stated order of liability.

The relation of this respondent Company to the obligation sued upon is analogous to that of an original mortgagor who has conveyed property subject to the mortgage, with an assumption by the grantee to pay and discharge the mortgage debt, only here the conveyance was for 99 years instead of in fee. Upon a default in such obligation the mortgagee may sue both the original mortgagor upon the debt and the grantee upon the undertaking in the deed. In such case, in Indiana as it is generally, the grantee is regarded as the principal debtor and the grantor as a surety. This accepted rule is stated in *Stanton v. Kenrick*, 135 Ind. 382, at 389, as follows:

> "One who, in a deed, assumes and promises to pay an encumbrance upon land as a part of the purchase price, becomes, by that assumption and promise, the principal debtor to the holder of the encumbrance, and liable to be sued himself for the debt in the first instance; and while the grantor remains bound for the obligation, yet, as between grantor and grantee, the former is surety and the latter principal."

See also

Ellis v. Johnson, 96 Ind. 377;
Higham v. Harris, 108 Ind. 246.

It has also long been a rule of equity that courts, having jurisdiction of the parties to controversies brought before them, will decide all matters in dispute and decree complete relief.

Pomeroy Equity Jurisprudence, Sec. 181;
Alexander v. Hillman, 296 U. S. 222-242;
Lincoln National Life Ins. Co. v. Pearman, 43 Fed. (2d) 163;
Carter v. Blaine County Inv. Co., 45 Fed. (2d) 643.

This respondent can find no valid ground for, nor reason to support, the contention of the City as to lack of jurisdiction. Interest on its bonds is unpaid and in default in a substantial amount; to deny such indebtedness to its bondholders or their right to enforce such obligation by lawful means would not serve the proper interests of any party to this cause. Indianapolis Gas being liable to its bondholders for more than $1,000,000 as adjudged by both the District Court and the Circuit Court of Appeals, and it being only through subsequent collateral contracts with the other defendants that its primary liability as debtor became that of a surety for the payment of said obligation, no valid reason can exist for realignment of Indianapolis Gas as a plaintiff to sue itself and the other defendants for a debt which it must pay if said other defendants do not. The jurisdiction of both the District Court and Circuit Court of Appeals was properly invoked in this cause, and the judgment of the Circuit Court of Appeals in determining the order of liability of the several defendants to the obligation sued upon was therefore proper and unassailable.

III.

The Decision of the Circuit Court of Appeals Directing Judgment Against All Defendants, Without Ordering Retrial of the Alleged Issue of Burdensomeness of the Lease, Did Not Deprive City of Any Constitutional Right of Due Process of Law.

City contends the decision of the Circuit Court of Appeals in ordering judgment against all defendants, without remanding the cause to the District Court for further hear-

ing on the alleged issue of burdensomeness of the lease, denies to it due process of law. City, in its answer and counter-claim below, alleged that the lease was burdensome upon the City and the property of the trust, and one which the initial trustee had no power to make for a period beyond its own trusteeship; and that it was not binding upon the City as successor trustee and did not constitute an asset of the trust which it was bound to accept. (I R. 186, 187.) A motion to strike out the allegations of burdensomeness as being immaterial and constituting no defense was filed by plaintiff and denied by the District Court and assigned as error above.

In its counter-claim against Indianapolis Gas and all other parties to the cause, City alleged that the validity of the lease had not been already adjudicated in the Fishback and Williams cases and that said lease did not constitute an enforceable obligation against either the City as trustee or the trust. (I R. 187.) Issue was joined by Indianapolis Gas upon said allegations. (I R. 215, 220.)

Before trial the District Court made the order (II R. 321-322) heretofore referred to, as set out in full at page 34 of City's brief. In the City's petition for rehearing filed with the Court of Appeals it sought and urged

> "an opportunity to prove the averments of its counterclaim and to have the lower court determine whether *when* executed *the lease was in fact* burdensome." (IV R. 1310.)

The above language of the petition for rehearing is also quoted at page 6 of the City's petition to this court for certiorari.

This reserved issue, as determined by the order and interpreted by the City in its petitions for rehearing and

for certiorari, was therefore simply whether the City had the right to "refuse and reject an assignment of the lease" in 1935 upon the alleged ground that in 1913 "when executed this lease was in fact burdensome."

That the judgment of the Circuit Court of Appeals was proper and did not deny to the City any rights of due process of law, through failure to remand to the District Court the cause for further hearing on that issue, is supported by each of the following reasons:

(1) City did not refuse and reject an assignment of the lease, but in fact received, recorded and retained said assignment and simultaneously took possession of the leased property and operated it for six months (until March 2, 1936) solely under authority thereof, and by ordinance expressly accepted the public trust of which the lease is part (III R. 1018, 1019). The reserved issue thus becomes moot.

(2) The fact that the lease was not invalid because of any burdensomeness upon the public charitable trust had been judicially determined by the Supreme Court of Indiana and by the Superior Court of Marion County, Indiana, and by the order of the Public Service Commission, in representative proceedings by beneficiaries on behalf of the trust itself, with the trustees in court, which order and adjudications are binding and conclusive upon both the original and successor trustees and the trust.

(3) Under decisions of Fishback and Williams cases any charge of burdensomeness would be wholly irrelevant as a matter of Indiana law.

(4) City and Citizens Gas having operated for 22 years under the lease, thereby greatly increasing the value of the trust, are now precluded by laches from any defense against an action on the lease by asserting the same is unenforceable on account of any alleged burdensomeness.

(1)

City Accepted Assignment of the Lease and Took Possession of the Entire Trust Property, Including That Under Lease, and therefore Any Alleged Ground for Not Accepting Such Assignment Becomes Moot.

The acts of the City on September 9, 1935, in succeeding to the trusteeship of the gas system, were only the culmination of an expressed and definite program and election which had been made and followed consistently for over six years. In defining the action of that date by Citizens Gas and City, it is therefore necessary to examine the City's expressed policy during the previous years. In every action and step, taken by the City preparatory to its succeeding Citizens Gas as trustee, is found a clearly expressed intention to take over the entire trust; the property which Citizens Gas had *operated* and in which it *had an interest*.

On March 20, 1929 the City, by resolution of its Board of Public Works (II R. 670 to 672, offered R. 327) first declared by formal action its election and purpose to exercise its right to succeed Citizens Gas as trustee of the public charitable trust. It there demanded of Citizens Gas "all rights, title, interest and ownership of whatever nature or character in and to the gas plant, mains and property" which it had. Demand was made that the latter company

secure by mortgage, if possible, sufficient sums to retire and redeem its common stock and preferred stock and then convey said gas system to the City "subject to such mortgage and other legal obligations against said company" (II R. 671). The property, so demanded, included the leasehold estate in the property of Indianapolis Gas which had been an integral part of the system operated since 1913. Said demand was made a few days after two statutes prepared by City authorizing the transfer went into effect. (Appendix C and D.)

The above resolution of March 20 was served upon Citizens Gas, whose directors by resolution of April 3, 1929 (II R. 672-673, offered II R. 327) acknowledged said demand and "the right of the City to take over the property and assets of said Company," and authorized its officers to comply therewith.

Following said resolution of March 20, the next step taken by City to succeed as trustee was action by its Board of Directors for Utilities on May 7, 1935. By resolution of that date (III R. 822-830, offered II R. 327), it authorized the City's gas system revenue bonds which should be issued and sold by the City in the amount of $8,000,000, principal and interest on said bonds to be payable from, and be a charge *only* upon the net revenues derived from operation of the gas system to be "owned and/or operated by" the City. At the beginning of the resolution it was stated the purpose of the bond issue was to obtain funds "for the taking over of certain property held by Citizens Gas Company and/or in which it has an interest." (III R. 822, offered II R. 327.) It also provided that the City agreed to take all steps necessary to acquire the property of Citizens Gas and that when the City had accepted "the possession of the property *operated* by Citizens Gas Com-

pany, it will cause the same to be continuously operated *as a gas system''* (III R. 828, offered II R. 327.) The form and tenor of the bonds so authorized was also set out in the resolution (III R. 825); and in the bond itself the purpose was stated in the exact language of the resolution quoted above.

Prior to the adoption of this resolution the Supreme Court of Indiana, by Judge Treanor, had decided the case of *Williams v. Citizens Gas Company et al.*, 206 Ind. 338 (Dec. 1933). In the light of that decision, holding that the lease was valid and a part of the trust estate, the description of the property as that "operated by" Citizens Gas "and/or in which it has an interest" was obviously intended to include the leasehold estate in the property of Indianapolis Gas.

In connection with the sale of its said revenue bonds, the City issued a prospectus to invited bidders in May, 1935 (II R. 533-536, offered R. 518). It was there stated that the City was to take over and operate the property of Citizens Gas "subject to outstanding obligations." It also included the following statement in describing the gas system:

> "For over twenty-one years, gas has been supplied to the inhabitants of Indianapolis and neighboring communities solely through the system operated by Citizens Gas Company; a system having 867 miles of mains and 75,949 meters in use as of May, 1935."

Referring to the fact that the leased property included 531 miles of gas mains (I R. 196, offered II R. 387), the prospectus continued:

> "The system is in part owned by Citizens Gas Company and in part leased by it from Indianapolis Gas Company, which is not an operating Company. * * * The Citizens Gas Company owns approximately 40 per cent of the mains of the system", and that Indianapolis Gas owned approximately 60 per cent of the mains. (II R. 535, offered R. 518.)

The prospectus then continued with a statement descriptive of the details of the ninety-nine-year lease and of its terms and provisions (II R. 533-536, at 535; offered II R. 518).

Thereafter in July, 1935, in reliance upon statements in the prospectus, said City's revenue bonds were purchased by Halsey, Stuart & Company and Otis & Company, by whom they were later sold and distributed to the public. (II R. 486-488; offered II R. 420.)

By September 9, 1935, the City with the proceeds from the sale of its gas revenue bonds, had retired the common stock, preferred stock and bonds of Citizens Gas (II R. 634, 635; offered R. 326), and had performed other conditions precedent to its succession as trustee of the trust. No money was paid to Citizens Gas, the entire consideration being paid to stockholders and bondholders in the retirement of their stock and bonds, the stockholders receiving a sum completing full dividends of 10 per cent per annum for 25 years.

On this date of September 9, 1935, Citizens Gas executed and delivered to the City instruments transferring and conveying all the property of every kind and character owned by Citizens Gas, including the lease in question.

The four separate instruments then delivered to the City were:

(1) a deed covering all real estate owned by Citizens Gas (III R. 833; offered II R. 327);

(2) an instrument of transfer and assignment of its personal property (I R. 122-7; offered II R. 327);

(3) an assignment of the lease of property of Indianapolis Gas (I R. 127-9; offered II R. 327); and

(4) an assignment of the lease for space in an office building (III R. 835; offered II R. 327).

These instruments of conveyance, including the assignment of the 99-year lease, all expressly provided that they were made subject to all legal obligations of Citizens Gas. They were all received, recorded and retained by the City (II R. 330, 467-8). The City took immediate possession of all the property which had been operated by Citizens Gas, including that of Indianapolis Gas, and has thereafter continued the operation of the leased property as a unified part of the entire gas system.

Upon receiving said instruments of conveyance and assignment, the City, through its Directors for Utilities, passed its resolution for so-called "temporary use" of Indianapolis Gas property and its so-called "rejection of the lease." (I R. 202; offered II R. 432.) By these *ex parte* resolutions, City has since sought to nullify the express provisions of the instruments of conveyance and assignment it accepted, which provide that the property is transferred subject to the legal obligations of grantor; to annul all its acts during the six previous years, as well as the statutory provisions (Appendix C and D) authorizing and controlling its succession to the trusteeship and the trust, including this lease.

The City's right to the possession and operation of the property of Indianapolis Gas, which it assumed upon receiving the instrument assigning said lease, was solely by right of said assignment and as a successor-lessee under the lease. No consent was given by Indianapolis Gas to the City's so taking possession and assuming operation of the leased property. Three weeks later, on September 30, 1935, the City forwarded to Indianapolis Gas its check in the amount of interest falling due October 1 on its outstanding bonds, and stated that by so doing it waived no rights to claim that the lease was not enforceable against it nor did Indianapolis Gas, in accepting said check, waive its right to claim enforceability (III R. 968, 969; offered II R. 384-5). This money was accepted by Indianapolis Gas under these provisions of non-waiver and the bond interest was therewith paid.

It was not until March 2, 1936, that an agreement was entered into by the City and Indianapolis Gas under which it was provided that the City might continue to operate the property of Indianapolis Gas without prejudice to the position or rights of either party. It provided that during the life of the agreement the City should make deposits in escrow in a local bank of amounts equal to certain lease rentals, including the amount of interest on Indianapolis Gas bonds as it should become due (I R. 205 to 207; offered II R. 386). It also provided that said agreement should not constitute a waiver of any alleged rights of the parties under the lease (II R. 637; offered I R. 386).

Therefore, from September 9, 1935, until March 2, 1936, the City was in possession and operated the property of Indianapolis Gas under no authority or right other than as successor to Citizens Gas and assignee of the lease.

City, having thus taken possession and assumed operation of the entire gas plant, including the parts thereof which Citizens Gas had acquired both by purchase and by this lease (in compliance with statute, Appendix B), by its Common Council expressly enacted by ordinance:

> "That the public charitable trust in all such plant and property so delivered to and as accepted by said Board of Directors for Utilities be and is hereby received and accepted, and the City of Indianapolis hereby agrees to the conditions and terms accompanying such trust and acknowledges itself bound to carry them out." (III R. 1018, 1019; offered II R. 429, 430.)

Under the above narrative of uncontradicted evidence, admitted by stipulation of all parties, it is conclusive that the City, in fact and in law, did accept and retain the assignment of the 99-year lease and, as such assignee, did enter into the possession and operation of said leasehold estate as a part and parcel of the trust *res*, the unified gas system, it was taking over. It must follow that any alleged grounds which the City might have had for refusing to accept the lease can not be an issue which is pertinent to the cause, or one which is here other than purely moot.

(2)

That the Lease Was Not Burdensome Was Determined by the Public Service Commission, and That It Was Not Invalid Upon Such Ground Was Judicially Adjudged by the Courts of Indiana, Which Said Determination and Judgments Are Conclusive Upon the Trust and the City Its Present Trustee

A.

The Order of the Public Service Commission

When the ninety-nine-year lease was executed (I R. 80; offered II R. 327), the Public Utilities Commission Act, Chapter 76, Indiana Acts 1913, known as the Shively-Spencer Utility Act, was in force. This act placed upon public utilities certain obligations as to furnishing service and providing proper facilities, and it also granted them certain rights of purchase and lease of property of other utilities giving similar service in the same community; such rights to be exercised solely under the control and direction and with the approval of the Public Service Commission.

Six sections of this act are set out under Appendices A, G, H, I, and L in this brief. Section 95½ of said act (Appendix A) provided that:

> "any public utility may also, with the consent of the holders of three-fourths of the capital stock, purchase or lease the property, plant and business or any part thereof of any other public utility at a price and on terms fixed by the commission."

It was under the authority and provisions of this statute that the joint petition of Citizens Gas and Indianapolis Gas, seeking approval of the proposed lease and merger, was filed with the Public Service Commission. The City of Indianapolis, by its corporation counsel, participated (I R. 116; offered II R. 327) in the extended hearing had upon the petition. The lease was thus approved and ordered "at a price and on terms fixed by the commission."

In the course of the proceedings one Fishback, as a resident freeholder of Indianapolis and certificate holder of Citizens Gas and for the protection of the rights of all similarly interested (II R. 654, 656, 657; offered II R. 327), filed his intervening petition urging that the petition for approval of the lease be denied upon, among others, the following grounds:

> "First. The physical valuation and the earning capacity of the Indianapolis Gas Company are not such as to warrant the payment to it of the rental proposed to be charged the Citizens Company. (II R. 654.)
>
> * * * * * * *
>
> "Fourth. The Citizens Gas Company has no power to make a lease covering a period longer than the term of its existence. It not before, by dividends and interests, then at the end of 25 years the certificates of stock are to be cancelled and the corporation wound up. (II R. 656.) * * *
>
> "I contend that the Citizens Gas Company is without power to make lease binding on the City of Indianapolis for a period of 74 years after the company goes out of existence." (II R. 657; offered II R. 327.)

After a protracted hearing, the Commission on October 1, 1913, made its finding and order approving the lease with certain modifications, among which was the reduction of rent paid to common stockholders of Indianapolis Gas by way of dividends, from 7% to 6%. In the course of its finding and order the Commission stated:

> "The two plants are so constructed and laid out as to adapt the two to a single working plant of great efficiency, and under one management they can be operated at a great saving as compared with the cost of operating them as separate and competitive plants.
>
> "The valuation of the Plant of the Indianapolis Gas Company is, in the opinion of the Commission, sufficient to justify, under the circumstances, a rental such as is proposed in the subjoined lease." (I R. 117-118; offered II R. 327.)

Following the order of October 1, Fishback filed his petition for rehearing, contending among other things:

> (3) "The rental ordered and permitted to be paid by the terms of the order and lease, is unreasonable and unlawful, and will result in a waste and misapplication of the funds, earnings, and property of the Citizens Gas Company, and an irreparable injury to its stockholders and certificate holders." * * *
>
> (5b) "The trustees and directors and officers of the Citizens Gas Company are not authorized by law or otherwise to enter into such a lease for a period of ninety-nine years." * * *
>
> (6) "The fulfillment of the terms and conditions of the lease and order will render impossible the fulfillment of its contract with the City of Indianapolis, and such order and lease im-

pairs the obligation of the contract between the company and said City as it relates to the taking over and ownership of the property and plant of the Citizens Gas Company by the City."

(7) Consent to the lease had not been given by the City.

(9) The order of the Commission was contrary to law. (II R. 659-660; offered II R. 327.)

On November 28, the Commission denied said petition for rehearing (II R. 660-663), and thereupon Citizens Gas took possession of the plant and property of Indianapolis Gas, which it continuously operated thereafter under said lease until September 9, 1935, when it conveyed and assigned to the City all and singular of its property, including the leasehold, subject to its legal obligations (I R. 122-127; III R. 833; offered II R. 327).

The decision of the Commission, under the settled law of Indiana, is conclusive in this collateral action upon the questions of fact as to whether the lease or merger was in the public interest and a proper and reasonable exercise by Citizens Gas of its powers as trustee of a public charitable trust, which was at the same time a public utility amenable to the laws of the state controlling such utilities. It is also conclusive as to the fairness and reasonableness of the rental and length of term provided in said lease, both of which were expressly committed by the statute to determination by the Commission.

Citizens Gas, in a memorandum on admissibility of certain evidence filed with the District Court in the trial of these causes, stated in discussing the order of the Public Service Commission:

> "The order expressly found that the execution of the lease and the merger did create greater efficiency and procure the operation at a great saving. Moreover, the order of the Commission must necessarily have been based upon the conclusion that the making of the lease and merger were in the public interest; and, furthermore, was in fulfillment of the duties of Citizens Gas Company as a public utility."

The order of the Commission is, furthermore, not subject to collateral attack in the courts except upon the ground of fraud, and it is to be noted that no attack has been made by the City, either in the trial of these causes or in any prior litigation, upon the motives or the judgment of either the Directors and Trustees of Citizens Gas in making the lease, or of the Public Service Commission in ordering the same. No suspicion of fraud has ever been alleged or intimated by the City in connection with these proceedings.

The rule announced by the Supreme Court of Indiana in *Public Service Commission v. City of Indianapolis*, 193 Ind. 37, 43, has never been qualified and is now the settled law of Indiana. It is stated in the opinion at page 43:

> "If the Commission had jurisdiction and kept within it, and its action was not vitiated by fraud, its decisions of all questions of fact as to the value of the properties, the sufficiency of the income to pay interest and dividends on the bonds and stock authorized, the petitioner's qualification as a purchaser, and all other questions which it was required to decide as preliminary to taking action in the matter, is conclusive on the courts in a collateral action."

City at pages 70 and 71 of its brief accepted the above announced rule as to the conclusiveness of the Commis-

sion's order upon the reasonableness of the lease terms and that it was made in the public interest. The order applied to a public utility. How it could be in the public interest and at the same time not in the interest of the beneficiaries of the trust (the public) is not explained.

As a defendant in the Williams case, City filed in the trial court a joint motion with Citizens Gas to strike out parts of the complaint and there urged as reasons therefor:

> "First. These subdivisions of the plaintiffs' complaint challenge a lease executed by Citizens Gas Company and Indianapolis Gas Company and approved by the Public Service Commission of Indiana. The Public Service Commission of Indiana has express authority to approve leases between two operating public utilities and it appearing from the averments of the complaint that such lease did have the approval of the Public Service Commission, the action of that Commission can not be collaterally attacked." * * * (II R. 806; offered II R. 328.)
>
> "Third. It appearing that the lease so approved by the Public Service Commission has been in full force and effect for nearly 17 years and that many millions of dollars have been expended in reliance upon its validity, all persons including plaintiffs (if they have any standing under any circumstances) are estopped to question the validity of the same." (II R. 807; offered II R. 328.)

The jurisdiction of the Commission to authorize execution of the lease is clearly established, and in view of the above and controlling law of Indiana defining the force and effect of orders of the Commission, it follows that the City may not collaterally attack the order and findings of the Commission in this cause by now alleging and seeking to prove that "when executed this lease was in fact burdensome."

Being deprived by law of the right to now present the issue of burdensomeness, the refusal of the Court of Appeals to remand the cause for further hearing on this issue did not deprive petitioner of any rights of due process of law.

B

Fishback v. Public Service Commission, 193 Ind. 282

Immediately upon denial by the Public Service Commission of his petition for rehearing and its order approving the lease, Fishback instituted suit in the Marion Superior Court of Indiana as a resident freeholder of the City and certificate holder of Citizens Gas in behalf of himself and all others so interested.

The purpose of the action as defined by the Supreme Court was:

> "to vacate and set aside an order of the Public Service Commission authorizing the Citizens Gas Company to lease the plant and property of the Indianapolis Gas Company for a period of ninety-nine years, and to operate it with its own plant and property as part of a consolidated system. The action also sought the cancellation of the lease made by authority of the order, and an injunction against appellees, the two gas companies, to prevent them from carrying out the provisions of the order." (193 Ind. 282, at 283-4.)

Citizens Gas, Indianapolis Gas, City of Indianapolis, and the Public Service Commission were defendants (II R. 648; offered II R. 328). The complaint set out the articles of incorporation of Citizens Gas (650), its franchise contract with the City (651), and the form of its trustee certificates (649). Thus before the court were all the instru-

ments which spelled out the Public Charitable Trust, and as a resident freeholder of Indianapolis suing for all others, the plaintiff was necessarily suing as a beneficiary of that trust and for all other beneficiaries.

The complaint alleged, among others, the following grounds to support the relief prayed for (II R. 648-668; offered II R. 328):

a. "The rental and fixed charges ordered and required to be paid by the terms of the lease and order as hereinbefore set forth are unreasonable and unlawful and their payment will result in a waste and misapplication of the funds, earnings and property of the Citizens Gas Company and an irreparable injury to its stock and certificate holders, including plaintiff." (II R. 665)

b. "The trustees, directors and officers of Citizens Gas were not and are not by law or otherwise authorized to enter into such a lease as hereinabove referred to for a period of 99 years." (II R. 668)

c. That City did not consent or join in the execution of the lease (II R. 665).

d. "The obligations taken on by Citizens Gas Company under said order and lease, to pay the interest on the bonds and dividends on the stock of Indianapolis Gas Company for a period of ninety-nine years, impairs the obligation of the contract existing between the Citizens Gas Company and this plaintiff and other stockholders, and between the company and the City of Indianapolis, in the following particulars:

"1. It constitutes such a lien and incumbrance upon the property and earnings of said company, that the company at the end of twenty-five years from the date of its franchise, can not

> mortgage such property for the purpose of raising funds from which to pay the stockholders of said company, including this plaintiff, the par value of the stock held by them and the balance of the unpaid accumulated ten per cent annual dividends." (II R. 665-666) (Offered II R. 328)

Defendants, including the City, filed motions to strike out parts of the complaint (II R. 624; offered II R. 327), which motions were in part granted and in part denied. Thereafter demurrers to the complaint were filed by Citizens Gas, Indianapolis Gas and Members of the Public Service Commission, while an answer in general denial was filed by the defendant City. (II R. 625)

The demurrers were sustained and, the plaintiff refusing to plead further, final judgment was rendered (after suit had pended for seven years, II R. 625) in favor of all defendants except City (II R. 625), as to which plaintiff dismissed on the day of judgment (II R. 624-627; offered II R. 326). The attempted appeal by plaintiff was dismissed by the Supreme Court of Indiana and it has been stipulated by all the parties to this cause that the judgment of the Marion Superior Court is *now in full force and effect*. (II R. 626; offered II R. 327).

It is the settled rule of Indiana, as it is generally, that the final determination of a matter by a court having jurisdiction forever sets at rest the questions determined and also every other matter which might have been litigated under the issues in the case, as between the parties and those in privity with them.

> *Fischli v. Fischli*, 1 Blackf. (Ind.) 360, 361;
> *Knox v. Clark County Co.*, 191 Ind. 354, 365;

Reynolds v. Lee (1935), 97 Ind. App. 460, 463;
Grantham Realty Corp. v. Bowers (1939), 215 Ind. 672, 678-679;
Citizens Loan & T. Co. v. Sanders (1934), 99 Ind. App. 77, 82, 83;
So. Pac. Ry. Co. v. U. S., 168 U. S. 1, 48.

For a judgment is binding not only upon the actual parties to the judgment but upon all who succeed them and are their privies in interest.

Skelton v. Sharp, 161 Ind. 383, 386, 387;
Grantham Realty Corp. v. Bowers Jr., 215 Ind. 672, 678, 679;
Vinson v. Graham (C. C. A. 10), 44 Fed. (2d) 772, 775-776.

The suit, being a class suit and brought by plaintiff as a resident of Indianapolis and for all others so situated, they being beneficiaries of the trust, the judgment entered therein must necessarily be binding upon not only the then trustees but all succeeding ones, and the trust itself.

Burns' Rev. Ind. Statutes 1933, ss. 2-213, 2-220.

Indianapolis Gas and Citizens Gas were both parties to the judgment and as to them, and those in privity, the judgment must be conclusive of the decided issues, viz., that

(a) The lease was not made invalid because of the alleged burdensomeness.

(b) Citizens Gas had power and authority to enter into the lease, and the trust with all beneficiaries are bound by it.

(c) The lease was not invalid because of the findings and order of the Commission not being

sustained by sufficient evidence or binding at law.

City contends that, by reason of dismissal as to it just prior to judgment, it is not now bound by the judgment. This contention overlooks the admitted facts that the trust itself was a party to the judgment in the person of the then beneficiaries and the then trustee, Citizens Gas, and that thereby the trust and its beneficiaries and trustees, then and in the future, are bound; and that the City was a party to the proceedings until the day of judgment and had joined issue by filing its denial of the allegations of the complaint averring that the rentals of the lease were excessive and in substance burdensome upon the trust. The opportunity was given it to join the plaintiff in claiming the lease invalid on the ground set out in the complaint. Had it joined issue with Indianapolis Gas, its then co-defendant, by a counter-claim alleging the invalidity of the lease for any reason, it could readily have precluded its dismissal on the day of judgment. It had been in court for seven years and the issues were presented to it which it accepted by its answer of denial. It may not now contend that the issues, which it has itself raised by its counter-claim in the cause now at bar, were not in their entirety presented to and accepted by it there.

However, had the City not been a party at any stage in the proceedings of the Fishback case, it would be as equally bound by the judgment therein as is Citizens Gas. It is axiomatic that an adjudication of title is binding, not only upon the owners at a particular time who were parties to the judgment, but also upon all those who subsequently acquire title under and through them.

Grantham Realty Corp. v. Bowers, 215 Ind. 672.

Were the rule otherwise, titles either of fee or leasehold estate might never be quieted by judgment for a period longer than the life of the particular owner, lessor or lessee who might be party to the judgment. Not only was Citizens Gas bound by this judgment, by which it sought to quiet its title in the leasehold estate, but also the City or any other successor trustee who might have become its grantee and assignee is bound, especially when taking "subject to all legal obligations" of the grantor.

City also contends that the binding effect of that judgment is not conclusive upon the parties to this cause by reason of the fact that Chase, the present trustee and representative of the bondholders of Indianapolis Gas, was not a party to that proceeding. It is true that neither the Chase bank nor its predecessor trustee nor any other creditor of Indianapolis Gas was a party to the Fishback suit. However, their presence or absence from that cause could in no wise diminish the conclusive effect of the judgment that, as between the trustee of the public charitable trust, the trust itself and this respondent Indianapolis Gas as well as their successors and assigns, the lease was a valid and enforceable obligation for its term and according to its tenor.

Issue in the instant cause was definitely joined in the District Court as to whether or not the matters presented and decided in the Fishback case were or were not controlling as between Indianapolis Gas, Citizens Gas and City in the present determination concerning the validity of the lease (I R. 10, 11, 14, Sec. 9, 14; I. R. 151-153, 159-161, Sec. 14; I R. 220).

It is submitted that the City may not now assert, as against this respondent, that the lease is invalid and unen-

forceable for any reason or on any ground which it has alleged in its counterclaim. It may not now collaterally attack either the judgment in the Fishback case or the order of the Commission by relitigating the question whether the lease is burdensome.

This decision of the Superior Court in *Fishback v. Public Service Commission* is conclusive in determining what is the law of Indiana.

West v. American Tel. & T. Co., 85 L. Ed. (adv.) 146;

Fidelity Union Trust Co. v. Field, 85 L. Ed. (adv.) 176.

It clearly determined that none of the objections urged by Fishback as a beneficiary on behalf of the trust estate were well taken under the law of Indiana and that the order of the Public Service Commission approving the lease in question "at a price and on terms fixed by the Commission" was valid and binding.

City is, therefore, deprived of no right of due process by the failure of the Circuit Court of Appeals to order this cause remanded to the District Court for further hearing upon an alleged burdensomeness of the lease.

C.

William v. Citizens Gas Company, 206 Ind. 448.

Allen G. Williams and another were suing in this action as beneficiaries of the public charitable trust, in behalf of all beneficiaries, and seeking to have the lease declared invalid on the ground that the order of the Public Service Commission approving the lease was invalid, that

the lease itself was burdensome upon the trust, and in effect upon allegation of every ground which has been alleged by the City in this present cause, either in answer to the complaint or in its counterclaim against this respondent and others (II R. 761 to 803; cf. R. 141 to 187; offered II R. 328).

All of the parties to the cause now at bar were parties to that litigation, and every issue presented here was in issue there and was put at rest by the final judgment in that cause. In statement of facts already before the Court is a full and detailed discussion of the pleadings, issues and matters determined in Williams v. Citizens Gas (II R. 630-633; offered R. 326; also R. 761-822; offered II R. 329). To re-state them here is unnecessary. With what is said in the Chase brief as to the effect of the Williams judgment, this respondent is in accord. It is submitted that the judgment in the Williams case is conclusive of all matters here presented, both *as a declaration of the law of Indiana* and as *res adjudicata*.

City contends in substance that it is not bound by that judgment for the reason that it had not become trustee of the public charitable trust at the time the judgment was entered, and also that it is not bound because of a change of conditions which has occured since said judgment. These contentions are purely fatuous. The City in fact had adopted the resolution and given notice that it was exercising its right to take over the trust on March 20, 1929 (II R. 628 (12), 670; offered II R. 327) before Allen G. Williams, et al., commenced their suit as beneficiaries under the trust on March 12, 1930 (II R. 630 (14), offered II R. 327). The only subsequent change which occurred in the administration of the public charitable trust was simply the substitution of the City for Citizens Gas as trustee of

such trust and the transfer of the legal title. An obligation of a trust, validly created by its then trustee, is in no wise affected by a change of trustees which may occur either through death, resignation, removal or assignment. The statement in the opinion of the Circuit Court of Appeals is obviously correct:

> "If the lease is valid, the rental obligation binds the trust *and it matters little that a new trustee succeeds the old one.* Otherwise any obligation incurred by a particular trustee would cease with the death, resignation or removal of that trustee: such a rule would lead inevitably to ridiculous results."

The rule as stated is a basic one underlying the successful functioning of all trusts and no authority has been cited by City, nor can any be found, holding otherwise.

In bringing the representative suit, Williams, et al., were acting for all beneficiaries of the charitable trust, as was expressly provided by the Indiana Statute:

> Burns Ann. Indiana Rev. Stat. 1933, sec. 2-213, 2-220;

See also:

> *Gaiser v. Buck*, 203 Ind. 9, 11, 13;
> *Siegel v. Archer*, 212 Ind. 599;
> *Englehart Estate v. Larimer*, 211 Ind. 218.

In *Siegal v. Archer*, 212 Ind. 599, it is stated at page 626:

> "One or more beneficiaries of a trust could sue on behalf of all to test the binding and valid force of a contract entered into by the trustee affecting the entire trust and making the trustees parties defendant; and where the trustees (as here) actively

> joined in the defense of such suit on the merits and procurred the court to sustain a demurrer to the complaint on which final judgment was rendered against such plaintiff beneficiaries by which the contract was adjudged valid, such judgment against the beneficiaries is binding upon the trustees who were thus made parties to the action."

Had any doubts remained after the judgment in Fishback v. Public Service Commission as to the validity of the lease, such doubts were forever put at rest by the decision in this Williams case. All clouds upon the title of the trust to this leasehold estate were removed and it was, and should be, conclusive for all time that the lease is valid and enforceable against all parties to the lease, their successors and assigns, and against the *res* of the public charitable trust. This final decision in Williams v. Citizens Gas Company, 206 Ind. 448, of the Supreme Court of Indiana became and is the law of Indiana upon the subject and is binding upon all parties and, under the rule of this court as announced in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, also upon courts of the United States.

Therefore, by reason of the order of the Public Service Commission finding that the terms of the lease were in all respects reasonable and beneficial to the trust and approving its execution; by reason of the judgments in both Fishback v. Public Service Commission, et al., and Williams v. Citizens Gas Co., et al., it necessarily results that the City is precluded in this action from defending against the lease obligations upon the ground that "when executed this lease was in fact burdensome."

City would seem to argue at page 39 of its brief that it was denied the right to present proof in support of allegations in its counterclaim that the order of the commis-

sion and the judgments in the Fishback and Williams cases were not res judicata. This is denied by the record. Not only were these issues not reserved in the pre-trial order of the District Court, but as the trial progressed, evidence was introduced by stipulation of the parties (Exhibit 1, II R. 613-639; II R. 648-668; offered II R. 326-7-8) describing the pleadings in the Fishback case and what issues were joined and what the judgment was (II R. 624-627; offered R. 327). By a like stipulation evidence to the extent of 61 pages (II R. 761-822; offered R. 328) was heard descriptive of the pleadings in the Williams case and 3 pages more (II R. 630-633; R. 327) describing the issues, decision and judgment were all introduced in evidence. Furthermore, City requested of the District Court the adoption of special findings of fact and a conclusion of law that it was not bound by the adjudications in the above cases (III R. 1089-1092; 1102) which requests were acted upon and adopted by the trial court and written into paragraph two of the decree appealed from. (III R. 1175-1179, 1190-1192).

The City was therefore fully heard in the District Court as to whether or not the several judgments pleaded were *res judicata* of the enforceability against it of the lease.

City has had its day in court on three separate former occasions, and again in the case at bar by cross-complaint, answer, scores of pages of evidence, special findings and conclusions of law relative to such order and former adjudications. Its present contention that due process has been denied to it in this cause is wholly without substance.

(3)

Both City and Citizens Gas are precluded by laches from now asserting, after acceptance for 22 years, that the lease is unenforceable or invalid according to its terms and provisions.

Had the litigation of the Fishback and Williams suits never been instituted or carried to judgment; *aside* from the representations made since 1913 by Citizens Gas in the sale of Indianapolis Gas bonds in the principal amount of approximately $2,000,000, that the interest of said bonds was guaranteed by Citizens Gas; *aside* from the statements of the City made in its election to succeed Citizens Gas as trustee of the trust; *aside* from the express provisions in the instruments of conveyance and assignments under which City accepted the property subject to all liabilities of its predecessor trustee; and *aside* from the statements made to the purchasers of its revenue bonds, upon which they relied, that the trust property included a leasehold estate forming a substantial part of the gas system they are to operate; — ASIDE from and ignoring all of these former proceedings, statements and actions, the question is presented whether City, succeeding trustee, could now for the first time after this period of the trust's acquiescence in the lease and use of the leased property, assert that the trust is no longer obligated to the undertakings there set out on the ground that the lease was or is burdensome, and seek the aid of equity to that end. This respondent contends that the answer must be in the negative.

No principal of equity has been longer or more firmly established than the one of laches which denies relief to a party when the seeking of that relief has been unreason-

ably delayed and where, after a period of acquiescence in the alleged wrongs, such changes have occurred which render the granting of such relief inequitable and contrary to the public policy.

We have seen that City in this cause is before the court solely as trustee of the trust and that it stands in the shoes of Citizens Gas, its predecessor. As such trustee it holds such rights and is subject to such liabilities as were those of its predecessor. The change in administrators of the trust has neither added to nor detracted from the rights or liabilities of the trust, and in the discussion of laches, as precluding the relief here sought by the present trustee, no distinction can properly be made between Citizens Gas and City.

In the twenty-two years during which the trustee has operated the leased property and acquiesced in the lease, it has extended the mains of the leased property in such manner and in such directions as it itself alone determined subject only to a limited control exercised by the City as a municipality. Since 1913 Indianapolis Gas has been a non-operating company with no control over its property or power to maintain it in the relative competitive position with that of the property owned in fee by the trust such as existed at that time (II R. 622, 3; offered R. 326).

It can not be supposed that the local group of Indianapolis citizens would have seriously entertained the request of Citizens Gas that it purchase the capital stock of Indianapolis Gas to enable a lease to be executed if the lease were to mean a unified operation for only twenty-two years. No utility would surrender its property to the complete control of its competitor to be operated as its competitor saw fit for only twenty-two years and then to be returned, and no business man would invest in property about to undergo

such a future. No surer way of self annihilation could be conceived. Certainly no such arrangement was in the contemplation of the Commission when it ordered and approved the lease in this case.

After accepting all the benefits incidental to a unified operation of the gas system without competition, the trust now seeks discharge from the obligations incidental to said lease upon the ground that "when executed this lease was in fact burdensome."

In Indiana, as it is generally, a party who has entered into a contract without fraud can not defend against the obligations thereby created by reason of the fact that in subsequent course of events the consideration moving from one party may, either in the opinion of that party or in fact, have become burdensome. No party to a contract may be relieved of obligations created thereby simply because he subsequently believes that his bargain was not so advantageous as he had supposed when entering into the agreement.

In *Mullins v. Hawkins*, 141 Ind. 363, at 366, the court states the rule:

> "Where a party voluntarily and without fraud or deception enters into a contract and receives all he contracted for, he can not be relieved on the ground of inadequacy or want of consideration."

Neither law nor equity will inquire into the adequacy of bona fide consideration after it has been accepted and utilized for over twenty-two years.

In *Hoyt v. Latham*, 143 U. S. 553, at 567, this court spoke as follows:

> "In cases of actual fraud or of want of knowledge of the facts, the law is very tolerant of delay; but where the circumstances of the case negative this idea, and the transaction is sought to be impeached only by reason of the confidential relations between the parties, and the *cestuis que trust* have ample notice of the facts, *they ought not to wait and make their action in setting aside the sale dependent upon the question whether it is likely to prove a profitable speculation.* As the question whether the sale should be vacated or not depends upon the facts as they existed at the time of the sale, so in taking proceedings to avoid such sale, the plaintiff should act upon his information as to such facts, and not delay for the purpose of ascertaining whether he is likely to be benefitted by a raise in the property, since that would practically amount to throwing upon the purchaser any losses he might sustain by a fall, and denying him the benfit of a possible rise."

City, when previously defending the lease before the Supreme Court of Indiana, in the Williams case, stated:

> "19. The lapse of seventeen years without action by the inhabitants and tax payers of Indianapolis to challenge the validity of the lease is such *laches* as to preclude the granting of the relief here prayed for." (III R. 954; offered II R. 420).

and also

> "But appellant ignores the transactions of seventeen years during which the Citizens Gas Company has openly held possession of the leased property and seeks to wipe out the very existence of the lease without any regard to the equities of the interested parties, yet that lapse of time constitutes such *laches* as to preclude equitable relief." (III R. 961; offered II R. 420).

Therefore, aside from all other considerations, City is now precluded by *laches* from seeking avoidance of the obligations of the lease upon alleged grounds that it is burdensome. For this additional reason no merit supports City's contention that it has been denied due process of law by failure of the Court of Appeals to remand the cause for further hearing upon that alleged issue.

Apart from all the above considerations of the issue of alleged burdensomeness of the lease, that it should be raised at all in this cause is amazing.

It will be noted that from a plant represented in 1913 by $1,250,000 of stock and $1,247,000 of bonds (II R. 609, ll. 15-34; offered II R. 420, 564) Citizens Gas had grown in the 22 years of joint operation of the combined property to own in fee property of which the reproduction cost was appraised at $17,607,310 and the "depreciated physical value" at $13,431,230 (I R. 196; offered II R. 327).

Under its operation of the entire system by virtue of the lease and being relieved of burdensome competition, the City was enabled as trustee to issue and sell to the public bonds in the amount of $8,000,000 (II R. 486; offered II R. 420) *all without the security of any mortgage on the gas property, without being a charge in any way upon the taxing powers of the City as a municipality,* and *dependent for the payment of both principal and interest solely upon the net revenues of the gas system.* This in itself is high tribute by public opinion to the earning capacity of the gas system, 62% of whose mains were operated under the lease. (I R. 195, 196; II R. 535; offered II R. 359).

When it is further recalled that this public appraisal of these bonds was founded upon and they were sold in reliance on the statements of City in its prospectus for bids (II R. 533 to 536): as to the rentals required under the lease to be paid and what had actually been paid the year before (1934), and upon representation that the leased property was a part of and would continue to be a part of the gas system for the duration of the lease, whose terms and provisions were in detail described, — the allegations in City's pleadings of burdensomeness, made only a few months after the sale of its bonds as above narrated, are truly startling.

Surely by no art of legerdemain may a contract 22 years old become suddenly burdensome within only a few months after it was so clearly demonstrated and admitted to be a thing of great value.

It may not be denied that the facts here narrated, all uncontradicted, conclusively confirm the judgment of the trustees in 1913 that the execution of the lease would be to the advantage and best interests of the public the settlors of the trust and the trust itself. It should be noted that Citizens Gas, original trustee has not in this cause either alleged or intimated that the provisions of the lease were unreasonable or burdensome in any particular, or that the 22 years' operation under it had not fullfilled all the hopes and expectations of its then trustee as to the benefits and advantages to be derived by the public charitable trust from its execution.

IV.

The Ninety-nine Year Lease Was Properly Held to Be Valid and Enforceable According to Its Terms Against the Trust, Citizens Gas, Former Trustee, and City as Present Trustee.

This respondent is in entire accord with the contentions made for its bondholders at pages 56 to 74 of Chase's brief, and we shall seek to avoid repetition so far as possible of matters there stated.

The grounds alleged by City (Br. pp. 43-52) do, however, present distinct challenge to certain admitted facts and the accepted rules of law determining the validity and enforceability of the lease against it, as trustee, and the trust. The discussion here will be directed to the numbered points set out at pages 44 and 45 in City's Brief.

1, 7 and 14.

City here contends that the leasehold estate and property of Indianapolis Gas never became part of the trust *res* and that it did not accept a part of the *res* and refuse to accept another part. The contention that the trust *res* did not include the leasehold estate in Indianapolis Gas property is contradicted by the actual operation of the leased property by the trust as an integral part of the gas system from 1913 to the present time. No distinction has existed during all such period in the use of the properties held in fee by Citizens Gas and that held in leasehold estate. The entire system has been operated and used by the trustee in performing the functions of the public utility and in carrying out the purposes of the trust as defined in franchise and Articles of Incorporation of Citizens Gas.

Not only is this contention of City denied by these overt acts but it is also denied by every statement made by either Citizens Gas or City during this entire period. Both City and Citizens Gas stipulated with all parties in the Todd case that:

> "Defendant Company (Citizens Gas) also is the owner of a certain leasehold estate in and to the property of the Indianapolis Gas Company as created by a certain contract of lease for ninety-nine years dated September 30, 1913 and recorded in Miscellaneous Record 78, page 257 to 278 inclusive, of the records in the Recorder's Office, Marion County, State of Indiana." (III R. 943; offered II R. 333, par. 2.)

During the trial of the Williams case the City also stated in a motion to strike out certain parts of the complaint:

> "If the lease is valid, the leasehold interest created thereby constitutes a part of the public charitable trust and is subject to be administered in the same way as the property owned by Citizens Gas Company in its own right. If for any reason the lease is invalid, it will fall outside the scope of the trust." (II R. 808)

Had the court in the Fishback or in the Williams cases held the lease invalid then, as the City properly stated, it would be "outside the scope of the trust." But they having adjudged the lease to be a valid and enforceable one, then clearly it became part of the public charitable trust and is subject to be administered in the same way as the property owned outright by Citizens Gas. When the statements of the City made in 1935 in its prospectus describing the gas plant revenue bonds, as well as state-

ments previously made in the pleadings and to the courts in each the Fishback, Williams, Todd and Cotter cases are recalled, as well as the operation of the property as a unified system since 1913, the present contention of the City must appear only an afterthought as a ground for its unsupportable position.

The statement in City's point 14 at page 45 of its brief, that it has accepted the entire trust *res* but has at the same time rejected the lease, is thus wholly denied by the facts. It is also shown to be erroneous by the settled rule of law that a designated trustee, while having no obligations to accept the trust, may not accept it in part and reject it in part. An acceptance in part is an acceptance in whole, and in the instant case it has already been shown that City has accepted the trust in its entirety, including the lease.

In re Lord & Fullerton (L. R. 1896), 1 Ch. 228, 232, 233;

1 Perry on Trusts (7th ed.), Sec. 264, p. 476.

5.

No fixed date existed for the expiration of the term of trusteeship of Citizens Gas, the initial trustee. Under the provisions of the trust it had no fixed period of tenure. It was not to transfer the property to a succeeding trustee until its stockholders had been paid in full their investment with interest at 10% and it was only provided that the City *might* within 25 years succeed as trustee upon the stockholders being so paid either from earnings of the company or at the end of 25 years through financing to be effected by the City. No *obligation* rested upon City to succeed to such trusteeship, and had it not done so the trusteeship of Citizens Gas would not have ended. It is well established

that equity will not permit a public charitable trust to fail by failure of any particular prospective successor trustee to accept the trust. The trust continues in perpetuity and neither the length of the term of any trustee nor the identity of its successor can have any effect upon the obligations of the trust validly created. The exercise by the City of its option and its acceptance of conveyance of the trust, subject to all legal obligation, was merely to substitute a new Trustee.

8.

The Articles of Incorporation of Citizens Gas and its franchise, as well as its charter (I R. 81, 95; offered II R. 327), deny City's statement that the original trustee was without power to make the 99 year lease. No rule is more firmly settled, or necessary for the proper administration of trusts, than that which holds that a trustee shall have such powers as are necessary and reasonable to the carrying out and performing of the general objects of the trust. Had the public utility act of 1913 not been passed giving the express power, Citizens Gas would yet have been vested with such power by its Articles, Charter and Franchise.

The City at page 52 of its brief admits that "Citizens Gas, in its franchise contract, bound itself to extend its lines and mains so that 'all inhabitants of said City may be supplied with gas for fuel and lighting purposes when they may reasonably require the same'." By no other means than by purchase of additional property or by leasing it could Citizens Gas have fulfilled this obligation.

The Public Utility Act, and particularly Section 95½ (Appendix A) thereof, has already been sufficiently presented to the court and were it conceivable that no power

had existed in Citizens Gas to make this lease before the enactment of that law, no doubt could remain thereafter that such power was given to Citizens Gas as a public utility.

That the power and authority of Citizens Gas to function as a public utility was not affected by the fact that it held its property as a Trustee of a public trust is conclusively decided by the following language of Judge Treanor at page 457 of the opinion in the Williams case, 206 Ind. 448:

> "It is necessary to recognize that Citizens Gas is a public utility and as such is amendable to the law to the same extent as any other public utility * * * nor can any beneficial interest of appellant and members of his class in the property or business of Citizens Gas preclude the State from exercising all control over the affairs of Citizens Gas which the State has power to exercise by reason that Citizens Gas is a public utility."

The power of Citizens Gas, the initial trustee, to execute this 99 year lease may not now be seriously or successfully challenged.

Only General Statutes and What They Provide As to Everybody Constitute Any Part of the Charter of Citizens Gas

The Constitution of Indiana provides that "Corporations other than banking shall not be created by special act, but may be formed under general laws," and Citizens Gas could not be an exception.

> Const. Ind., Art. 11, sec. 13;
> *Marion Trust Co. v. Bennett*, 169 Ind. 346, 350.

The Statute of Indiana under which Citizens Gas was organized (Appendix F; Acts 1905, pp. 434, 435) authorized the formation of a corporation "to carry on any of the following named purposes," six in number, if the persons organizing it would "make, sign, and acknowledge * * * a certificate * * * which shall state (1) the corporate name * * * (2) the object or objects of its promotion, which shall include any or all of the purposes included in any one of the above subdivisions of this section, (3) the amount of capital stock, (4) the term of its existence (not to exceed 50 years), (5) number of directors and the names * * * for the first year, and (6) the name of the city or town in which its principal place of business is to be located, and file the same * * *"

Citizens Gas provided in its articles that "the term of existence shall be 50 years" (I R. 99, XIII; offered II R. 327), and that its "object" should "be to supply the City of Indianapolis and its inhabitants with light, heat and power" (I R. 95, III; offered II R. 327), which was the second, numbered "(b)" of the six purposes for any one of which incorporation was authorized.

There was no statutory authority whatever (and never has been) for assumption by this public utility corporation, as such, of any trust relation or duties. And under the law of Indiana all that was written into the Articles of Incorporation not expressly directed by the statute to be therein was and is void as to the corporation itself, except only as constituting a private contract between the promoters and stockholders subscribing thereto.

Indiana Bond Co. v. Ogle, 22 Ind. App. 593, 595;
State ex rel. v. Anderson, 31 Ind. App. 34, 42-43;

Mercantile Com. Bank v. Southwestern Corp., 93 Ind. App. 313, 328;
McCallister v. Shannondale etc Co., 47 Ind. App. 517, 524, 526-529;
Farmers M. F. I. Co. v. Jackman, 35 Ind. App. 1, 11-12;
Shaw v. Bankers N. L. I., 61 Ind. App. 346, 354, 355;
Supreme Lodge K. P. v. Knight, 117 Ind. 490, 495.

And under said law the "Charter" of the corporation, and all that determines its powers and duties as a corporation consists of the general law of the State and what that general law has directly authorized to be in its articles.

Westport Stone Co. v. Thomas, 195 Ind. 319, 327;
Supreme Lodge K. P. v. Knight, 117 Ind. 489, 495.

But in addition to 12 lines of the Articles of Citizens Gas which stated the facts authorized by the statute, the promoters also wrote into its Articles other provisions extending to more than twelve times as much additional (1500 words in 9 long sections) of a private agreement concerning the disposition of the company's earnings, *first* to pay all investors 10% per annum so long as they should hold stock; *second*, to repay all stockholders by the end of 25 years the full amounts invested; *third*, to give the City an option at the end of 25 years to pay any balance due the stockholders; and *fourth*, on the stockholders receiving back the amounts invested, with 10% per annum thereon, at the end of 25 years to convey the "gas plant and property to said City subject to" obligations incurred in obtaining money paid to the stockholders, "and other legal obligations against said company" (I R. 98, 99, X, XII; offered II R. 327). Similar contract stipulations had been written

into the Franchise Contract between the City and the assignors of Citizens Gas (I R. 81 to 95; offered II R. 327), and were written into the stock subscriptions (II R. 766, 767) and into the certificates issued for shares of stock (II R. 767, 768; offered II R. 328). And in an action by stockholders asserting their absolute ownership of the property accumulated by Citizens Gas it was decided that a Public Charitable Trust had been created in whatever interest they had as stockholders in excess of cumulative dividends of 10% per annum, plus the return of all they invested, but subject to legal obligations and *bona fide* indebtedness.

Todd v. Citizens Gas Co. (C. C. A. 7), 46 Fed. (2d) 855, 859, 860, 862, 864;
Cotter v. Same, same opinion.

9 and 10.

That the City did not sign the lease in 1913 or was not named as a party is true, but no support is given City's present contention thereby.

Obviously the City did not sign the lease in 1913 because it had no connection with the administration of the trust at that time. Citizens Gas was then operating as a public utility and sole trustee and it alone could by the lease create the leasehold estate. Furthermore, at the time of the execution no certainty existed that the City would ever succeed to the trusteeship. It had no obligation to do so and no expression or election to exercise its right of succession was made until the resolution of the City's Board of Public Works of March 20, 1929.

The lease, however, did bind Citizens Gas, the original trustee "itself, its successors and assigns"; and as such successor and assignee City as trustee is equally bound with Citizens Gas to the performance of its obligations.

11.

This respondent has already discussed in this brief the acceptance of the assignment of the lease by the City and its taking possession and assuming operation of the leased property. The City may not contend that it could voluntarily receive property under conditions expressly set out in the instruments of conveyance and then immediately thereafter deny the same by *ex parte* action and have such action clothed with validity by law. One may not purchase property and immediately upon its acceptance, resolve not to pay the purchase price. If the conditions attached to the instruments of conveyance, or the price of the property purchased, is not satisfactory, the grantee or the purchaser should accept neither the conveyance nor the property. Once accepted, the liabilities incidental thereto may not be destroyed by wishful thinking, however formal may be its *ex parte* expression.

From pages 45 to 48 City argues in its brief that support is given its present position by Sections 85 and 254 of Chapter 129, of the Indiana Acts of 1905, the Cities and Towns Act.

These sections of this act have no application whatever to any question presented in this appeal. They are a limitation only upon contracts under which *direct* obligations of a City, as a municipal corporation, are created and which become a charge upon the taxing powers of the municipality. They pertain to agreements such as for lighting streets or furnishing heat to municipal institutions.

Fox v. City of Bicknell, 193 Ind. 537.

Were this act any inhibition upon the activities of the City as a trustee in administering this trust, a serious cloud

would fall upon the validity of the gas plant revenue bonds issued by the City itself which do not mature for many years beyond the period set out in this statute. (II R. 539; offered II R. 404)

The cases cited by City: *Gas Light, Etc. Co. v. City of New Albany*, 156 Ind. 406, and *City of Indianapolis v. Wann*, 144 Ind. 175, offer no support to its contention. In the former case, the City of New Albany made a contract for 23 years for the lighting of its streets and granted a franchise to carry out said contract. It exceeded the then statutory period for which the City might contract for lighting and was therefore held invalid. In the second case, a contract was held void by a statute which prohibited city agreements that undertook payments "beyond existing appropriations". The undertakings to pay for the lights was in each case a direct obligation of the city and therefore amenable to the particular statute. It will be noted that when these early cases were decided, the State had not yet taken away power of cities to grant franchises to utilities and conferred it upon the Public Service Commission, as was done in the Acts 1913, Chapter 76. (Appendix E, G, H, I)

City of Vincennes v. Vincennes Traction Co., 187 Ind. 498, 503;
Public Service Com. v. City of Indianapolis, 193 Ind. 37, 47.

City, before both District Court and Circuit Court of Appeals, urged this statute as a defense to its present position and in each instance it was denied. The District Court in its opinion characterized this ground of defense as follows:

> "The lease was not an agreement by the Indianapolis Gas Company to furnish gas to the citizens of Indianapolis * * *. It was simply a contract by it with another corporation to permit such other corporation to use its property for a definite time upon payment to it of a definite and fixed consideration. Furthermore, no appropriation under this statute is necessary, because it was admitted by plaintiff, on oral argument, that it does not contend the payment of the rental, or any part thereof, can be enforced from the general fund of the City or from any other fund than the income derived from the operation of the trust and from such trust property. It is, therefore, apparent that neither of these sections of the statute has any application to the facts in this case." (III R. 1152, 1153)

Other sections and acts of the legislature also definitely preclude this particular act of 1905 from supporting City's contentions. Said Cities and Towns Act of 1905 also provided:

> "Sec. 53. The common council of every city shall have power to enact ordinances for the following purposes:
>
> * * * * *
>
> "Sixth. To receive gifts, donations, bequests and public trusts and to agree to conditions and terms accompanying the same and bind the corporation to carry them out." Acts of 1905, Chapter 129; Burns' Ind. Rev. Stat., 1933, Section 48-1407.

The Indiana Acts of 1929, Chapter 77, page 252, provides for the creation of the Department of Utilities for the City of Indianapolis and in defining its powers provides in paragraph 7 of Section 3 that it may

> "take over, adopt and assume the performance of the provisions of any lease under which any utility property may be held at the time of the acquisition of any utility by any such city, and to take any and all steps necessary to perform and fulfill the terms of any lease, and to obtain and preserve the benefits therefrom." (Appendix D)

It continues to provide the board with power to secure the benefits incident to taking down bonds under an open mortgage and to authorize their sale under direction of the Public Service Commission.

Paragraph 7, Section 3, grants power to the board

> "to take over all contracts and rights of any kind or character, and to fulfill and perform all obligations relating to the property and business of any utility company whose property may be taken over by any such city."

In Chapter 78, Sec. 1 of said act of 1929 (Appendix C), the right of City to accept this particular trust property was expressly granted. The act provided that, as to any corporation organized to furnish light, heat and power to any city (Citizens Gas), the property of such corporation might be conveyed to the city

> "*subject to the outstanding legal obligations of said corporation*, whenever the holders or owners of shares of stock, stock certificates or holders or owners of any beneficial interest in such capital stock shall have received the face or par value of such shares of stock, stock certificates or beneficial interest, together with the interest or dividends thereon provided for in such articles of incorporation * * *"
>
> "Said municipal corporation shall be *authorized to accept, hold and own* all the property of such

> corporation so transferred to it, including that located within this state and that located in any other state and any shares of stock or other interest in any other corporation of which said corporation making such transfer shall be the owner, and *any right, title or interest such transferring corporation may have in any lease upon other property* * * *"* (Appendix C.)

Both last above acts of the legislature were prepared by and passed at the instance and request of the City of Indianapolis (II R. 729; III R. 855; offered II R. 328, 334) and since their passage no doubt can exist as to the power of the City to accept this trust, with both the benefits and obligations attached to the 99-year lease.

Eight years after the lease was made, Citizens Gas did surrender to the Public Service Commission its 25-year City franchise and accept an indeterminate permit, without limit as to term of existence (II R. 722; offered II R. 328), all in full compliance with the law (Appendix E, G).

> *Williams v. Citizens Gas Company*, 206 Ind. 448, 458.

The 25-year City franchise under which Citizens Gas commenced business was surrendered under statutory authority in 1921 (III R. 822; offered II R. 327) and was thereby entirely abrogated.

> *Central Union T. Co. v. Indianapolis T. Co.*, 189 Ind. 219, 230-231;
>
> *Farmers etc. T. Co. v. Boswell Tel. Co.*, 187 Ind. 371, 381-382;
>
> *Greensburg W. Co. v. Lewis*, 189 Ind. 439, 453-454.

At page 48 of its brief the City apparently seeks to characterize itself as a "remainderman" and to argue

therefrom that the lease is invalid as against it in such capacity. Obviously no rights of a remainderman are involved in this case. The City is not the remainderman but solely the succeeding trustee of a public charitable trust which continues in perpetuity. The trust property could only vest in it by conveyance and assignment. Discussion has heretofore been had of the rule that the power of a trustee to execute a lease and its reasonableness is determined by the duration of *the trust* and not by the length of tenure of any particular *trustee*.

Citizens Gas and Indemnity Agreement.

Further support of the decision now before this court for review is found in the position of Citizens Gas and in the indemnifying agreement of September 9, 1935, given by City to Citizens Gas (II R. 306-307; offered II R. 327)

After the decision of the Circuit Court of Appeals, ordering judgment against all defendants in certain order of liability, Citizens Gas sought no rehearing of that decision by petition, nor has it sought the review of that decision by this court by a petition for certiorari. It has, in fact, at all times since 1913 properly insisted that it was fully empowered to create for the trust the leasehold estate in the property of Indianapolis Gas. In its answer and counterclaim in this cause it alleged:

> "Its directors, officers and trustees had complete power and authority to execute and enter into the said lease in the manner and form as aforesaid, and admits that the said lease was valid and binding upon this defendant and its property from the date of the execution thereof to the time this defendant conveyed, transferred and assigned all of its said property to the City of Indianapolis as aforesaid." (I R. 237).

It also alleged that it was at all times a trustee of the public charitable trust

> "and all rights, property and assets then or thereafter acquired were held by it as such trustee" (I R. 233).

See also *Magie v. German Evangelical Church*, 13 N. J. Eq. 77, 89, 90, Aff'd 15 N. J. Eq. 500;
Mills v. Davison, 54 N. J. Eq. 659.

By its own averments the primary obligations of Citizens Gas under the lease ended only when it "conveyed, transferred and assigned all of its property to the City." Obviously its liability, as a principal for the payment of the rental under the lease, changed to that of a surety only upon the acceptance of all its property by City.

On September 9, 1935, City gave to Citizens Gas an indemnity agreement which provided in part as follows:

> "The City of Indianapolis further agrees that it will hereafter well and sufficiently save, defend, keep harmless and indemnify the said Citizens Gas Company of Indianapolis, its officers, directors and trustees, from any and all loss, damage, costs, charges, *liability* or expense on account of any pending actions or suits which may have heretofore been instituted against said company and on account of any actions or suits which may hereafter be brought against said company, arising from any and all acts or omissions to act on the part of said company of any nature whatsoever" (II R. 306, 307; offered II R. 327).

In the light of this indemnity and of the admitted liability of Citizens Gas under the lease it would seem entirely immaterial whether or not the City did in fact reject

the lease. If the lease were rejected, then by accepting the property held solely in fee by Citizens Gas, City became bound by its indemnity agreement to discharge the admitted liability of Citizens Gas under the lease. For this additional reason, therefore, it is submitted that City's objections to the judgment of the Circuit Court of Appeals are without support.

V.

Decision of the Circuit Court of Appeals Is in Complete Harmony with the Statutes and Decided Law of the Courts of Indiana, and the Rule of Erie Railroad Co. v. Tompkins Is in No Wise Violated.

Indianapolis Gas contended, before both the District Court and the Circuit Court of Appeals, that the questions presented in this cause were all to be determined by the decisions and laws of the State of Indiana under the rule of this court as announced in *Erie Railroad Co. v. Tompkins*. The decision of the Court of Appeals itself indicates that it is based upon the statutes and settled decisions of Indiana.

The decision is apparently based neither on *estoppel* nor *res adjudicata* but is the independent judgment of the court, based upon the controlling laws of Indiana. The matter of estoppel discussed in the brief of City has heretofore been sufficiently argued in this brief. The contention of City (Br. p. 64) that an Indiana municipal corporation may not be estopped by any acts done by its municipal officers in excess of their authority has no relevancy to any question here presented. In the instant case all acts done by the City, from its appearance before the Public Service

Commission in 1913 through its corporation counsel to its succession as trustee of the public charitable trust and the acceptance of the trust property, including the leasehold estate, were done lawfully and under express authorization by the different statutes. No officer of the City has done other than as expressly provided by the laws of the State controlling its succession to the trusteeship, *except* its attempted refusal to comply with the instruments of conveyance providing that they were made all subject to the obligations of Citizens Gas, including the obligations under the lease.

Discussion has heretofore been had in this brief as to the effect of the order of the Public Service Commission approving the lease and upon all matters argued by City at pages 67 to 71 of its brief. Had the Court of Appeals placed its decision solely upon the prior decisions of Indiana courts in *Fishback v. Public Service Commission* and *Williams v. Citizens Gas* as being *res adjudicata* of the validity and enforceability of the lease against the City, no valid objection to the decision upon that ground could have been raised. We have, heretofore, discussed these decisions at length, not necessarily as *res adjudicata* but as determinations of law binding upon the courts of the United States. So far as the Fishback and Williams cases are concerned, this respondent's prior discussion will not be here repeated.

The cases of *Todd* and *Cotter v. Citizens Gas* (46 Fed. (2) 855) have never been urged by this respondent as directly determining the validity or invalidity of the lease. They did decide, however, that Citizens Gas was the trustee of a public charitable trust and that if and when City took over, it would take such property as a succeeding trustee of a continuing trust. These cases did determine that the

trust was one continuing in perpetuity, and defeat the argument of City that it is a remainderman or that the term of the lease was unreasonable as extending beyond the life of the trust. In the trial of those causes certain statements were made by City which are pertinent to the present questions. These statements, made by stipulation or answer, that the lease was entered into "pursuant to order of the Public Service Commission of Indiana and with full consent and approval of the City of Indianapolis", and that the *res* of the public charitable trust did include the leasehold estate, are all statements and admissions which were properly before the court in the determination of the present cause.

City presents no authority which denies that the decisions in the Fishback and Williams cases did clearly and conclusively decide that the lease was one which Citizens Gas had full power and authority to make and which, being valid, constituted since its execution part and parcel of the public charitable trust to which City has succeeded as trustee.

VI

Present Contentions of City Would Make the Public Charitable Trust Invalid and Fraudulent as Against Creditors, and Thus Nullify Decision in Todd v. Citizens Gas.

It was decided in *Todd v. Citizens Gas* that a public charitable trust existed in the property of Citizens Gas in which it was the initial trustee. The trust might after a certain period and upon the payment of a certain charge upon the trust be conveyed to the City, which would operate the same as successor trustee. The condition

precedent to such succession was the repayment to the stockholders of Citizens Gas, the settlors of the trust, of the face value of their stock, with cumulative interest thereon, at the rate of ten per cent per annum. Upon discharge of this condition precedent, the trust property might then be conveyed to the City, "*subject to all outstanding legal obligations.*" The decision was based by the Court upon the franchise contract entered into in 1905, and upon the statutes of the State of Indiana in force.

The contentions of the City in this cause directly violate that decision. They, in effect, urge that City, as successor trustee, may directly retire all stock and bonds of Citizens Gas and then receive and take over its entire property and assets, free from any charge for the payment of its existing obligations, and itself incurring no liability therefor. By so doing, it leaves Citizens Gas with no assets of any character whatever, save an indemnity agreement, to discharge its obligations incurred during its years of operation of the utility.

Had such a construction of the trust been reasonable, or the existence of such rights in the settlors or a successor Trustee been contemplated by or suggested to the Court, it could only have declared the trust void as being in violation of an express statute of Indiana and fraudulent as to creditors. Under such a construction, as is now urged by the City, the trust would virtually have been one in favor of its settlors, allowing them to retrieve from the trust, after thirty years of operation, its entire assets free from any charge to pay the obligations incurred during that period. Such a trust would have been held void in any jurisdiction under settled, universal rules.

There was before 1905, and has been ever since, a statute in force in Indiana declaring that

> "all deeds of gift, conveyances, transfers or assignments, verbal or written, of goods or things in action, made in trust for the use of the person making the same, shall be void as against creditors, existing or subsequent, of such person."
>
> Burns' Ind. Rev. Stat. 1933, Sec. 33-409 (Appendix K).

This statute has properly been construed to embrace property both real and personal in which the trust assets may be invested.

> *Plunkett v. Plunkett*, 114 Ind. 484, 489;
> *Carter v. American Trust Co.*, 82 Ind. App. 587, 590.

While the Todd case did not itself directly decide upon the validity of the ninety-nine (99) year lease, it did decide, definitely and surely, that if and when Citizens Gas transferred and assigned all its assets and property to City as successor trustee, such assets and property would be so conveyed, *subject to all legal obligations of the grantor trustee.*

Respondent submits that the decision in the Todd case conclusively precludes such a construction and interpretation of the instruments creating the public charitable trust as is urged by City and it denies such rights to settlors or City, successor trustee, as the City seeks in this litigation.

VII

Circuit Court of Appeals Properly Refused to Order Judgment in Behalf of Chase for Interest on Unpaid Bond Coupons at the Rate of Six Per Cent Per Annum

The answer to the question presented by the cross-petition for a writ of certiorari in causes Nos. 423 and 424, filed by Chase, depends upon the construction of the bonds on which they pay the interest, and of the mortgage by which the payment of both bonds and coupons is secured.

Each bond recites that it is a "five per cent gold bond" and that it is payable with interest "at the rate of five per cent per annum" (I R. 25; offered II R. 327); each coupon recites that it is for "six months interest on its first consolidated five per cent gold bond No. ———" (I R. 27; offered II R. 327); and the mortgage deed of trust, besides setting out the form of the bonds and coupons, refers to them as "five per cent gold bonds" (I R. 27, 29; offered II R. 327), thus fully establishing what was the "rate per cent agreed upon in the original contract sued on."

The sections of the statute recited on pages 136, 137, of Chase's brief, filed December 7, 1940, require a judgment to bear interest "at the rate agreed upon in the original contract sued upon" if there was an agreed rate, "and if there be no contract by the parties, then at the rate of six (6) per cent per annum."

Burns' Indiana Statutes 1933, Sec. 19-2002.

They further provide generally that "in the absence of agreement," "On money due on any instrument in

writing * * * interest shall be allowed at the rate of six dollars per year on one hundred dollars."

Ibid., Sec. 19-2003.

The argument of counsel for the cross-petitioner, in effect, is that as to the coupons themselves "no rate per cent is agreed upon," because they "are silent as to the rate of interest to be paid on the coupons." An argument to the effect that said fact, together with the provisions in the mortgage itself that money collected by the mortgage trustee shall be distributed ratably to the persons holding coupons, "but without interest on interest" (I R. 40; offered II R. 327), is cause for refusing to allow any interest at all on the coupons until reduced to judgment, had prevailed in the District Court. But we do not know of any stronger argument to the effect that no more than five per cent per annum can be recovered on these overdue coupons, both before judgment and after judgment, than the very apparent fact that by "contract of the parties" there was "an agreed rate" of interest at 5% per annum, stated "in the original contract sued on."

Therefore, five per cent is the maximum per cent to which bondholders are entitled and Chase may not justly contend that the Circuit Court of Appeals erred in the rate of interest allowed upon unpaid coupons.

CONCLUSION

Indianapolis Gas respectfully submits that the unanimous decision of the Circuit Court of Appeals, now before this Court for review, was properly made in an exercise of certain jurisdiction of all the parties, and that it is in complete accord and harmony with the settled law of Indiana and should therefore be affirmed.

Respectfully submitted,

LOUIS B. EWBANK,
WILLIAM R. HIGGINS,
Counsel for The Indianapolis Gas Company, Respondent.
1311 Fletcher Trust Building,
11 N. Pennsylvania Street,
Indianapolis, Indiana.

Filed January 20, 1941.

APPENDIX A

(All emphasis in these quotations is ours.)

Indiana Acts 1913, Chapter 76, Section 95½, page 199:

> "That with the consent and approval of the commission but not otherwise, any two or more public utilities, furnishing a like service or product and doing business in the same municipality or locality within this state, or any two or more public utilities whose lines intersect or parallel each other within this state may be merged and may enter into contracts with each other that will enable such public utilities to operate their lines or plants in connection with each other; and any public utility may also, with the consent of the holders of three-fourths of the capital stock outstanding, purchase or lease the property, plant or business or any part thereof of any other such public utility at a price and on terms fixed by the commission. Any such public utility may, with the consent of three-fourths of the holders of the outstanding stock, sell or lease its property or business or any part thereof to any other such public utility at a price and on terms fixed by the commission upon paying in cash to non-consenting stockholders the appraised value of their stock as fixed by the commission."

APPENDIX B

Indiana Acts 1905, Chapter 129, Section 53 (in part), page 247; Burns' 1933, Sec. 48-1407:

> "Sec. 53. The common council of every city shall have power to enact ordinances for the following purposes:

First. To provide a corporate seal, with appropriate device, for such city, to be affixed to all instruments or writings needing authentication * * *"

"Sixth. To receive gifts, donations, bequests and public trusts and to agree to conditions and terms accompanying the same and bind the corporation to carry them out. * * *" *

APPENDIX C

Indiana Acts 1929, Chapter 78, Section 1, pages 268, 271:

"That if in the original articles of incorporation of any corporation organized under the laws of this state prior to May 1st, 1913 (that being the date of the creation of the public service commission of this state), for the purpose of furnishing natural or artificial gas for fuel or for illuminating purposes, or for furnishing electric lights or water to the citizens of any town or city within this state, or to furnish light, heat and power to any town or city, or the inhabitants thereof, provision is made for the transfer or conveyance of the property of such corporation to such town or city, *subject to the outstanding legal obligations of said corporation* (our emphasis), whenever the holders or owners of shares of stock, stock certificates or holders or owners of any beneficial interest in such capital stock shall have received the face or par value of such shares of stock, stock certificates or beneficial interest, together with the interest or dividends thereon provided for in such articles of incorporation, such provision in such articles shall be, and is hereby legalized and declared to be valid and binding upon such corporation and upon the holders and owners of any such shares of stock, stock certificates or beneficial interest therein or their assigns, and

said town or city shall be authorized and entitled *to accept a transfer and conveyance of any such property* (our emphasis) in accordance with the terms and conditions of such articles of incorporation, without the question of the acceptance or acquisition of such property being submitted to a vote of the electors of such town or city * * *"

"Whenever any instrument of transfer or conveyance shall be executed, transferring or conveying the property, either real or personal, of any such corporation to such town or city, the title to such property shall vest in such town or city, *subject to* all outstanding *legal obligations* of said corporation * * *"

"Said municipal corporation shall be *authorized to accept, hold and own* all the property of such corporation so transferred to it, including that located within this state and that located in any other state and any shares of stock or other interest in any other corporation of which said corporation making such transfer shall be the owner, and *any right, title or interest such transferring corporation may have in any lease upon other property* * * *"

APPENDIX D

Indiana Acts 1929, Chapter 77, Section 3, pages 257, 259:

"The said board of directors for utilities shall have the exclusive government, management, regulation and control of any water works, gas works, electric light works, heating and power plants, and all property relating thereto, which any such city may heretofore have acquired or may hereafter acquire or construct for the service of the public as consumers, and such board of directors shall be charged with the duty of and shall have all neces-

sary power to make all necessary repairs, renewals, enlargements, extensions or additions to any such plant or property which in the judgment of said board of directors is desirable or necessary for the proper serving of the inhabitants of said city and the adjacent community served with respect to any such utility from any such plant or plants. In connection with the duties devolving upon such board of directors as aforesaid, it shall have power as follows:

(1) To condemn, appropriate, *lease*, rent (our emphasis throughout), purchase and hold *any real estate*, rights of way, materials or *personal property* within such city or within five (5) miles of the corporate limits thereof, needed for the proper giving of service by any such utility to the inhabitants of said city and the community contiguous thereto and served from any such utility plant * * *"

"(7) To take over, adopt and *assume the performance of the provisions of any lease under which any utility property may be held at the time of the acquisition* of any utility by any such city, and to take any and all steps necessary to *perform* and fulfill the terms of *any such lease*, and to obtain and preserve the benefits therefrom; and in event there be any outstanding *open mortgage* upon the property *covered by any such lease* so taken over under the provisions of which bonds may be withdrawn from the trustee under such mortgage for the purpose of paying all or part of the cost of additions to the property covered by such mortgage, to do and perform all things necessary in order to secure the benefit of such mortgage provisions and to enable the escrow bonds held by the trustee under any such mortgage to be taken down and sold in order to defray the cost of any extensions and *betterments of such leased property* and, subject to the approval of the public service commission of

Indiana, to sell any such bonds so taken down for the purpose of assisting in defraying the costs of any such extensions or betterments to such *leased property* * * *"

APPENDIX E

Indiana Acts 1921, Chapter 93, pages 197, 198:

"Any public utility operating under an existing license, permit, or franchise, from any county, city or town, within the State of Indiana, shall upon filing at any time prior to July 1, 1923, with the auditor or clerk of any such county, city or town which granted such license, permit or franchise, and with the public service commission of Indiana, a written declaration, legally executed that it surrenders such license, permit or franchise, receive by operation of law in lieu thereof an indeterminate permit as provided in the act creating the public service commission of Indiana, entitled "An act concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission," approved March 4, 1913, and such public utility shall hold such permit under all the terms, conditions and limitations of said act as fully and completely as if the same had been done prior to July 1, 1915."

APPENDIX F

Indiana Acts 1905, Chapter 139, Section 1, pages 434, 435:

"Whenever three (3) or more persons may desire to form a company to carry on any of the following named purposes, to wit:

(a) Any kind of manufacturing, mining, mechanical or chemical business or to furnish motive power to conduct such business;

(b) To supply any city, town, village or community with water, light, heat or power;

(c) To own, construct, operate and maintain stockyards and transit companies and conduct and transact the business incident thereto;

(d) To own, construct, maintain and operate grain elevators or flour mills or both and transact the business incident thereto, including the manufacture of flour, meal and all grain and cereal products, and the buying and selling of grain and cereals of all kinds, and the manufactured products thereof, and also including the right to own and maintain motive power to conduct such business;

(e) To buy and sell any kind or kinds of merchandise in connection with the manufacture of such merchandise, and for the sale of such merchandise when manufactured. They shall make, sign and acknowledge before some officer capable of taking acknowledgements of deeds, a certificate in writing, which shall state the corporate name adopted by the company, the object or objects of its promotion, which may include any or all of the purposes included in any one of the above named subdivisions of this section, the amount of the capital stock, the term of its existence (not, however, to exceed fifty (50) years), the number of directors and the names of those who shall manage the affairs of such company for the first year, and the name of the city or town in which its principal place of business is to be located, and file the same in the office of the recorder of such county, where it shall be recorded, and a duplicate thereof in the office of the secretary of state;

(f) To buy, sell and lease lands and buildings and other structures thereon, and to erect dwellings and other buildings and structures on lands leased or purchased."

APPENDIX G

Indiana Acts 1913, Chapter 76, Sections 100, 101, pages 201, 202:

"Sec. 100. Every license, permit or franchise hereafter granted to any public utility shall have the effect of an indeterminate permit subject to the provisions of this act, and subject to the provision that the license, franchise or permit may be revoked by the commission for cause or that the municipality in which the major part of its property is situated may purchase the property of such public utility actually used and useful for the convenience of the public at any time as provided herein, paying therefor the then value of such property as determined by the commission and according to the terms and conditions fixed by said commission, subject to all the provisions as to hearings and appeals set out in section one hundred and five (105) and section one hundred and six (106) hereof. Any such municipality is authorized to purchase such property and every such public utility is required to sell such property at the value and according to the terms and conditions determined by the commission as herein provided. If this act should be repealed or annulled then all such indeterminate franchises, permits or grants shall cease and become inoperative and in place thereof such utility shall be reinstated in the possession and enjoyment of the license, permit or franchise surrendered by such utility at the time of the issue of the indeterminate franchise, permit or grant; but in no event shall such reinstated license, permit or franchise

be terminated within a less period than five years from the date of the repeal or annulment of this act."

"Sec. 101. Any public utility operating under an existing license, permit or franchise shall, upon filing at any time prior to the expiration of such license, permit or franchise and prior to July 1, 1915, with the clerk of the municipality which granted such franchise and with the commission, a written declaration, legally executed, that it surrenders such license, permit or franchise, receive by operation of law, in lieu thereof an indeterminate permit as provided in this act: and such public utility shall hold such permit under all the terms, conditions and limitations of this act."

APPENDIX H

Indiana Acts 1913, Chapter 76, Section 97, page 200:

"No license, permit or franchise shall be granted to any person, copartnership or corporation to own, operate, manage or control any plant or equipment of any public utility in any municipality where there is in operation a public utility engaged in similar service under a license, franchise or permit without first securing from the commission a declaration after a public hearing of all parties interested, that public convenience and necessity require such second public utility. Any existing permit, license of franchise which shall contain any term whatsoever interfering with the existence of a second public utility is hereby declared to be against public policy and is hereby amended in such manner as to permit a municipality to grant a license, franchise or permit for the operation of such second public utility pursuant to the provisions of this act."

APPENDIX I

Indiana Acts 1913, Chapter 76, Section 110, pages 205, 206:

"Every municipal council shall have power, (a) to determine by contract, ordinance or otherwise the quality and character of each kind of product or service to be furnished or rendered by any public utility furnishing any product of service within said municipality and all other terms and conditions not inconsistent with this act upon which such public utility may be permitted to occupy the streets, highways, or other public property within such municipality, and such contract, ordinance or other determination of such municipality shall be in force and prima facie reasonable. Upon complaint made by such public utility or by any qualified complainant as provided in sections 57 to 71 the Commission shall set a hearing as provided in sections 57 to 71, and if it shall find such contract, ordinance or other determination to be unreasonable, such contract, ordinance or other determination shall be void. (b) To require of any public utility by ordinance or otherwise such additions and extensions to its physical plant within said municipality as shall be reasonable and necessary in the interest of the public, and to designate the location and nature of all such additions and extensions, the time within which they must be completed and all conditions under which they must be constructed subject to review by the commission as provided in subdivision (a) of this section. (c) To provide for a penalty for noncompliance with the provisions of any ordinance or resolution adopted pursuant to the provisions hereof. (d) The power and authority granted in this section shall exist and be vested in said municipalities anything in this act to the contrary notwithstanding: Provided, however, When-

ever after a request by petition in writing of any public utility, the city or other political subdivision or other body, having jurisdiction of the matter, shall refuse or fail for a period of thirty (30) days, to give or grant to such public utility permission and authority to construct, maintain and operate any additional construction, equipment, or facility reasonably necessary for the transaction of the business of such public utility, and for the public convenience or interest, then such public utility may file a petition with said commission for such right and permission, which petition shall state with particularity the construction, equipment or other facility desired to be constructed and operated, and show a reasonable public necessity therefor, and also the failure or refusal of such city, political subdivision or other body to give or grant such right or permission; and the commission shall thereupon give notice of the pendency of such petition, together with a copy thereof, to such city or other political subdivision or body of the time and place of hearing of the matter set forth in such petition; and such commission shall have power to hear and determine such matters and to give or grant such right and permission and to impose such conditions in relation thereto as the necessity of such public utility and the public convenience and interest may reasonably require."

APPENDIX K

Burns' Indiana Statutes 1933, Section 33-409.

"*Deeds in trust for grantor.* All deeds of gift, conveyances, transfers or assignments, verbal or written, of goods or things in action, made in trust for the use of the person making the same, shall be void as against creditors, existing or subsequent, of such persons."

APPENDIX L

Indiana Acts 1913, Chapter 76, Sections 105, 130, pages 203, 214.

"Sec. 105. The commission shall thereupon proceed to set a time and place for a public hearing upon the matters of the just compensation to be paid for the taking of the property of such public utility actually used and useful for the convenience of the public, and of all other terms and conditions of the purchase and sale and shall give to the municipality and the public utility interested, not less than thirty (30) days' notice of the time and place when and where such hearing will be held, and such matters considered and determined, and shall give like notice to all bondholders, mortgagees, lienors and all other persons having or claiming to have any interest in such public utility by publication of such notice, once a week for not less than three (3) successive weeks, in at least one (1) newspaper of general circulation printed in the English language and published in the county in which such public utility is located, which publication shall be caused to be made by the municipality. Within a reasonable time, not exceeding one (1) year after the time fixed for such hearing in such notice, the commission shall, by order, fix and determine and certify to the municipal council, to the public utility and to any bondholder, mortgagee, lienor or other creditor appearing upon such hearing, just compensation to be paid for the taking of the property of such public utility actually used and useful for the convenience of the public and all other terms and all conditions of sale and purchase which it shall ascertain to be reasonable, allowing not exceeding one hundred twenty days (120) for the payment of such compensation. The compensation and other terms and conditions of sale and purchase thus certified by the commission shall constitute the compensation and

terms and conditions to be paid, followed and observed in the purchase of such plant from such public utility. Upon the filing of such certificate with the clerk of such municipality and payment of the compensation fixed the exclusive use of the property taken shall vest in such municipality."

* * *

"Sec. 130. All acts and parts of acts conflicting with the provisions of this act are repealed in so far as they are inconsistent herewith."

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In the Supreme Court of the United States

OCTOBER TERM—1940.

CITY OF INDIANAPOLIS, *et al.*,
Petitioners,

v.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., *et al.*,
Respondents.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc.,
Cross-Petitioner,

v.

CITIZEN'S GAS COMPANY OF INDIANAPOLIS, *et al.*,
Respondents.

10, 11, 12 & 13

Nos. ~~421, 422, 423, and 424.~~

REPLY BRIEF OF CHASE NATIONAL BANK, TRUSTEE, RESPONDENT AND CROSS-PETITIONER.

HOWARD F. BURNS,
JOHN ADAMS,
HARVEY J. ELAM,
Counsel for The Chase National Bank of the City of New York, Trustee.

BAKER, HOSTETLER & PATTERSON,
Union Commerce Building,
Cleveland, Ohio,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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TABLE OF ABBREVIATIONS.

In addition to the abbreviations and designations used in our original brief (see Pl. Br. pp. 1 and 2 and page facing p. 1) we shall use the following abbreviations:

Cit. Gas Br.	Brief of Citizens Gas Company of Indianapolis, Respondent and Cross-Respondent.
City Br.	Brief of City of Indianapolis, *et al.*, Petitioners and Cross-Respondents, dated December 28, 1940.
Ind. Gas Br.	Brief of The Indianapolis Gas Company, Respondent, dated January 20, 1941.
Pl. Br.	Brief of Chase National Bank, Trustee, Respondent and Cross-Petitioner, dated December 7, 1940.

In the Supreme Court of the United States

OCTOBER TERM—1940.

CITY OF INDIANAPOLIS, *et al.*,
Petitioners,
v.
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., *et al.*,
Respondents.
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc.,
Cross-Petitioner,
v.
CITIZENS GAS COMPANY OF INDIANAPOLIS, *et al.*,
Respondents.

Nos. 421, 422, 423, and 424.

REPLY BRIEF OF CHASE NATIONAL BANK, TRUSTEE, RESPONDENT AND CROSS-PETITIONER.

INTRODUCTION.

We shall confine ourselves in this Reply Brief to a consideration of the "assigned errors intended to be urged" by the City (City Br. 13-14), and to the argument advanced by Indianapolis Gas to the effect that the unpaid and overdue coupons should bear interest at 5% rather than 6% (Ind Gas Br. 82-3).

The brief of Citizens Gas requires no comment. The Circuit Court of Appeals held that the Lease is "valid and enforceable against" Citizens Gas and that plaintiff is entitled to "a coercive judgment for the unpaid and overdue interest coupons" against Citizens Gas (IV R. 1307-8). Citizens Gas has not sought a review of that decision and it is conclusive upon it in all respects. It apparently does not contend otherwise.

Counsel for the various defendants have by their silence accepted as accurate the statement of the case set forth in our original brief (Pl. Br. 2-24). It will be necessary, however, for us to point out certain inaccuracies appearing in the City's brief before proceeding to the argument.

Correction of Inaccuracies and Omissions in City's Brief.

1. The statement that the sole purpose of Citizens Gas "was to act as trustee of a public charitable trust" and that it "had no power or authority to act otherwise" (City Br. 5) is inaccurate and misleading. Citizens Gas was primarily a public utility incorporated "to supply the city of Indianapolis and its inhabitants with light, heat and power" (1 R. 95), although it also had certain duties and responsibilities as trustee of the public charitable trust. This situation is correctly summarized in the brief of Citizens Gas (p. 6):

> "(4) Since Citizens Gas was a public utility as well as the original Trustee of the Public Charitable Trust, the lease in question was made pursuant to the authority of the Public Service Commission Law of Indiana and only after approval had been given by the Public Service Commission of Indiana (1 R. 116-122). The propriety of this was adjudicated in *Williams v. Citizens Gas Company, et al.*, 206 Ind. 448, 188 N. E. 212."

Under the law of Indiana, the state's power over Citizens Gas as a public utility transcended the rights of the beneficiaries of the public charitable trust. Citizens Gas, therefore, had power to make the Lease when the state specifically conferred that power by the adoption of the Shively-Spencer Act (Pl. Br. 57, 67, 144), and when the Public Service Commission approved the making of the Lease. It is immaterial whether Citizens Gas had previously enjoyed such power (Pl. Br. 66-9; *infra*, pp. 37-9).

2. The statement that "On September 30, 1935 Indianapolis Gas agreed to make an arrangement for temporary use," of its property (City Br. 9), is wholly unsupported by the record and contrary to the facts. The letters exchanged between the City and Indianapolis Gas on September 30th (DX Stip. 64 and 65, III R. 968-9; Offered, II R. 384-5) merely agreed that the payments which the City was then making and was expecting to make in the future would be without prejudice to the rights of either of the parties. In accepting the payments, Indianapolis Gas said (DX Stip. 65, III R. 969):

> "* * * you making these or future payments referred to without prejudice to your position or rights and we accepting the same without prejudice to our position or rights under said lease or in any relation thereto."

Thus, the only agreement made was that the *payments* were to be made and accepted without prejudice to the rights of either of the parties. This agreement was in no sense "an arrangement for temporary use."

As a matter of fact, these letters were not exchanged until three weeks after the City had accepted the assignment of the Lease, recorded it, and taken possession of the leased property, so that the reservation contained in both letters preserved to Indianapolis Gas the rights which it had secured by the City's previous action in accepting the assignment of the Lease.

3. The agreement of March 2, 1936, referred to by the City, is the first agreement of any sort between Indianapolis Gas and the City with respect to the temporary use or continued operation of the property. In referring to this agreement (City Br. 11), counsel for the City have carefully quoted the paragraph which provided that continued operation should be without prejudice to the City's rights, but have omitted the similar paragraph with respect to the rights of Indianapolis Gas. The latter paragraph reads (I R. 207):

> "It is further understood that your acceptance of this agreement and of such payment and your agreement that such sums may be deposited in escrow and that we may operate the plant referred to *shall not prejudice your position or rights** and that you are at full liberty to assert, notwithstanding this agreement and the payment made in pursuance thereof, that said lease is a valid and binding lease upon the City of Indianapolis and said Department of Utilities of said City or against any property of either in accordance with its terms."

Since this agreement specifically provided that it was without prejudice to the rights of the parties, it cannot be tortured into any waiver of the rights accruing to Indianapolis Gas through the City's accepting and recording the assignment of the Lease and taking possession of the leased property, almost six months before.

4. The statement that "The action of the Board of Directors rejecting the lease was ratified by an ordinance of the common council of the City" (City Br. 10) is only a half truth. The fact is that the City Council ratified and confirmed all that the Board of Directors for Utilities did in taking over and accepting the public charitable trust (DX 8, III R. 1018-19; Offered, II R. 429). Thus the City Council "ratified, approved, adopted and confirmed" the action of the Board of Directors for Utilities:

(1) In offering the City's Revenue Bonds for sale upon the express representation that the City was taking over the "property owned by Citizens Gas Company of Indianapolis and/or in which it has an interest, * * *" (Pl. Br. 17).

(2) In representing, in connection with the sale of the City's Revenue Bonds, that the system which it was taking over was "* * * in part owned by Citizens Gas Company and in part is leased by it from Indianapolis Gas Company, * * *" (Pl. Br. 18).

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* Emphasis appearing in quotations throughout this brief is ours unless otherwise indicated.

(3) In executing the Indemnity Agreement in which it agreed to save Citizens Gas harmless against all its liabilities (Pl. Br. 21).

(4) In accepting and recording the assignment of the Lease and taking possession of the leased property (Pl. Br. 107-111).

(5) In accepting and recording the instruments of conveyance transferring all property of Citizens Gas, which conveyances were expressly made subject to "all other legal obligations of the Citizens Gas Company" (Pl. Br. 112-14).

The City Council was in no better position to "keep its cake and eat it" than was the Board of Directors for Utilities and in ratifying and confirming all the acts done in taking over the property of the public charitable trust it necessarily approved the acts of the Board of Directors and the legal consequences flowing therefrom.

5. Counsel for the City say (City Br. 12) "The bill does not allege that the lease is valid, * * *" and then go on to state that the plaintiff is predicating its rights merely upon laches, estoppel, and *res judicata*. This statement as to the allegations of plaintiff's Bill, *even if true*, would be wholly without significance. There was no occasion for plaintiff to allege *in haec verba* that the Lease was valid. Such an allegation would have been merely a conclusion of law and wholly devoid of significance.

The fact is, however, that from the time of the filing of the original Bill, continuously to the present time, plaintiff has been contending that the Lease is valid and binding on the original parties thereto, upon the City of Indianapolis as successor trustee, upon the trust property, and upon Citizens Gas. Thus in paragraph 19 of the Bill (I R. 17-18) it is alleged that "*upon the execution and delivery of said 99-year lease*" the Mortgage Trustee became vested with certain distinct and independent rights against "the lessee, its successors and assigns." Obviously, the mortgagee acquired rights growing out of the

acceptance of this 99 year Lease only because it was a valid and binding obligation of the parties thereto.

The second prayer of the Bill asked expressly that the Lease be found a valid and binding obligation upon all of the defendants (Bill, I R. 20-21). The City has continuously recognized that plaintiff was asserting that the Lease was valid and binding. Thus the City's counter-claim states (I R. 183, 3rd paragraph):

> "That the plaintiff, The Chase National Bank of the City of New York as Trustee under said Mortgage and Deed of Trust securing bonds of The Indianapolis Gas Company * * * is asserting that said lease is valid and binding, * * *."

In answer to the City's counter-claim plaintiff stated (I R. 214): "* * * but plaintiff denies that the aforesaid lease was void when executed or is now void in any respect whatever, * * *."

These statements show that there has never been any real doubt as to the plaintiff's contention.

6. The statement that "* * * there was a definitely fixed date for the termination of its [Citizens Gas's] trusteeship" (City Br. 16, 44) is unsupported by the record and contrary to fact. As pointed out in our original brief (Pl. Br. 63-4) there were five possible contingencies which would result in the City's succeeding Citizens Gas as trustee, none of which was certain to occur. All of those contingencies except one depended upon the City's exercise of its rights, and that was an uncertain matter, since it involved the raising of funds and the assumption of obligations. The City admitted in its brief filed in the Circuit Court of Appeals that "At the time this lease was executed, it was not known and could not have been known that the City would exercise its right to take over the trust."*

7. In specifying the assigned errors the City (City Br. 14) complains of the supposed error of the Circuit

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* City's Brief in Cause 7143 in Circuit Court of Appeals, p. 52.

Court of Appeals "In holding a municipal corporation liable for 77 years for future payments of more than $45,000,000 * * *." In so far as this statement indicates that a liability is imposed upon the City of Indianapolis payable out of revenues raised by taxation, it is contrary to fact and wholly unsupported by the record. Both the opinion and the orders of the Circuit Court of Appeals make it clear that the primary liability is imposed upon "(1) The City *as successor Trustee* and the Trust Property;" (IV R. 1306; 1307, 1308). Indeed, the Court of Appeals amended its opinion after the filing of the City's first Petition for Rehearing by inserting the words "as Successor Trustee" after the words "the City" to make the limitation of liability entirely clear (cf. IV R. 1335 and 1306, line 34). The City does not attempt to support its suggestion that any liability is imposed upon the City payable out of revenues raised by taxation, as distinguished from liability imposed on the trust property and the City as successor trustee.

In so far as the City's statement includes the suggestion that it will be necessary to pay $45,000,000 in rent over a period of 77 years for the use of the Indianapolis Gas property, it is wholly immaterial to any issue before the Court. The fact that interest on $10,000,000 at 5% for 20 years will total $10,000,000 or in 80 years will total $40,000,000, has no relevance in determining whether the rate of 5% is either lawful or reasonable or whether the obligation was validly assumed.

As pointed out in our original brief (pp. 65-66), the leasing of the Indianapolis Gas property was vastly more economical for Citizens Gas than selling its own stock to purchase the same property. That a substantial amount of rent is paid for the Indianapolis Gas property is more than offset by the fact that the lessee receives tremendous revenues from the Indianapolis Gas property which constituted in 1913, when the Lease was made, and still con-

stitutes a very large part of the combined system resulting from the leasing of the Indianapolis Gas property. In this connection the following facts are significant:

(1) The City admits (City Br. 46) that the Indianapolis Gas property "was twice the size of that of Citizens Gas" when the Lease was made in 1913.

(2) In 1913, when the Lease was made, Indianapolis Gas had 41,541 meters in use, as compared with 11,165 for Citizens Gas (PX 93, III R. 901, Offered II R. 342; Stip. 5 (b), II R. 621).

(3) At the end of 1913 Indianapolis Gas had 387.34 miles of mains, as contrasted with 184.52 miles of mains for Citizens Gas (PX 93, III R. 901).

(4) On June 30, 1913, the total assets and the property of Citizens Gas were worth $2,781,480 and $2,521,170, respectively (PX 92, p. 4, physical exhibit, not printed; Offered, II R. 342). In 1913 the Public Service Commission of Indiana determined that the Indianapolis Gas Bondholders and stockholders were entitled to a 5% return on $4,833,000 of Bonds and a 6% return on $2,000,000 of stock, so that the value of the Indianapolis Gas property was obviously more than twice that of Citizens Gas.

Thus it is apparent that the City's talk about paying an aggregate of $45,000,000 for interest, dividends, and taxes in connection with the Indianapolis Gas property over a period of 77 years has no real bearing upon the merits of the controversy.

We shall have occasion to correct other inaccuracies in the City's statements during the course of the following argument.

ARGUMENT.

I. THE CIRCUIT COURT OF APPEALS PROPERLY REFUSED TO REALIGN INDIANAPOLIS GAS WITH CHASE AS A PARTY PLAINTIFF.

(Pl. Br. 38-45.) (Ind. Gas Br. 27-29.)
(City Br. 22-32.)

As we have seen (Pl. Br. 40-43), any one of the numerous controversies between plaintiff and Indianapolis Gas would preclude a realignment of Indianapolis Gas. A mere statement of these controversies is sufficient in and of itself to remove all possible doubt as to federal jurisdiction of this case. In addition to plaintiff's prayer for a decree declaring the Lease to be binding on *all* the defendants, the relief sought which creates a definite adversity of interest between plaintiff and Indianapolis Gas includes the following:*

1. A declaration that the rights of Indianapolis Gas under the Lease are part of the security for the Bonds (Prayer 3, I R. 21).

Here is a clash of interests as to what assets of Indianapolis Gas are covered by its Mortgage.

2. An order, pending final judgment, restraining Indianapolis Gas from interfering with the Lease in any way (Prayer 4, I R. 21).

The danger of such interference is shown by some of the correspondence between the City and Indianapolis Gas (PX Stip. 66, III R. 838, Offered, II R. 329; DX Stip. 68, III R. 970, Offered, II R. 433-4). The agreement of March 2, 1936 (Exhibit E, I R. 205, Offered, II R. 386) shows that before this suit was filed Indianapolis Gas did

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* An order of the District Court (II R. 321-2) reserved some of the issues in this case for trial at a later date. Among the issues so reserved are Nos. 1, 3, 6, 7 and 8 hereinafter enumerated, and the issue as to plaintiff's right to recover its expenses and attorney's fees (see No. 5, p. 10. *infra*).

not hesitate to attempt to make modifications in the Lease in complete disregard of the rights of the Bondholders.

The City asserts that plaintiff does not fear any adverse action by Indianapolis Gas, since plaintiff has taken no steps to procure the temporary injunction for which it prays (City Br. 26). While it is true that the actual issuance of an injunction was not sought, any adverse action by Indianapolis Gas was forestalled and plaintiff's rights were adequately protected by the filing of the Bill and the prayer for injunction.

> *Merrimack River Savings Bank v. City of Clay Center*, 219 U. S. 527, 536 (1911).

3. A declaration that the contract of March 2, 1936 has no effect on the rights of the Bondholders under the Lease (I R. 259, Par. (4)).

The Lease requires the lessee to pay the bond interest *to the Bondholders* (I R. 69, Par. 21; I R. 72, Par. 22), but this contract makes *all* the rent payable to Indianapolis Gas (I R. 206, Par. (b)).

4. A decree ordering the City to pay to *plaintiff* all the interest payments becoming due thereafter (Prayer 7, I R. 21).

The agreement of March 2, 1936 reveals the necessity for establishing and enforcing plaintiff's right to receive part of the rent paid under the Lease, as against any claim of Indianapolis Gas thereto.

5. A judgment for the unpaid interest, with interest on the unpaid interest, and for plaintiff's expenses and attorney's fees (Prayer 8, I R. 21; Prayer 10, II R. 301).

6. A judgment for all losses caused by the failure of Indianapolis Gas to make, or cause to be made, the repairs and renewals necessary to properly maintain the mortgaged premises (Prayer 10, II R. 301).

7. An order compelling Indianapolis Gas to apply to the satisfaction of all judgments against it in this case all

of its assets, of whatever nature, including $120,000 of Bonds, its interest in the escrow fund being accumulated under the contract of March 2, 1936, and its right to recover from the City for the use of its property, whether under the Lease or otherwise (Prayer 12, II R. 302).

8. A declaration that any of the assets of Indianapolis Gas remaining after the satisfaction of the judgments against it are part of the security for the Bonds, and also an order sequestering any such surplus assets until Indianapolis Gas shall have given adequate security for the ultimate discharge of its obligations under the Mortgage (Prayer 12, II R. 303-4).

The City is obviously wrong when it says (City Br. 23): "The real and controlling controversy in this case is whether the pleaded lease has become enforceable against the City." Issues 5, 6, 7 and 8 just enumerated have nothing to do with the validity of the Lease and they are much too important to be ignored in determining the question of federal jurisdiction.

Since plaintiff has these numerous controversies with Indianapolis Gas, Indianapolis Gas could not be realigned as a plaintiff, even if it were in accord with plaintiff in some of the other controversies. We have pointed out that (Pl. Br. 40): "The City has never cited a single case in which the plaintiff had even one substantial controversy with a defendant and such defendant was realigned with the plaintiff for jurisdictional purposes," and that statement still stands.

The City relies entirely on *Sutton v. English*, 246 U. S. 199 (1918), claiming that (City Br. 30): "the attitude of the parties toward what this Court characterized as the actual and substantial controversy determined whether there should be realignment" in that case. This "actual and substantial controversy" was *the only controversy* between plaintiffs and the defendant sought to be realigned (see Pl. Br. 41-2). The fact that their clash of interest in

this one controversy *prevented* a realignment does not support the City's argument that a similarity of interest in a single controversy *requires* a realignment. On the contrary, since a clash of interest in one controversy prevents realignment, where such clash of interest appears there can be no realignment because of any similarity of interest in any other controversies in the same case. As a matter of fact, there was a similarity of interest in three of the four controversies in *Sutton v. English*, and this Court nevertheless ruled that no realignment was required.

The fact that plaintiff sought and obtained a judgment *against* Indianapolis Gas which will now amount to more than $1,700,000 is sufficient in and of itself to prevent a realignment of Indianapolis Gas, and there are numerous other controversies between plaintiff and Indianapolis Gas. The City argues (City Br. 26) that ample funds to pay the judgment can be obtained from the escrow fund and the operation of the utility property, and that Indianapolis Gas is therefore "wholly insulated from any liability." This argument presupposes that federal jurisdiction is dependent in some way upon the ultimate collectability of the various defendants. Obviously, both the principal and surety on an obligation are properly sued *as defendants*, without regard to the solvency or collectability of either.

The City argues further that since the liability of Indianapolis Gas is secondary to that of the City as trustee, the trust property, and Citizens Gas, the judgment of the Court of Appeals "amounts in substance *not to a judgment against Indianapolis Gas, but one in its favor*" (City Br. 26, italics are the City's). This assertion suggests another method of testing the soundness of the City's argument. Even if Indianapolis Gas had secured a judgment holding that it was *not* liable for the overdue and unpaid interest, the fact of such a judgment would have no effect on the question of jurisdiction. Federal jurisdiction is determined with reference to the controversies presented by the plead-

ings and not with respect to the ultimate decision of those controversies. For example, the amount in controversy necessary to sustain federal jurisdiction is determined by the amount claimed, and the amount actually recovered is wholly immaterial.

> *Scott v. Donald*, 165 U. S. 58, 89 (1897);
> *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U. S. 283, 288 (1938).

Similarly, the presence of a federal question essential to federal jurisdiction depends upon the issues presented by the pleadings, and it makes no difference that the federal question is determined adversely to plaintiff or is not even determined at all.

> *Siler v. L. & N. R. R. Co.*, 213 U. S. 175, 191 (1909);
> *Levering & Garrigues Co. v. Morrin*, 289 U. S. 103, 105 (1933).

As shown by these well established rules, the presence of a controversy which sustains federal jurisdiction is not negatived by the ultimate decision of such controversy adversely to the plaintiff.* Just as a decision that Indianapolis Gas is not liable for the unpaid interest would have no effect on federal jurisdiction of this case, so the decision that the liability of Indianapolis Gas is only secondary has no effect on federal jurisdiction.

The fallacy of the City's argument that jurisdiction must be determined with reference to the ultimate decision of the merits is readily apparent. If the City had prevailed in its contention that the Lease is invalid (as it did in the District Court), plaintiff's recovery would have been confined to Indianapolis Gas alone and the City would apparently concede the existence of jurisdiction. On the other

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* This is well illustrated by a case in which jurisdiction of a single defendant is based on diversity of citizenship. In such a case federal jurisdiction is not destroyed merely because the defendant is successful on the merits.

hand, since the City's contentions were denied and the Lease was held valid, so that Citizens Gas, the trust property, and the City as trustee were also held liable for the unpaid interest, the City insists that Indianapolis Gas is no longer a proper party defendant, although a judgment is still rendered against it. Thus it should be noted that while the City was asserting that Indianapolis Gas should be aligned as a plaintiff, it was at the same time contending that Indianapolis Gas was the only party liable for the indebtedness which plaintiff sought to recover. If the City had prevailed in its contentions both as to jurisdiction and the merits, it would have been necessary to realign as a party plaintiff the *only* party liable to Chase. The absurdity of the position thus taken by the City clearly reveals the fallacy of its arguments on this question.

There can be no real doubt concerning federal jurisdiction of this case. Plaintiff is entitled to an adjudication of the rights which it asserts against Indianapolis Gas, and the adverse relationship created by the assertion of those rights precludes any realignment of Indianapolis Gas as a party plaintiff.

II. THE CITY HAD AMPLE OPPORTUNITY TO BE HEARD ON THE QUESTION WHETHER THE ALLEGED BURDENSOMENESS OF THE LEASE WAS A VALID DEFENSE AND THE COURT OF APPEALS' DIRECTION TO ENTER FINAL JUDGMENT WITHOUT A RETRIAL OF THAT ISSUE WAS IN FULL ACCORD WITH DUE PROCESS OF LAW.

(Pl. Br. 45-56) (Ind. Gas Br. 29-61)
(City Br. 32-43).

It may be helpful in analyzing the City's so-called constitutional question to determine just what the City is contending and what it is not contending. It is clear from the City's brief, its assignment of errors, and the grounds relied upon in its petitions for certiorari that:

The City contends:

(1) That the Circuit Court of Appeals had no right to decide as a matter of law that the alleged burdensomeness of the Lease was not a valid defense and direct a final judgment, because

(a) It was necessary for the District Court to pass on this question of law before it could constitutionally be passed on by the Court of Appeals (City Br. 40);

(b) The District Court did not pass on the question of law (City Br. 41).

(2) That in so far as the decision of the Circuit Court of Appeals was based on the prior adjudication in the *Williams* case, such decision was unwarranted because

(a) "The question of *res adjudicata* is a question of fact" (City Br. 39);

(b) The City had no opportunity to be heard on the question of *res judicata* in the District Court (City Br. 17, 39).

The City does not contend and has made no assignments of error entitling it to contend:

That the decision of the Court of Appeals that the alleged burdensomeness is not a valid defense was in itself an erroneous decision.

Let us consider for a moment the significance which attaches to the City's failure to make this contention.

The City concedes "that the issue of burdensomeness * * * was decided against the City by the Circuit Court of Appeals." (City Br. 17). This means that the Court decided that the alleged burdensomeness was not a valid defense *as a matter of law*, since there is no claim that the question of *fact* was passed upon. The City does not con-

tend that this question of law was erroneously decided, nor does the City attempt to answer the argument in our original brief (Pl. Br. 50-54) showing that the allegations of burdensomeness presented no valid defense. It is perhaps a fair inference that the City has no answer.

Even if the Circuit Court of Appeals had erroneously decided the question of burdensomeness or had erroneously failed to consider it at all, no constitutional question as to due process would be involved, but only an erroneous decision in the course of a judicial proceeding. Thus, in *Collins v. Johnston*, 237 U. S. 502 (1915), this Court was reviewing an order of the District Court denying appellant's petition for a writ of *habeas corpus*. The appellant contended that he had been "deprived of due process of law in violation of the Fourteenth Amendment, in that the trial court arbitrarily denied and refused to consider a valid and legally conclusive defense offered by him upon the trial of the second indictment" (p. 506). In answer to this contention this Court said (p. 507):

> "Nor are we able to see that the refusal of the proffered defense, even were such refusal erroneous, could at all affect the jurisdiction of the court, or amount to more than an error committed in the exercise of jurisdiction. The averment that the defense was 'arbitrarily refused' merely states a conclusion of law, and is of no effect in the absence of facts sufficient to show that the ruling was in truth arbitrary; and no such facts are alleged."

In the case at bar the City does not even claim that the Circuit Court of Appeals decided the question of burdensomeness erroneously. Its sole contention is that the Court of Appeals had no *right* to decide the question. Reduced to its simplest elements, the City's contention is that the Circuit Court of Appeals had no right to pass upon the question whether the alleged burdensomeness of the Lease constituted a valid defense no matter how trivial or absurd that alleged defense might be, and that the Court was re-

quired to remand the case to the trial court to take evidence on a question which the Court believed to be wholly immaterial as a matter of law.

With this background we shall proceed to examine the City's contentions under the following headings:

(a) The City's contention that it was necessary for the District Court to pass on the question whether burdensomeness was a valid defense before the Court of Appeals could constitutionally pass upon it is unsound and contrary to the decisions of this Court.

(b) There is no factual basis for the City's supposed constitutional question, because the District Court did in fact rule on the defense of burdensomeness and its ruling was preserved for review by plaintiff's exception to the overruling of its motion to strike.

(c) The City's contention that the Circuit Court of Appeals should not have based its decision as to burdensomeness on *res judicata* is unsound, because there is no indication that the Court based its decision on that ground.

(d) To the extent, if at all, that the Circuit Court of Appeals based its decision upon the prior adjudication in the *Williams* case, it was fully justified in doing so since the parties had been fully heard in the District Court as to the effect of that adjudication.

(a) The City's Contention that it was Necessary for the District Court to Pass on the Question Whether Burdensomeness was a Valid Defense Before the Circuit Court of Appeals Could Constitutionally Pass Upon it is Unsound, and Contrary to the Decisions of This Court.

As pointed out in our original brief (Pl. Br. 48-49), the decision of this Court in *American Surety Co. v. Baldwin*, 287 U. S. 156, 168, establishes beyond question that a defense may properly be considered for the first time in

an appellate court. This case alone disposes of the City's argument and yet the City's brief makes no attempt to explain or distinguish this case or the rule announced therein.

There can be no doubt concerning the applicability of the rule of *American Surety Co. v. Baldwin* to a federal equity case. It has always been held that an appeal in an equity case invokes a hearing *de novo* and that the Court of Appeals is not limited to a mere review of the rulings of the trial court.

Thus, in *Alexander v. Redmond*, 180 Fed. 92 (C. C. A. 2nd, 1910), a trustee in bankruptcy brought a bill in equity to set aside an assignment as a preference. A jury was impaneled to try the issues and at the end of plaintiff's case defendants "rested subject to request for permission to reopen the case" and moved for a directed verdict, which was granted. On appeal the Court of Appeals reversed the trial court and ordered final judgment for the plaintiff. To the defendants' objection that they had had no opportunity to prove their defense, the court made this answer (p. 93):

> "This being an appeal in equity, the facts as well as the law are open for our consideration, as they would be even if the jury had rendered a verdict without direction, and the issues must be disposed of upon the record brought here from the circuit court. *No reservation of a motion to reopen the case extends to this court.* The circumstance that a jury was impaneled is immaterial. *Appeal in equity brings the cause here for final disposition.*"

Many other cases could be cited to the same effect, but we call the Court's attention to one. In *Lyon v. Union Gas & Oil Co.*, 281 Fed. 674 (C. C. A. 6th, 1922), the plaintiffs brought suit to quiet their title to certain premises and to enjoin defendants from setting up any claim by virtue of a certain oil and gas lease. The District Court dismissed the case and plaintiffs appealed. Plaintiffs had notified

the defendants that they must either proceed to develop the leased property or forfeit the lease. The Court of Appeals held that one of the material issues was whether a sufficient time had elapsed between the notice given by plaintiffs and the time when suit was brought. The Circuit Court of Appeals expressly held that although the trial court did not pass upon this issue, the court was free to determine that question. Thus the court said (p. 678):

> "While the trial court did not determine the question of the sufficiency of the time intervening between the notice and the commencement of this action, nevertheless this action is here upon appeal, and therefore *all issues presented by the pleadings and the evidence are before this court for adjudication.*"

Defendants had made no effort to prove in the lower court an excuse for failure to develop the property and "rested their case upon the testimony introduced by the plaintiffs." In the Court of Appeals defendants suggested in argument a number of causes for their delay but that Court held that the forfeiture of the lease was justified. Thus the lessees' defenses that they had not been allowed sufficient time and that they had some excuse for failure to develop the property were decided adversely to them by the Court of Appeals, although these questions had not been passed upon by the District Court.

There are many recent cases recognizing that a Court of Appeals may direct final judgment in an equity case or in a law case where the facts are not in dispute. See, for example:

Thornton v. Carter, 109 F. (2d) 316 (C. C. A. 8th, 1940);

Union Central Life Insurance Co. v. Imsland, 91 F. (2d) 365, 368 (C. C. A. 8th, 1937).

Under some circumstances, even when there is a constitutional right to a trial by jury, an appellate court may

direct the entry of final judgment on questions of law, although they were not considered by the lower court.

Forged Steel Wheel Co. v. Lewellyn, 251 U. S. 511, 516 (1920);

Baltimore & Carolina Line v. Redman, 295 U. S. 654 (1935).

Under the new rules of civil procedure the right of the Circuit Court of Appeals to direct the entry of final judgment, even in a jury case, has been enlarged, or at least has been somewhat simplified from a procedural point of view.

Montgomery Ward & Co. v. Duncan, 85 L. ed. 132, 138 (December 9, 1940).

It is a fundamental concept of our procedure that no one has a right to prove facts—even in a jury case—which will be unavailing if proved. The entry of judgments on demurrer, the granting of motions to strike immaterial claims or defenses, the rejection of evidence on the trial because of immateriality, and the entry of judgments on motions for judgment on the pleadings are all examples of this practice. The reports of this Court and of every common law court are replete with illustrations.

In *Fidelity & Deposit Co. v. United States*, 187 U. S. 315 (1902), this Court was reviewing a judgment for plaintiff entered by the Supreme Court of the District of Columbia because the defendant's affidavit of defense, required by rule of court, was inadequate. Defendant claimed that the rule was invalid because it deprived it of due process of law and the right of trial by jury. This Court denied those contentions and said (p. 320):

"* * * If it were true that the rule deprived the plaintiff in error of the *right* of trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues. The purpose of the rule is

to preserve the court from frivolous defences and to defeat attempts to use formal pleading as means to delay the recovery of just demands.

"Certainly a salutary purpose and hardly less essential to justice than the ultimate means of trial." (Emphasis is the Court's.)

See also:

Smoot v. Rittenhouse, 27 Washington L. Rep. 741 (U. S. Supreme Court, 1876);

Souffront v. Compagnie des Sucreries, 217 U. S. 475 (1910).

The City's authorities distinguished.

None of the cases cited by the City has any tendency to support the City's contention that a hearing in the trial court on the question of law—whether burdensomeness was a valid defense—was an essential element of due process.

Harvey v. Elliott, 167 U. S. 409 (1896) (City Br. 37), involved the entry of a summary judgment as a punishment for contempt and the judgment was held void for want of due process.

In *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292 (1937) (City Br. 37), this Court held that the Commission had erred in entering a finding based on facts which did not appear in the record and in acting on "information secretly collected and never yet disclosed." The failure of the Ohio law to provide a review for such a determination was held to be a violation of due process.

In *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287 (1920) (City Br. 37-8), the Public Service Commission had prescribed a complete schedule of maximum rates which was legislative in character, based on a valuation of the utilities property. This Court held that "the State must provide a fair opportunity for submitting that

issue to a judicial tribunal," and that was the extent of the decision.

In *Bluefield Water Works and Improvement Co. v. Public Service Commission*, 262 U. S. 679 (1923) (City Br. 39), this Court held that a utility was entitled to a judicial review of both the law and the facts in determining whether the rates fixed by the Public Service Commission were confiscatory in character.

In *Montgomery Ward & Company v. Duncan*, 85 L. ed. 132 (December 9, 1940) (City Br. 42) the case was remanded to the District Court to rule on the motion for a new trial because that motion was addressed to certain questions which lay entirely within the discretion of the District Court (see p. 137).

In *Saunders v. Shaw*, 244 U. S. 317 (1917) (City Br. 37), this Court reversed a judgment of the Louisiana Supreme Court. The Louisiana Supreme Court had rendered judgment absolute against the party who succeeded in the trial court and this ruling was placed on "a proposition of fact which was ruled to be immaterial at the trial" and concerning which there had been no proper opportunity to introduce evidence. If the Circuit Court of Appeals had ruled on the issue of burdensomeness *as a matter of fact*, this case might have some pertinence, but the issue of burdensomeness was held to be immaterial *as a matter of law*.

In so far as this case is cited by the City to support its position that it seasonably raised the constitutional question, it lends no support to such contention. As we shall see later (*infra*, pp. 24-5), the issue as to the motion to strike was fully argued in the Circuit Court of Appeals without any suggestion from the City that that Court could not properly or constitutionally pass upon it. The City never contended that a ruling on the question of burdensomeness would violate the *Fifth* Amendment until it filed its Second Petition for Rehearing in the Circuit Court of Appeals (compare IV R. 1310, Par. 1 and IV R. 1346, Par.

3) and made its first claim of any constitutional right (*under the Fourteenth Amendment*) in its first Petition for Rehearing (IV R. 1310).

Cobbledick v. United States, 309 U. S. 323 (1940) (City Br. 40), is an authority against rather than in support of the City's position. This Court did not say, as the City indicates, that "an appeal is a matter of grace," but that "*the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice.*" (p. 325). It necessarily follows that the requirements of due process can be as completely satisfied by a hearing on a question of law in an appellate court as in a trial court. This is precisely what this Court held in *American Surety Co. v. Baldwin*, 287 U. S. 156 (*supra*, p. 17).

(b) There is no Factual Basis for the City's Supposed Constitutional Question, Because the District Court Did in Fact Rule on the Defense of Burdensomeness and Its Ruling was Preserved for Review by Plaintiff's Exception to the Overruling of I[illegible] Motion to Strike.

The City's supposed constitutional que[illegible] is based upon the assumption that the District Court did not rule upon the question of law whether the alleged burdensomeness of the Lease was a valid defense. The fact is, however, that the District Court did rule upon that question in denying plaintiff's motion to strike these allegations from the City's answer and counterclaim.

As pointed out in our original brief (pp. 47-48), plaintiff filed a motion to strike from the City's answer and counterclaim all the allegations asserting that the Lease was burdensome, and thereby squarely raised the issue whether the alleged burdensomeness would be a valid defense if proved (II R. 317). This motion was overruled by the District Court, to which action plaintiff excepted (II R. 320), and on its appeal plaintiff assigned this action

of the District Court as error (Points 1 and 2, III R. 1196).

The City seeks to raise the inference that plaintiff abandoned its motion to strike because it entered no formal exceptions to the order of January 18, 1939, on which the City bases its entire claim. This order did not reserve any issues of law previously decided on the motion to strike, but only deferred *the taking of evidence*. There is no basis for claiming that plaintiff's failure to take an exception* to this reservation can be construed as an abandonment of the exception previously taken to the important decision made by the District Court on the question of law involved in the motion to strike.

Certainly it was not so construed by the plaintiff or by the City in the course of the proceedings.

The propriety of the action of the District Court in overruling plaintiff's motion to strike was fully argued in the Circuit Court of Appeals. The City argued (Appendix A, *infra*, p. 67) that the ruling of the District Court was not reversible error, but there was no suggestion that the question could not properly or constitutionally be considered by the Court of Appeals. In support of the foregoing statement we have printed as Appendix A to this brief all of the discussion on this subject in any of the briefs filed in the Circuit Court of Appeals before the decision of that Court. These excerpts from the briefs filed in the Court of Appeals show how fully the question as to the motion to strike was argued in that court. There was no suggestion from anyone that the plaintiff had abandoned its motion to strike or that the question of law raised by the District Court's refusal to strike the allegations of burdensomeness was not properly before the Court of Appeals.

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*Of course, under Rule 46 of the new Rules of Civil Procedure no exception was necessary.

The City now claims (City Br. 36) "The City was not bound to contemplate a decision by the Circuit Court of Appeals of the reserved issue of burdensomeness before its evidence was heard."

The City was put on notice by the motion to strike, the exception to the overruling of that motion, the terms of the order of January 18, 1939, the assignment of errors in the District Court, and by the briefs in the Circuit Court of Appeals that plaintiff was still insisting on its motion to strike and that the Court of Appeals was requested to direct a final judgment. Thus, in the Circuit Court of Appeals, plaintiff concluded its argument on the motion to strike as follows (Appendix A, *infra*, p. 64):

> "We submit that the District Court erred in refusing to strike the City's allegations as to the burdensomeness of the Lease from its Answer and Counterclaim; and we submit that this Court should correct this error of the District Court to the end that there may be a speedy and final determination of this already too protracted litigation."

Notwithstanding the notice which the City thus received that plaintiff was insisting on its motion to strike and the right to have a final judgment directed, it was not until after the Court of Appeals had announced its decision that the City's counsel even suggested that the Court of Appeals did not have the right to pass on the question of law whether the allegations of burdensomeness constituted any defense.

The City had a hearing in the District Court on plaintiff's motion to strike, which presented the question of law whether the allegations of burdensomeness furnished any valid defense. Thus there is no factual basis for the City's contention that the Court of Appeals passed on this question of law before the District Court had done so.

(c) The City's Contention that the Circuit Court of Appeals Should Not Have Based its Decision as to Burdensomeness on Res Judicata is Unsound, Because There is no Indication that the Court Based Its Decision on that Ground.

The Circuit Court of Appeals would have been fully justified in deciding every issue as to the validity of the Lease, including the issue of burdensomeness, on the basis of the prior adjudication in the *Williams* case. There is, however, no justification for claiming that the Court based any part of its decision on the principle of *res judicata*.

The rule in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, announced in 1938, required that federal courts follow the state law as pronounced by the highest court of the state. That decision of this Court was urged upon the Court of Appeals by plaintiff and the defendants. We submit that the Court was applying that rule, rather than any doctrine of *res judicata*, when it cited the *Williams* and the *Fishback* cases. We call attention to the language of the Court itself (IV R. 1299-1300):

> "However, another point arises where as here the trustee has the power to make leases. In making a long term lease a trustee is under a duty to act with prudence. If a trustee makes a lease which is unreasonable under the circumstances, he thereby commits a breach of trust. For this a trustee incurs liability to the beneficiaries who in addition may have such a lease set aside. This record discloses that the trustee was justified in selecting the mode of acquisition which it did. When the prudence point was urged before the Indiana Supreme Court, that court did not find the lease in question unreasonable as to time or as to its other terms. *Williams v. Citizens Gas, et al.*, 206 Ind. 448, 458, 460.
>
> "We therefore conclude that the trustee had the power to make the long-term lease in question and that this particular leasehold interest in the Indianapolis Gas property is part of the trust *res*. In passing it

might be said that the few cases discussed in the opinion above are determinative of the immediate issue here, *i.e.*, as to the validity of the 99 years lease. See in particular *Fishback v. Public Service Commission, et al.*, 193 Ind. 282; *Williams v. Citizens Gas, et al.*, 206 Ind. 448; *Todd v. Citizens Gas, et al.*, 46 F. (2) 855; *Chase Nat. Bank v. Citizens Gas, et al.*, 96 F. (2d) 363, 365. No amount of verbal magic resorted to by counsel for the City will avail to brush aside the barrier these cases present to him. Nor have we overlooked the various admissions and apparent inconsistencies of the City during the history of this gas utility controversy in the courts and before the administrative bodies, but these points we find unnecessary to the decision herein reached."

Obviously, in citing the *Fishback* and the *Williams* cases, the Circuit Court of Appeals was merely applying the Indiana law as laid down by the courts of Indiana. In both of those cases, brought by beneficiaries of the public charitable trust, the Indiana courts decided that allegations as to the burdensomeness of the Lease were no basis for setting the Lease aside or declaring it invalid.

There is much talk throughout the City's brief concerning the failure of the Circuit Court of Appeals to follow the Indiana law. The fact is, however, that the established law of Indiana compelled the conclusion which the Circuit Court of Appeals reached and this is particularly true as to the alleged defense of burdensomeness.

As pointed out in our original brief (Pl. Br. 51-52, 90-92), the order of the Indiana Public Service Commission determining that the Lease was in the public interest is conclusive under the law of Indiana and cannot be attacked in a collateral action. *Public Service Commission v. Indianapolis*, 193 Ind. 37, 43; 137 N. E. 705, 707. The City itself admits this (City Br. 70-71).

In both the *Fishback* and the *Williams* cases the Lease was attacked by beneficiaries of the public charitable trust on the ground, among others, that it was burdensome. In

both cases the courts of Indiana refused to hear evidence in support of such ground of attack. These decisions were undoubtedly based, among other things, on the settled law of Indiana that there could be no collateral attack upon the determination of the Public Service Commission.

Fishback v. Public Service Commission, 193 Ind. 282; 138 N. E. 346, 139 N. E. 449;

Williams v. Citizens' Gas Company, 206 Ind. 448; 188 N. E. 212.

There can be no doubt that the *Williams* case was decided upon that ground, among others, since the Supreme Court of Indiana there said (188 N. E. 216):

"* * * Further it was within the jurisdiction of the public service commission to consider and approve the lease and the complaint discloses that the public service commission did approve it."

We submit that in disposing of the issue of burdensomeness the Circuit Court of Appeals was deciding that *as a matter of Indiana law, as established by the courts of Indiana*, the Lease was valid and the defense based upon alleged burdensomeness was wholly inconsequential.

(d) To the Extent, if at all, that the Circuit Court of Appeals Based Its Decision upon the Prior Adjudication in the Williams Case, it was Fully Justified in Doing so Since the Parties had been Fully Heard in the District Court as to the Effect of that Adjudication.

Even if we suppose, for the purpose of argument, that the Circuit Court of Appeals rested its decision as to burdensomeness solely on the question of *res judicata*, such action would be fully justified. The fact that the decision in the *Williams* case is *res judicata* of the issues presented in the case at bar has been discussed elsewhere (Pl. Br. 75-89, *infra*, pp. 50-55). We shall confine ourselves here to considering the City's contentions that "The question of

res adjudicata is a question of fact" (City Br. 39) and that "The scope and effect of the issues in the *Williams* case could not be passed on initially by the appellate court" (City Br. 42).

The fact is that the question of the effect of the *Williams* case was fully presented in the District Court and there is no factual basis for the City's contention that it was denied an opportunity to present the facts. Thus, whether, as the City contends, "The question of *res adjudicata* is a question of fact" becomes wholly immaterial, since the City had a full opportunity to try that fact in the trial court. The fact that the *Williams* case was *res judicata* was expressly pleaded by the plaintiff (I R. 18, Par. 20) and denied by the City (I R. 159-161), and the facts as to the parties and pleadings in the *Williams* case were established by a Stipulation signed by all the parties in the case at bar (Stip. 14, II R. 630-633). The Stipulation shows in detail the parties to the cause (Par. 14 (a) and (b)), sets out or incorporates all of the pleadings in the cause, states the facts as to the decisions of the Superior Court and the Supreme Court of Indiana, and states that the final judgment of the Superior Court, which was affirmed by the Supreme Court, "has never been modified, reversed or set aside, but is now in full force and effect" (Par. 14 (j), II R. 633).

The City objected to the admission of the evidence contained in subdivision 14 of the Stipulation and all of the exhibits incorporated therein on the ground that the facts thus proved did not warrant a decision that the *Williams* case was "*res adjudicata* on the questions here involved" (DX 29, III R. 1052-3, Par. 4). Thus there can be no doubt that the City knew the purpose for which this evidence was offered, and had full opportunity to offer any countervailing evidence which it could produce. The Stipulation of facts (PX 1, II R. 616, Offered II R. 326) was dated February 15, 1939 (II R. 639) and had, of course, been in preparation long before that time, and the trial did not com-

mence until March 2, 1939 (II R. 323). Hence the City had ample opportunity to prepare any evidence which it wished to offer in opposition to the stipulated facts relating to the *Williams* case.

Entirely aside from the question of the *evidence* presented to the District Court, it affirmatively appears that the *City* submitted to the District Court the question whether the *Williams* case was *res judicata* and requested the Court to make findings and conclusions on that question. Thus City's requested Finding 33 (III R. 1091-2) contained elaborate findings in regard to the *Williams* case, including a finding that (p. 1092):

> "* * * None of the questions involved in this case were actually litigated in the *Williams* case nor could such questions have been litigated under the issues in that case."

Finding 33 as requested by the City was adopted almost verbatim by the District Court, with some additions thereto, and the part quoted above was adopted *in haec verba* (Finding 40, III R. 1178-9).

The City also specifically requested the District Court for a conclusion of law that the *Williams* case was not *res judicata* "of the validity and binding effect of the lease upon the City" (No. 1, III R. 1102). The District Court adopted this requested conclusion, merely expanding it to include Citizens Gas as well as the City (No. 2, III R. 1190).

Thus the City expressly tendered to the District Court the issue whether the *Williams* case was *res judicata* of the issues here presented and obtained a decision from the District Court to the effect that the case was not *res judicata*. There is, therefore, no basis for the City's contention that "The scope and effect of the issues in the *Williams* case" were passed upon for the first time by the appellate court (City Br. 42).

In concluding this branch of the discussion it is important to observe that the City has made no attempt to meet the argument presented in our original brief (Pl. Br. 46-47, 50-51) that the reserved issue has become moot and is wholly immaterial. The only question reserved by the order of the District Court was whether the City "had the right as such successor trustee *to refuse and reject an assignment of such lease* on the ground that such lease was burdensome." As pointed out in our original brief (p. 51), the City did not "refuse and reject an assignment of such lease." On the contrary, the City accepted the assignment of the Lease, had it recorded, and went into possession of the leased property and has been operating it ever since. Beyond that, as held by the Circuit Court of Appeals (IV R. 1300-1301), the City, in electing to take the trust property, necessarily elected to take the Lease which was an integral part of the trust estate.

The City's contention that it should be released from the obligations of the Lease because they are inconvenient or burdensome can best be answered in the language of this Court in *Rees v. City of Watertown*, 19 Wall. 107 (1873), in which a municipal corporation was attempting to escape from its obligations on the ground that the payment of them would be inconvenient or burdensome. In disposing of that question this Court said (p. 116):

> "Upon a class of the defences interposed in the answer and in the argument it is not necessary to spend much time. The theories upon which they proceed are vicious. They are based upon the idea that a refusal to pay an honest debt is justifiable because it would distress the debtor to pay it. A voluntary refusal to pay an honest debt is a high offence in a commercial community and is just cause of war between nations. So far as the defence rests upon these principles we find no difficulty in overruling it."

We submit that there is no basis in fact for the City's contention that the question of law—whether burdensome-

ness was a defense—was not passed upon by the District Court, and there is no basis in law for the City's contention that the Circuit Court of Appeals was not free to pass on that question of law if the District Court had not ruled upon it.

III. CITIZENS GAS HAD AMPLE AUTHORITY TO EXECUTE THE LEASE AND THE LEASE IS ENFORCEABLE AGAINST THE CITY AS SUCCESSOR TRUSTEE.

(Pl. Br. 56-74, 93-8.) (Ind. Gas Br. 62-75.)
(City Br. 43-52.)

The significance of the City's argument as to the powers of Citizens Gas and the enforceability of the Lease against the City lies in the City's failure even to attempt to deal with several facts of vital importance to the determination of these questions. For example, the City concedes, as we have shown (Pl. Br. 56, 63), that the Lease was valid during the trusteeship of Citizens Gas, and we have pointed out that a trustee's contract, valid when made, does not become a nullity merely because of a change in trustees. The City has made no attempt to show how this Lease, admittedly valid during the 22 years of the trusteeship of Citizens Gas, could suddenly become invalid when the City succeeded Citizens Gas as trustee.

Likewise, we called attention to the importance of the conduct of Citizens Gas and the City during a period of 22 years as showing their practical construction of the powers of Citizens Gas (Pl. Br. 79). We also pointed out that the City has consistently ignored the fact of this practical construction (Pl. Br. 118). Although the City presents an extensive argument on the question of estoppel (City Br. 53-66), it still pays no attention to the fact that both Citizens Gas and the City have construed the Franchise and Articles of Citizens Gas as giving Citizens Gas the power to execute the Lease and make it binding on the trust for its full term. Under the law of Indiana, "it is the

duty of a court, where the language of a contract is indefinite or ambiguous, to adopt the construction and practical interpretation which the parties themselves have put upon the contract."* Thus, this practical construction of the contract between the City and Citizens Gas and the City's failure to make any reference thereto are of vital importance.

(a) The Franchise and Charter Powers of Citizens Gas Included the Power to Execute the Lease and Make It Binding Upon the Trust For the Full Term of the Lease.

(Pl. Br. 58-66.) (City Br. 43-52.)

The basis of the City's argument on this question is its assertion that a grant by a municipality is strictly construed against the grantee (City Br. 49). The alleged refusal of the Court of Appeals to apply the Indiana law on this subject is listed as one of the "assigned errors intended to be urged" by the City (City Br. 14). The City presents this argument once more, in complete disregard of *City of Vincennes v. Citizens' Gaslight Co.*, 132 Ind. 114, 31 N. E. 573, a case reviewed in our original brief (Pl. Br. 58). In that case the Supreme Court of Indiana expressly held that where, as in the case at bar, a franchise contains a contract with the municipality as well as a grant to occupy the streets, such contract is "construed and interpreted like any other written contract." The City's failure even to mention this case indicates that it cannot deny that the law of Indiana is in fact directly contrary to its contention.

The City does not hesitate to go to the absurd extremes necessarily involved in its theory that Citizens Gas

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* *City of Vincennes v. Citizens' Gaslight Co.*, 132 Ind. 114, 31 N. E. 573, 576 (Pl. Br. 58, 72). In this case, as in the case at bar, the contract in question was one between a private corporation and a municipality in the State of Indiana.

had no powers other than those specifically enumerated in its Articles. Thus, the City says (City Br. 51):

> "Thus, if the terms of the trust remain silent on a trustee's powers, as the Circuit Court of Appeals said, and which is the fact, the power to make the lease cannot be implied."

In other words, since the terms of the trust are silent as to the trustee's powers and no powers can be implied, the trustee was without any powers whatever. The absurd situation which the adoption of the City's theory would have created reveals the fallacy of that theory.

The fact that the Franchise contained detailed provisions as to the use of the streets and the company's transactions with its customers (City Br. 51) sheds no light on the question whether Citizens Gas had the power to enter into a lease. The City's assertion (City Br. 51) that the Articles contained detailed provisions as to the order in which the earnings of Citizens Gas should be used and the duties of its officers is wholly unfounded. The Articles merely state the order in which certain general classes of expenditures and disbursements shall be made, the first in order being "the payment of matured debts and operating expenses" (I R. 98, Par. IX). Clearly, the rent coming due under the Lease is one of the "matured debts and operating expenses" thus given priority in the disbursement of the earnings of Citizens Gas. As for the duties of the officers, the City's reference (City Br. 51) to the record in support of its assertion is to Article IV of the *By-Laws* (I R. 103), which are not part of the Articles and are therefore not included in the contract between Citizens Gas and the City. There were no such provisions in the Articles themselves (I R. 95-100).

The City's contention that Citizens Gas was intended to continue indefinitely as a competitor of Indianapolis Gas (City Br. 44) is wholly unfounded. The fact of the desire to deprive Indianapolis Gas of its monopoly does not show

an intention to preclude the citizens' own gas company from taking over Indianapolis Gas and thus placing the public charitable trust in complete control. If the City sincerely believed that the trust instruments required competition between the public charitable trust and Indianapolis Gas, it would never have made its covenant with the holders of its Revenue Bonds to "use all reasonable efforts to resist competition and maintain the exclusive right to serve gas in the City of Indianapolis" (PX Stip. 47, III R. 828; offered, II R. 327). In short, the City has searched the Franchise and Articles of Citizens Gas in vain in its endeavor to find some implication that Citizens Gas had no power to execute the 99-year Lease.

The City's assertion that there was a fixed date for the expiration of the trusteeship of Citizens Gas (City Br. 44, Par. (5)) has already been shown to be wholly unfounded (Pl. Br. 63, *supra*, p. 8). Unable to find a case in which a lease was held improper because extending beyond *the term of the trustee* who made it, the City now contends that the Lease violates the rights of remaindermen (City Br. 48). No rights of remaindermen are here involved. The City is correct when it says that it is the successor trustee of this trust (City Br. 44, Par. (6)). The trust is a perpetual, charitable trust, and there is no provision for the City or anyone else to turn the trust estate over to any remainderman at any time. On the other hand, the case of *In re Hubbell*, 135 Iowa 637, 113 N. W. 512,* on which the City relies (City Br. 48-9), involved a *private trust* and the trust itself would have ended before the termination of the lease there involved. The *Hubbell* case itself points out the distinction between that case and the case at bar (p. 522):

> "* * * As hereinbefore noted, the decisions with reference to charitable trusts afford no aid, for the

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* The opinion of the Circuit Court of Appeals contains a careful and accurate analysis of this case and its applicability to the case at bar (IV R. 1298-9).

trust period in these is indeterminable, and the length of the lease is considered only as bearing upon the reasonableness of its provisions and of the rentals stipulated. Such leases have been approved where otherwise reasonable with terms varying from 80 to 1,000 years. See *Atty. Gen. v. South Sea Co.*, 4 Beav. 453; *City of Richmond v. Davis*, 103 Ind. 449, 3 N. E. 130."

The "Additional Authorities of City of Indianapolis,"* just received, have no bearing upon the power of Citizens Gas to make the Lease or upon the question whether it is enforceable against the City. The authorities cited relate wholly to *private* trusts and the power of a trustee *as lessor* to make a long term lease of the trust estate. In general, these authorities deal with the question whether a trustee may make a lease extending beyond the life of the trust. They have no bearing upon and no tendency to support the City's contention that a trustee *as lessee* may not make a lease which will extend beyond the term of his trusteeship, though not beyond the duration of the trust.

When a trustee of a private trust makes a lease of the trust property extending beyond the life of the trust, questions are involved as to the respective rights of the beneficiaries entitled to the income and those ultimately entitled to the principal. No such question is involved in the case at bar which involves a charitable trust continuing indefinitely. The authorities cited are clearly within the distinction pointed out by the Circuit Court of Appeals in dealing with *In re Hubbell*, 135 Iowa 637; 113 N. W. 512, upon which the City relies. In discussing that case, the Court of Appeals said (IV R. 1299):

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* These authorities, cited in support of the proposition that the Lease is unenforceable against the City, are:

Scott—The Law of Trusts (1939) Vol. II, Section 192, page 1010;

Restatement of the Law—Trusts—Vol. I, Section 189 (c), page 499.

"* * * The *Hubbell Trust* case does not stand for the proposition that a trustee has no power to lease for a term of years. At the most it stands for the rule that a trustee has no power to lease trust property for a term of years exceeding the period of the trust. It does not take much comparison to see that such a rule does not support the proposition here urged, namely, that the trustee lacked the power to lease beyond its period of trusteeship.

"Moreover in the instant case the trustee's power to acquire a long-term leasehold interest is in issue, not the trustee's power to lease trust property for a long term of years."

It is clear under the authorities that a trustee has power to make a lease which may extend beyond his term of office, and the City has never cited any authority which casts any doubt on the power of Citizens Gas to make the Lease here in question.

(b) The Express Statutory Power of Citizens Gas to Enter Into the Lease for 99 Years Overrode the Limitations, If Any, Arising From the Public Charitable Trust.

(Pl. Br. 66-69.) (City Br. 49-50.)

The City contends that the charter of Citizens Gas was not altered by the enactment of the Public Service Commission Law and cites *Todd v. Citizens' Gas Co.*, 46 F. (2d) 855, in support of this contention (City Br. 49). The *Todd* case merely held that the public charitable trust and the rights vested in the beneficiaries thereof were not destroyed when Citizens Gas surrendered its Franchise. That holding is wholly immaterial to the question at issue in this case. Also, as we have seen (Pl. Br. 68), the court in that case was careful to point out (p. 868):

"We are not dealing with the question of the power which the state might have exercised with respect to vested property rights created in the public interest as an inducement to the grant, if it had seen fit to do so.

The supreme authority of the state over both proprietary and governmental functions of its agency, the municipality, is not to be gainsaid."

Moreover, the City's contention is directly opposed to well established Indiana law. In *Williams v. Citizens' Gas Co.*, 206 Ind. 448, 188 N. E. 212, the Supreme Court of Indiana held that Williams, a beneficiary of the trust here in question, and the beneficiaries for whom he spoke, held whatever interest they might have in Citizens Gas subject to the state's power to control that company as a public utility. Thus the court said (p. 215):

> "* * * the class of beneficiaries of which appellant is a member hold whatever interest they may have in the Citizens' Gas Company subject to the power of the state to control the Citizens' Gas Company as a public utility."

It is significant that the City makes no reference to this holding by the Supreme Court of Indiana.

In this connection, it should be noted that the power of the State of Indiana to control public utilities extends to those owned or operated by municipalities. Thus, under the provisions of the Public Service Commission Law (Sec. 1, Pl. Br. 142), the public utilities subject to that Law include those municipally owned or operated. Examples of the application of this Law to municipal public utilities are to be found in the recent cases of *City of Huntington v. Northern Indiana Power Co.*, 211 Ind. 502, 5 N. E. (2d) 889 (1937) and *Public Service Co. v. New Castle*, 212 Ind. 229, 8 N. E. (2d) 821 (1937). This means that the public charitable trust, being a public utility enterprise, is subject to the state's paramount power of control and that both Citizens Gas and the City have been at all times subject to control by the state in their conduct of that enterprise.

In addition, as a matter of Indiana law, the statute conferring express power to make the Lease (Sec. 95½, Pl. Br.

144) became part of the charter of Citizens Gas as soon as it was enacted. This fact is clearly established by *Westport Stone Co. v. Thomas*, 175 Ind. 319, 94 N. E. 406 (1911), and *Denny v. Brady*, 201 Ind. 59, 163 N. E. 489 (1928), cases cited in our original brief (Pl. Br. 61-2), but not even mentioned in the City's brief.

Its Articles and its Franchise gave Citizens Gas ample authority to make the Lease. Beyond that, all possible doubts as to the powers of Citizens Gas in this respect were removed by the grant of express statutory authority to enter into this Lease for 99 years (Pl. Br. 56-8, Subhead (a)).

(c) The Williams Case Conclusively Determined That Citizens Gas Had Power to Execute the Lease and Make It Binding Upon the Trust For the Full Term of the Lease.

(Pl. Br. 69-70.)

The *Williams* case conclusively determined, *as a matter of Indiana law*, that Citizens Gas had power to execute the Lease and make it binding on the trust for its full term of 99 years (Pl. Br. 69-70). The City argues that the judgment in the *Williams* case is not *res judicata*,* but it fails to answer the proposition advanced in our first brief (Pl. Br. 89) that the decision in that case established the law of Indiana applicable to the precise facts and issues here presented. The City does claim that "the enforceability of the lease against the City" was not litigated in the *Williams* case (City Br. 75-6), but this claim was shown to be without any foundation (Pl. Br. 76-9), before the City repeated it once more in its brief on the merits in this Court.

The decision in the *Williams* case—that the public charitable trust was not entitled to have removed this

* There can be no doubt that the decision in the *Williams* case is *res judicata* in the case at bar (Pl. Br. 75-89, *supra*, pp. 28-30, *infra*, pp. 50-55).

alleged "unlawful cloud upon the title of said Municipal City, as trustee" (PX Stip. 35, II R. 772, Offered, II R. 328)—is an authoritative statement of the law of Indiana as to the binding effect of the Lease on the City as successor trustee. As such it is a binding precedent in all federal courts.

(d) The Statutory Prohibitions on Which the City Relies Have No Application to the Case at Bar.

(Pl. Br. 93-8.) (City Br. 45-8.)

The City's contention (City Br. 47) that the Lease itself was prohibited by Sections 85 and 254 of Chapter 129 of the Acts of 1905 (quoted Pl. Br. 147-9) is obviously absurd. These statutes relate solely to contracts to which a municipality is a party and, as the City points out (City Br. 44), the City was not originally a party to the Lease. Moreover, any prior prohibitions on this subject were swept aside by the enactment of the Public Service Commission Law in 1913, shortly before the Lease was executed. This Law defines "public utility" to include municipally owned or operated public utilities (Sec. 1, Pl. Br. 142), and under this Law the City itself could have entered into the Lease in 1913.

When the City took over the trust property in 1935, the question was not whether the City had the power to execute the Lease, but rather whether the City had the power to take over the trust property subject to the obligations under the Lease. The latter question must be answered in the affirmative. As we have seen (Pl. Br. 94-5), Section 53 of Chapter 129 of the Acts of 1905 (quoted Pl. Br. 147) gives cities express power to receive public trusts "and to agree to conditions and terms accompanying the same and bind the corporation to carry them out." The City accepted the public trust here in question and expressly stated that it "hereby agrees to the conditions and terms accompanying such trust and acknowledges itself bound to

carry them out" (DX 8, III R. 1018-19, Offered, II R. 429). Beyond that, the validating acts of 1929 (quoted, Pl. Br. 150-5), prepared by counsel for the City for this very purpose (Pl. Br. 101-3), remove all possible doubt as to the power of the City to accept the trust property subject to the obligations under the Lease.

Here again, the City has adopted the expedient of ignoring the facts which disprove its contentions. With the exception of a footnote reference to Chapter 77 of the Acts of 1929 (City Br. 7), made in another connection, the City's brief makes no mention of Section 53 of Chapter 129 or of either of the validating acts of 1929 (Chapters 77 and 78). This is all the more remarkable in view of the fact that the Circuit Court of Appeals laid particular emphasis upon the validating acts of 1929. Thus the court said (Opinion, IV R. 1288, footnote):

> "In fact this legislation expressly authorized the transfer of utility property (held in fee or by virtue of a lease) under circumstances peculiarly similar to the factual situation existing between Citizens Gas, Indianapolis Gas and the City in the instant case. If the legislators had had in mind the exact factual situation here involved, they could not have passed more appropriate legalizing and enabling legislation."

The City's contentions based on Sections 85 and 254 of Chapter 129 of the Acts of 1905 (City Br. 45-48) are wholly unfounded.

IV. THE RULE OF ERIE RAILROAD CO v. TOMPKINS REQUIRED THE DECISION THAT THE LEASE IS VALID AND BINDING AND IN SUSTAINING THE VALIDITY OF THE LEASE THE CIRCUIT COURT OF APPEALS FULLY COMPLIED WITH THAT RULE.

(Pl. Br. 74-92, 118-134) (Ind. Gas Br. 77-9) (City Br. 52-86).

The rule of *Erie Railroad Co. v. Tompkins*, on which the City relies, required the decision of the Court of Appeals that the Lease is valid and binding. In fact, the Court of Appeals could have come to a contrary decision only if it had completely disregarded that rule and the settled law of Indiana. Every Indiana decision and statute relevant to the issues raised in this case compels the conclusion that the Lease is valid and binding for its full term. The *Williams* case alone conclusively negatives, *as a matter of Indiana law*, all the City's *present* contentions as to the validity of the Lease (Pl. Br. 76, 89).

We have already discussed the City's contentions that the Court of Appeals did not follow the Indiana law that a grant by a municipality must be taken most strongly against the grantee (*supra*, pp. 33-7; Pl. Br. 58-66), and that the court refused to follow certain provisions of the Acts of 1905 (*supra*, pp. 40-41; Pl. Br. 93-8). There are three other questions as to which the City claims the court refused to follow the Indiana law, namely, the question of estoppel, the question of the effect of the approval of the Lease by the Public Service Commission, and the question of *res judicata* (City Br. 13, Par. 4). Since it is certain that the Court of Appeals reached its conclusion that the Lease was valid and binding independently of any of these principles, it is clear that the decision of that court would not be disturbed, even if the City were to prevail in its arguments on these questions. We shall, however, show briefly that the court did not depart from the Indiana law as to any of these questions.

(a) The Circuit Court of Appeals Did Not Depart From the Indiana Law in Dealing With the Question of Estoppel of a Municipal Corporation.

(Pl. Br. 118-129; (Ind. Gas Br. 77-8) (City Br. 53-66).

One of the alleged errors assigned by the City is the supposed refusal of the Court of Appeals to follow the Indiana decisions on "the question of estoppel of a municipal corporation" (City Br. 13, Par. 4(a)). However, the City admits (City Br. 53, footnote): "The Circuit Court of Appeals made no express holding on the question of estoppel *in pais*." Thus, the City is assigning error for failure to follow the Indiana law with respect to a question on which the court below made no holding. Obviously, that court cannot have refused to follow the Indiana law on a question as to which it made no holding.

In our original brief we called attention to the fact that the City had made no reference to the importance of the conduct of Citizens Gas and the City during the 22-year period from 1913 to 1935 as (a) showing their *practical construction* of the powers of Citizens Gas, (b) showing their *practical construction* of the City's exercise in 1929 of its right to take over all the trust property, including the Lease, and (c) precluding them from denying the validity of the Lease, because of their *laches* (Pl. Br. 118). The significance of the City's extended argument on the question of estoppel lies in the fact that the City is still studiously avoiding any discussion of the conduct of Citizens Gas and the City from these points of view.*

Even the City's argument on the question of estoppel ignores many significant facts which are sufficient in them-

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* The City's assertion (City Br. 63, Par. (j)) that it advised Citizens Gas of its intention to reject the Lease, a short time before it took over the trust property in September, 1935, is no answer to the laches of Citizens Gas and the City during the 22 years preceding any such announcement (Pl. Br. 129-132).

selves to estop the City. What the City actually does (City Br. 53-64) is to enumerate and later attempt to explain several things upon which plaintiff does not rely as a basis for an estoppel, but it fails to mention or explain many of the matters upon which plaintiff principally relies. For example, the City does not even mention its failure to object to the Lease until after it had been in effect for over 21 years, the insertion of at least one provision in the Lease at the instance of the City, the City's acts in requiring compliance with that provision, and its insistence upon the validity of the Lease in the *Fishback* case and in the *Williams* case (Pl. Br. 124-6).

The City contends (City Br. 63-4) that there can be no estoppel if the other party was not influenced by the acts pleaded as estoppel. This rule and the Indiana cases cited in support thereof do not preclude a decision that the City is estopped to deny the validity of the Lease. As we have shown in our original brief (pp. 123-4), where representations in regard to a material matter have been made in the course of a transaction, it is assumed in the absence of evidence to the contrary that the representations were relied on. The City cites no Indiana cases which purport to cast any doubt on the validity of this well established rule.

The representations that Citizens Gas had a 99-year Lease of the mortgaged property and that it guaranteed the payment of the interest and the refunding of the principal of the mortgage Bonds were, to say the least, material representations. The City and Citizens Gas bore the burden of showing that the representations in question were *not* relied upon, and no attempt was made to sustain that burden. It is, therefore, clear that a holding that the City is estopped to deny that the Lease is binding for its full term, based on the presumption that these representations were relied on, would be in complete accord with *Ross v. Banta*, 140 Ind. 120, 150, 34 N. E. 865, 39 N. E. 732, and

Hosford v. Johnson, 74 Ind. 479, the Indiana cases on which the City relies (City Br. 63-4), and with the rule for which they are cited.

The City's only other argument on the question of estoppel is that "an estoppel against a municipal corporation cannot be founded upon acts done by municipal officers in excess of their authority" (City Br. 64). Here, too, an acceptance of the City's contention and the Indiana cases on which the City relies would not preclude a holding that the City is estopped to deny the present binding effect of the Lease. The City does not point out which of the many acts of its municipal officers during the 22-year period in question are claimed to have been done in excess of their authority. Its only contention on this subject—that certain provisions of the Acts of 1905 prevented it from taking the trust property subject to the obligations under the Lease—has already been shown to be unfounded (*supra*, pp. 40-41). Moreover, the City's argument addressed to the "estoppel against a municipal corporation" overlooks the City's admission that Citizens Gas conveyed all its property to the City "subject to all outstanding legal obligations of that Company" (I R. 243), among which obligations are those predicated on the estoppel *against Citizens Gas*, which is not a municipal corporation.

There can be no doubt under the law of Indiana that a municipal corporation may be estopped when it has taken affirmative action influencing another which renders it inequitable for the corporate body to assert a different set of facts. Thus, in *State v. Town of Hessville*, 191 Ind. 251, 131 N. E. 46 (1921), the court said (pp. 47-48):

> "[5] For some purposes the doctrine of estoppel is applicable to municipal corporations, not because of the mere nonaction of its officers to assert a right, but because of some affirmative action influencing another, which renders it inequitable for the corporate body to assert a different set of facts."

See also:

Town of New Castle v. Hunt, 47 Ind. App. 249, 93 N. E. 173 (1910).

The City's assignment of error based on the alleged failure of the Court of Appeals to follow the Indiana law on "(a) the question of estoppel of a municipal corporation" (City Br. 13, Par. 4) presents no real issue. The Court of Appeals, as the City admits (*supra*, p. 43), did not base its decision as to the validity of the Lease upon estoppel, although it would have been fully justified in doing so and such holding would have been fully supported by Indiana law.

(b) The Order of the Public Service Commission is a Conclusive Determination That the Lease is in the Interest of the Public Charitable Trust and in Fulfillment of the Duties of Citizens Gas as a Public Utility and the Circuit Court of Appeals Did Not Deviate from the Law of Indiana in Determining the Significance of that Order.

(Pl. Br. 90-92) (Ind. Gas Br. 39-45)
(City Br. 67-71).

The City does not claim that the Circuit Court of Appeals, in reaching its conclusion that the Lease is valid and enforceable, attributed any particular significance to the decision of the Public Service Commission. Hence, there is nothing in the City's argument (City Br. 67-71) which even tends to suggest that the Court of Appeals deviated in any respect from the settled law of Indiana by the attribution of any—or any improper—significance to the decision of the Public Service Commission. In this branch of its argument the City follows its characteristic procedure of attributing certain straw men to the plaintiff's argument and then proceeding to demolish them.

The City admits that under the law of Indiana a decision of the Public Service Commission "is conclusive upon the courts in a collateral action" (City Br. 71). The City also concedes that the Commission's order approving the Lease determined that the Lease "was advisable and *in the public interest*" (City Br. 71, italics are the City's). This means that the Commission's order is conceded to be a conclusive determination that the Lease is "in the public interest." Since "the public" *i.e.*, the inhabitants of Indianapolis, are the beneficiaries of the public charitable trust,* it necessarily follows that the Lease has been conclusively determined to be in the interest of the beneficiaries of that trust. Thus the City's admissions are in effect an admission of one of plaintiff's two claims in respect of the Commission's order.

Plaintiff's second claim is that the Commission determined that the Lease was in fulfillment of the duties of Citizens Gas as a public utility (Pl. Br. 91-2). The state had delegated its power to control public utilities to the Commission and this determination was, therefore, an exercise of the state's paramount authority over the public charitable trust as a public utility (*supra*, pp. 37-9, Pl. Br. 66-9). As the Supreme Court of Indiana held in the *William* case (188 N. E. 215):

> "* * * Granting the existence of a trust relationship between the Citizens' Gas Company and a class of persons of which appellant is representative, *that relationship cannot qualify the power of control of the state over the Citizens' Gas Company as a public utility*; * * *."

This is the rule of Indiana law on which plaintiff relies. This rule is in complete harmony with the Indiana decisions cited by the City (City Br. 70) for the propos-

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* *Todd v. Citizens' Gas Co.*, 46 F. (2d) 855, 865 (1931).
Williams v. Citizens' Gas Co., 206 Ind. 448; 188 N. E. 212, 213, 215 (1933).

tion that the Commission's order was an administrative or legislative order.* The fundamental fact is that, as a matter of Indiana law, the Commission's order approving the Lease constituted an exercise of "the power of control of the state over the Citizens' Gas Company as a public utility."

Although the City has assigned no error to the holding of the Court of Appeals "that the lease contract covered a term of 99 years" (IV R. 1294), it argues that the Public Service Commission approved the Lease for some undetermined period less than 99 years (City Br. 69-70). The fact is, however, that the Commission expressly approved the making of the Lease "*for a period of ninety-nine years*" (Bill, Exhibit D, First Par., I R. 116, Offered, II R. 327). The significance of this fact is emphasized by the fact that Fishback had objected before the Commission concerning the length of the term of the Lease (PX Stip. 13, II R. 656-7, Offered, II R. 328, 331) and that he renewed this objection in his petition for a rehearing following the announcement of the Commission's decision (PX Stip. 13, II R. 660). Obviously, if it had been intended to limit the term of the Lease, provisions to that effect would have been included in the Lease and the Commission's order approving the Lease, whereas the fact is that both the Lease and the order contain provisions expressly providing for a term of 99 years.

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* In discussing the Public Service Commission the City says (City Br. 68): "It is neither legislative nor judicial in character." Two pages later the City says (City Br. 70): "* * * the Public Service Commission is 'purely an administrative or legislative body without judicial power.'" It is the settled law of Indiana that the approval of a lease by the Public Service Commission is a legislative act. Thus, in *Fishback v. Public Service Commission*, 193 Ind. 282, 138 N. E. 346, the court said (p. 347):

> "[1, 2] The approval of a lease of the property of one public utility corporation by another is a legislative act, from which no appeal lies to the courts, * * *."

The act of the Public Service Commission in approving the making of the Lease "for a period of ninety-nine years" was an exercise of the state's power to control the public charitable trust as a public utility. Under the law of Indiana, its approval of the Lease is conclusive as to the power of Citizens Gas to enter into the Lease and make it binding for its full term of 99 years. It is clear that the Circuit Court of Appeals did not attribute any greater significance to the order of the Public Service Commission than is warranted under the settled law of Indiana.

(c) The Circuit Court of Appeals Did Not Depart From the Indiana Law in Dealing With the Doctrine of Res Judicata.

(Pl. Br. 74-90, 92) (Ind. Gas Br. 45-54)
(City Br. 72-86).

The City assigns as error the alleged refusal of the Circuit Court of Appeals to follow the Indiana law on "(b) the doctrine of *res adjudicata*" (City Br. 13, Par. 4). However, it is clear that the Court of Appeals did not decide that the prior decisions were *res judicata* (*supra*, pp. 26-8), although it would have been warranted in doing so. The court's statement that "the few cases discussed in the opinion above are determinative of the immediate issue here" (City Br. 72) is undoubtedly correct and, as the court said, "No amount of verbal magic resorted to by counsel for the City will avail to brush aside the barrier these cases present to him" (IV R. 1300). In making these statements, however, the court was not holding that these cases were *res judicata*, but was recognizing that these Indiana decisions sustaining the validity of the very Lease here in question are controlling under the rule of *Erie Railroad Co. v. Tompkins*. The City presents the amazing argument (City Br. 72) that in thus acknowledging these Indiana decisions as controlling upon it, the Court of

Appeals failed to comply with the requirement that it must follow the decisions of the Indiana courts.

The City's extended argument that the *Todd* and *Cotter* cases are not *res judicata* (City Br. 79-86) is irrelevant. Plaintiff does not claim that the decision in those cases is in and of itself determinative of the validity of the Lease and plaintiff made no such argument in its original brief nor did the Circuit Court of Appeals so hold. Likewise, as we have pointed out (Pl. Br. 92), from plaintiff's point of view the primary importance of the *Fishback* case does not lie in its effect as *res judicata*. We shall, therefore, limit our discussion to the City's contention—that the Court of Appeals did not follow the Indiana decisions on the doctrine of *res judicata*—as it relates to the decision in the *Williams* case. The complete answer to this contention is that the Court of Appeals did not hold that the decision in the *Williams* case was *res judicata*. However, we shall show that such holding would have been in full accord with the law of Indiana.

1. **Under the Indiana law, it is immaterial whether the City presents new issues as to the binding effect of the Lease on the trust, and in fact it presents no such new issues.** (Pl. Br. 76-81) (City Br. 75-8).

The City's contention that the decision in the *Williams* case is not *res judicata* because "The issues in the *Williams* case were essentially different from the issues in this case" (City Br. 75) has no foundation either in law or facts. In our original brief we showed by numerous quotations from the pleadings in the *Williams* case that the supposed new issues—"The enforceability of the lease against the City" (City Br. 75-6), "the right of the initial trustee to bind the City to the terms of the lease" (City Br. 76), and "*the validity of the lease after the transfer to the City*" (City Br. 78, italics are the City's)—had in fact been determined in the *Williams* case (Pl. Br. 76-9). The City's argument,

which is devoid of any record references to support it, contains no attempt to refute our proof of this fact.

It is also clear, *as a matter of Indiana law*, that even if the City were presenting new issues in this case, such fact would be wholly immaterial to the binding effect of the decision in the *Williams* case. This rule of law was fully discussed in our original brief (pp. 79-81). The City ignores our argument on this question, ignores the Indiana cases cited in our brief which established the rule on which we rely, and cites no Indiana case to support its theory that if there were some new issue in this case, the presence of such issue would have some effect on the question of *res judicata*.

It, therefore, clearly appears that there is no basis, either in fact or in the law of Indiana, for the City's claim that there are new issues in this case the presence of which destroys the binding effect of the decision in the *Williams* case.

2. The City's theory that the transfer of the trust property affected the conclusiveness of the decision in the Williams case is unsound and has no support in the law of Indiana. (Pl. Br. 82-3) (City Br. 76, 81-83).

The City contends (City Br. 81) that at the time of the *Williams* case "the rights of the City had not accrued and thus its rights were not and could not have been adjudicated." This contention finds no support in the Indiana law and is refuted by the following facts: (1) the City was expressly made a party to the *Williams* case in its capacity as "the trustee of said Public Charitable Trust" (PX Stip. 35, II R. 763, Offered, II R. 328), (2) when the defendants filed their first pleading in the *Williams* case (Stip. 14(b), II R. 631), the City had already demanded the transfer of the trust property (PX Stip. 22, II R. 670, Offered, II R. 327) and had procured a judicial determination of its right to enforce that demand (Stip. 13(b), II R. 630), and (3)

the unsuccessful appeal from that determination was finally disposed of (Stip. 13(i), (j), II R. 630) before the defendants filed their demurrers in the *Williams* case (Stip. 14(d), (e), (f), II R. 632).

In addition, as we pointed out in our original brief (p. 82), the City's argument ignores the familiar rule of law that a transferee of property takes that property subject to any judgment which affected it while it was the property of the transferor. If the City's theory were accepted, any owner of property against whom a judgment was rendered affecting that property could free the property from the judgment by the simple expedient of transferring it to a third party. No such theory has been accepted by the courts, nor does the City cite any authority which supports any such theory.

It is significant that although the City purports to insist upon full compliance with the law of Indiana, it has not even mentioned the two Indiana cases cited in our original brief (p. 82) which show that in Indiana a transferee of property is bound by any judgment which affected that property in the hands of his transferor. *Kitts v. Willson*, 140 Ind. 604, 39 N. E. 313, one of the two cases cited in support of the City's argument on this question (City Br. 81-2), lends no support to the City's contentions but, on the contrary, fully supports the rule of law on which plaintiff relies. It should first be noted that, as shown by the City's quotation from the opinion (City Br. 82), the City is wrong when it says that Sarah Kitts brought her suit for partition *after* receiving the deed from Duncan (City Br. 82). The opinion specifically states that the suit for partition was filed in 1880 and that the deed from Duncan was delivered to Sarah Kitts in 1887 (39 N. E. 314).

The fact which distinguishes the above case from the case at bar is stated in the portion of the opinion quoted by the City (City Br. 82):

"* * * In this case she steps into the shoes of Duncan, *who was not a party to the former suit.* Whatever rights he would have, if appellant here, such rights, and no other, she has." (39 N. E. 314.)

In the case at bar, both Citizens Gas and the City were parties to the former suit and *Kitts v. Willson* does not, therefore, apply to this case. Beyond that, in *Kitts v. Willson* the Indiana court recognized the rule upon which plaintiff relies—that a transferee of property takes that property subject to any adjudications against it in the hands of the transferor—when it said (speaking of Sarah Kitts and Harden Duncan) "Whatever rights he would have, if appellant here, such rights, and no other, she has." To paraphrase this statement, as applied to the case at bar: Whatever rights Citizens Gas would have, such rights, and no other, does the City of Indianapolis have.

The only other case on which the City relies is *Maple v. Beach*, 43 Ind. 51 (City Br. 82), which is distinguishable because the parties in that case were not the same as the parties to the former suit there involved. This case is cited for the City's contention that (City Br. 82):

"The benefit to be derived from a judgment must be mutual before it can operate as an estoppel."

This proposition on which the City relies presents a good rule by which to test the City's theory as to the effect of the subsequent transfer of the trust property. If Williams had succeeded in obtaining a decision that the Lease was invalid, the City would undoubtedly rely on such decision as *res judicata* and would vigorously deny that the question of validity could be litigated again merely because the City had received the trust property after the *Williams* case was decided. Thus, the test of mutuality for which the City contends reveals the fallacy of the City's theory as to the effect of the transfer of the trust property.

3. Under the law of Indiana, the judgment in the Williams case binds the trust and any trustee thereof, although defendants therein presented no issues to the trustee and prospective successor trustee, their co-defendants.

(Pl. Br. 83-89) (City Br. 76, 81-84).

The City argues that the decision in the *Williams* case is not *res judicata* because the parties to this case were co-defendants in the *Williams* case and presented no issues between themselves in that case (City Br. 76. Par. 3). In arguing this proposition, the City makes no attempt to deal with the facts shown by the *Williams* case and the rule of law applicable thereto upon which plaintiff relies. In our original brief we showed that Williams was permitted to sue in behalf of the public charitable trust, that both the initial trustee and the successor trustee were parties to that suit, and that in such a situation the decree of the court binds the trust and any trustee thereof, without regard to whether the initial trustee or the successor trustee took a position adverse to its co-defendants (Pl. Br. 83-9). The City makes no mention of these facts or of this well established rule of law, and its argument is, therefore, irrelevant.

None of the authorities on which the City relies deals with a situation comparable to that presented in the case at bar and those authorities are, therefore, immaterial to the question under discussion. On the other hand, the City fails even to mention the authorities cited in our original brief (Pl. Br. 86-8) which clearly establish the rule of law directly applicable to this case, namely, that in a suit by a beneficiary of a trust in behalf of the trust, the judgment binds the trust and any trustee thereof, without regard to the issues, if any, raised between the trustee and its co-defendants. In our original brief we said (Pl. Br. 84): "The City has never cited any authority denying this well established rule," and that statement still stands.

The City's proposition that no binding decree can be entered in a suit brought by a beneficiary of a trust in behalf of the trust if no issues are presented to the trustee by his co-defendants is clearly unsound and finds no support in the law of Indiana.

As we have seen, the Circuit Court of Appeals did not hold that the decision in the *Williams* case is *res judicata* (*supra*, pp. 26-8) and, therefore, that court cannot have refused to follow the Indiana decisions as they relate to the effect of the *Williams* case as *res judicata*. We have, however, briefly considered each of the City's arguments in its attack upon our contention that the decision in the *Williams* case is *res judicata* and we have shown that the City's arguments on this question are wholly devoid of any foundation, either in fact or in the Indiana law.

V. THE INTEREST RATE ON THE COUPONS AFTER MATURITY AND ON THE JUDGMENT SHOULD BE SIX PER CENT.

(Pl. Br. 134-138.) (Ind. Gas Br. 82-83.)

We have no quarrel with the statement of the applicable Indiana law as expounded by the Circuit Court of Appeals (IV R. 1305), and by Indianapolis Gas (Ind. Gas Br. 82-83). The single issue is a question of fact whether a coupon attached to an Indianapolis Gas Bond is the same obligation as the Bond itself or a separate and distinct one. Obviously, it is the latter.

The Circuit Court of Appeals placed some emphasis on the language in the coupon: "being six months' interest on its First Consolidated Mortgage Five Per Cent Gold Bond No. ....." The quoted language is without significance in determining whether the coupon is the same obligation as the Bond or a distinct one. The language is merely *descriptio obligationis* and has no tendency to show that the coupon is merely part of the general obligation of the Bond.

We submit that the applicable rate of interest is six per cent, both on the coupons after maturity and on the judgment.

CONCLUSION.

The Lease here in question was made more than 27 years ago. During the first 22 years of that time Citizens Gas, as it admits (Bill, Par. 11, I R. 12, 224) accepted and enjoyed the profits and use of the property as granted under said 99 year Lease, and was relieved from the waste and expense of competition and duplication of facilities, and it operated and maintained the leased plant and property as a unified part of its own plant and system without regard to the preservation of the leased property as an independent, separable and competitive system. Throughout this period every one proceeded on the basis that there was a valid Lease for the full term of 99 years. As stated by the Circuit Court of Appeals (IV R. 1294):

> "* * * And until this litigation was started it appears that every one proceeded on the basis that the lease contract covered a term of 99 years."

During the entire period of 27 years the City of Indianapolis and the residents and inhabitants thereof have had the full benefit and advantage of such operations and of the profits produced thereby. The Lease was originally approved by both the directors and trustees of Citizens Gas Company and by the Public Service Commission of Indiana. There has never been a suggestion throughout this case that any director or trustee of Citizens Gas Company or the Public Service Commission was actuated by anything but the highest motives in making or approving this Lease. The reports of Citizens Gas to its stockholders issued at about the time the Lease was made (Pl. Br. 6-7) are eloquent of the advantages which would flow to Citizens Gas and to the public from the making of the Lease here in question.

We submit that Citizens Gas clearly had authority to make the Lease here in question and that the Lease is enforceable against the trust property and against the City as successor trustee. The technical objections urged by the City to the binding character of the Lease and to the procedure of the Court of Appeals are without substance and the judgment of the Court of Appeals (except as to the rate of interest just discussed) should be affirmed.

Respectfully submitted,

HOWARD F. BURNS,
JOHN ADAMS,
HARVEY J. ELAM,

Counsel for The Chase National Bank of the City of New York, Trustee.

BAKER, HOSTETLER & PATTERSON,
Union Commerce Building,
Cleveland, Ohio,
Of Counsel.

Filed February 5, 1941.

APPENDIX A.

REPRINT OF THOSE PARTS OF BRIEFS IN CIRCUIT COURT OF APPEALS, FILED PRIOR TO THE DECISION OF THAT COURT, DEALING WITH PLAINTIFF'S MOTION TO STRIKE AND THE REVIEW OF DISTRICT COURT'S ORDER DENYING THAT MOTION.

Brief of Plaintiff-Appellant (Chase) ..... p. 58
Brief of Defendant-Appellant, Indianapolis Gas... p. 65
Brief of City of Indianapolis..... p. 67
Reply Brief of Plaintiff-Appellant (Chase)..... p. 68

Brief of Plaintiff-Appellant (Chase).
Filed January 10, 1940.
(pp. 161-168.)

IV. THE DISTRICT COURT ERRED IN REFUSING TO STRIKE FROM THE CITY'S ANSWER AND COUNTERCLAIM THE ALLEGATIONS AS TO THE BURDENSOMENESS OF THE LEASE.

Plaintiff moved the Court to strike from the City's answer and counterclaim all the allegations that the rentals required by the Lease are excessive or that the Lease is burdensome (II R. 317). This motion was overruled, but the Court directed that the evidence as to this alleged reason for the City's claim that the Lease is not enforceable against it should be deferred and presented for determination at a later date (II R. 320, 321-2). However, it is clear that none of these allegations is in any way material to the issue as to the validity and enforceability of the Lease, that no evidence in support of those allegations is admissible in this case, and that the District Court should have granted plaintiff's motion to strike.

1. Prior Determinations that the Lease is Not Burdensome are Binding upon the City.

We have already shown that the order of the Public Service Commission approving the Lease conclusively determined that the Lease is in the public interest. That

order contains an express finding that the value of the lessor's properties justified the rental to be paid (I R. 118). It was within the Commission's jurisdiction to determine, and it did determine, that it was in the public interest for Citizens Gas to lease the property of Indianapolis Gas on the terms approved by the Commission, and that determination is conclusive in the case now before this Court. Since the "public interest" is synonymous with the interests of the residents of the City of Indianapons, the Commission's finding that the Lease was in the public interest was in effect a decision that the Lease was beneficial to the trust estate of which those residents were the beneficiaries.

In this connection it will be remembered that on the demurrers to the *Williams* complaint the Indiana courts held that the Lease was valid and binding, despite Williams' allegations (II R. 780) as to the burdensomeness of the Lease. Thus, in *Williams v. Citizens' Gas Co.*, 206 Ind. 448, 188 N. E. 212 (1933), the court said (p. 216):

> "* * * Further it was within the jurisdiction of the public service commission to consider and approve the lease and the complaint discloses that the public service commission did approve it. The complaint does not make out a case for any relief on the basis of invalidity of the lease or of the action of the commission in approving the same."

Thus the Supreme Court not only held that the ruling of the Public Service Commission was binding and conclusive, but also held that any evidence as to the alleged burdensome character of the Lease would not establish the invalidity of the Lease and that no such evidence could be received. This decision upon the precise point here under consideration was made at the behest of the City itself (PX Stip. 38, III R. 813; PX 135, quoted *infra*, pp. 169-70).

2. The City is Precluded by its Laches and the Laches of Citizens Gas from Raising any Issue as to the Alleged Burdensomeness of the Lease.

The laches of Citizens Gas and the City have already been fully discussed (*supra*, pp. 73, 154), but a few additional details should be noted here.

When his petition for a rehearing was denied by the Public Service Commission, Fishback at once filed suit to set aside the Commission's order. Among other things, Fishback contended that (II R. 661):

> "4. The *rental and fixed charges* to be paid as part of the rental ordered and permitted to be paid by the terms of the lease and order, *are unreasonable and unlawful, and their payment will result in a waste and misapplication* of the funds, earnings and property of the Citizens Gas Company, and an irreparable injury to its stock and certificate holders, including plaintiff."

Fishback also alleged that (II R. 665-6):

> "* * * *the obligation taken on by the Citizens Gas Company under said order and lease,* * * * *impairs the obligation of the contract existing between* the Citizens Gas Company and this plaintiff and other stockholders, and between *the company and the City of Indianapolis*, in the following particulars:
>
> * * *
>
> "2. It constitutes such lien and incumbrance upon the property and earnings of said company that the city can not at the end of twenty-five years from the date of the franchise of the company take over the plant and system of the company as provided in section 22 of the franchise of said company, as shown in Exhibit No. 2 hereto attached."

The City denied these allegations as to the burdensomeness of the Lease (Stip. 9(c), II R. 625) and thereby took a position directly opposed to the position it takes in the case at bar.

We submit that the laches of Citizens Gas and the City for a period of 22 years precludes both of them from contending that the Lease is burdensome or unfair in any respect.

3. The City, as Successor in Interest to a Party to the Lease, Could Not Escape the Obligations of the Lease Even if it Were Able to Show that those Obligations Were or Are Burdensome.

The law is well established that a party to a contract —otherwise valid—or the successor in interest to that party, cannot escape the obligations of that contract by proving that those obligations were burdensome in the first instance or became burdensome later.

If it could be shown that the Lease is *now* burdensome, that fact alone would be without legal significance. If the Lease was fair at the time it was made (the determination of the Public Service Commission that it was fair is conclusive on this point), it cannot be claimed that it is unfair now because it appears to be burdensome at the present time. It would be no evidence of unfairness to show that the leased property at the present time has depreciated in value, in the absence of some showing that this depreciation is due to some fault of the lessor, a showing which could not be made in view of the fact that it was the duty of the lessee "to maintain and keep the demised premises in as good order, repair and condition" as they were at the time the Lease took effect (I R. 64).

If it could be shown that the Lease was burdensome *when executed* (thus making a collateral attack upon the express finding of the Public Service Commission), that fact would also be without legal significance. The rule is clearly established that a contract binds the parties thereto, even though one of them comes to believe that he is paying far more than the consideration he receives is worth, and even though that is the fact.

1 *Restatement of the Law of Contracts*, Sec. 81;
Hamilton v. Hamilton, 162 Ind. 430, 70 N. E. 535, 537 (1904);
Warner v. Marshall, 166 Ind. 88, 75 N. E. 582, 592 (1905);
Smith v. Smith, 340 Ill. 34, 172 N. E. 32, 34 (1930).

Similarly, a lessor cannot set aside a lease because he considers the rent to be inadequate, and a lessee cannot avoid the obligations provided for in his lease because he thinks that they are burdensome.

Lowther Oil Co. v. Guffey, 52 W. Va. 88, 43 S. E. 101, 102 (1903);
Smith v. Collins, 148 Ala. 672, 41 So. 825 (1906).

The rule which these cases announce is so clearly established as to require no further discussion at this time. The cases reviewed below (*infra*, pp. 166-7), involving municipal corporations, are, of course, additional authorities in support of the rules just referred to. Municipal corporations are in the same position as individuals in so far as their contractual obligations are concerned and are held just as responsible for performance of their contracts as are individuals or private corporations.

Safety Insulated Wire & Cable Co. v. Baltimore, 66 Fed. 140, 144 (C. C. A. 4th, 1895) (certiorari denied 165 U. S. 720);
Indianapolis v. Indianapolis Gas-Light & Coke Co., 66 Ind. 396, 407 (1879);
Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 107; 39 N. E. 433, 436;
State ex rel. v. Kansas City, 319 Mo. 386; 4 S. W. (2d) 427, 431.

Since municipalities and individual persons are on the same footing with respect to the necessity of fulfilling their contractual obligations, and since an individual can-

not refuse to carry out his contract because he has not made a good bargain for himself, it, of course, follows that a municipal corporation may not refuse to comply with the provisions of a contract on the ground that it is, or is thought to be, burdensome.

Eau Claire Dells Improvement Company v. Eau Claire, 172 Wis. 240, 179 N. W. 2 (1920). This was an action to enjoin the city of Eau Claire from forfeiting plaintiff's contract with the city. The contract was entered into in February, 1877 and provided that the plaintiff should build and maintain a dam and that it should have a 99 year lease of any of the resulting water power not required for the city's uses. The city made no complaint about the lease until 1906, when it declared the contract forfeited.

The Supreme Court said that this contract was a business matter, as contrasted with the exercise of governmental functions, and that in matters of this sort a city is governed by the same rules as an individual. The court ruled that *the city could enter into a contract of this sort for a period of 99 years and that it was estopped to object to the validity of the lease.* The court also said (179 N. W. 7):

> "It may be from the present viewpoint, more than forty years after the contract has been in effect, that it could be said the city made an improvident contract. But it cannot be said that good judgment would have so pronounced at the time it was made. But be that as it may, it was entered into in good faith, without fraud, in furtherance of the legislative purpose and in a proprietary capacity. In such capacity *it is deemed competent for a municipality, as well as for a private individual, to make a valid improvident contract.*"

In *Fooshee & Hungerford v. Victoria*, 54 S. W. (2d) 220, the Texas Court of Civil Appeals said (p. 223):

> "However inadvisable and shortsighted it may have been on the part of a city administration to have

made the contract with appellants, it was executed by the city, and *it has no more power to arbitrarily cancel and repudiate the contract than any citizen would have.*"

Terre Haute v. Terre Haute Water-Works Company, 94 Ind. 305 (1884). This case involved the city's sale of its shares of stock in a water-works company. Unfortunately the opinion omits many of the facts but it appears that the sale of the stock was upheld. At any rate, the Court held that the city had authority to make such a sale and that as an incident to such authority it had the right to decide upon what terms the sale should be made. On this point the Court further said (p. 307):

"Where a discretionary power is conferred upon a municipal corporation courts will not interfere with its exercise. *Sales made by a municipal corporation*, in the exercise of a discretionary power vested in it, *can not be annulled upon the ground that the bargain was an improvident one.*"

Thus, it is clear that in September, 1935, the City could not for the first time attack the validity of the Lease because of its alleged burdensomeness. The advantageous or burdensome character of a contract is of no importance in determining whether the contract is binding, either before or after the transfer of the assets of one of the contracting parties.

We submit that the District Court erred in refusing to strike the City's allegations as to the burdensomeness of the Lease from its Answer and Counterclaim; and we submit that this Court should correct this error of the District Court to the end that there may be a speedy and final determination of this already too protracted litigation.

Brief of Defendant-Appellant Indianapolis Gas Company.

Filed January 10, 1940.

(pp. 176-178.)

VI.

THE AVERMENTS OF THE CITY THAT IT HAS A RIGHT, AS SUCCESSOR TRUSTEE, TO REJECT THE LEASE AND AVOID LIABILITY THEREUNDER ON THE GROUNDS THAT SAID LEASE IS BURDENSOME AND NOT ADVANTAGEOUS TO THE TRUST, EVEN IF SAID FACTS ARE TRUE, PRESENTS NO VALID GROUND OF DEFENSE.

In the order of the District Court made on January 18, 1938 (II R. 321-2) it was provided that the trial be deferred on the one issue regarding inforcibility of the lease arising from the claim of the City that it had the right as successive trustee to refuse and reject an assignment of such lease on the grounds that such lease was burdensome and not advantageous to the trust.

Reference is made to this order and reserved issue only to point out that it is not such an issue as, upon reversal of the judgment appealed from, would require a new trial of the cause. The rule has been long established in Indiana, as it is elsewhere, that after parties have entered into a contract *without fraud*, no defense to the obligations thereof is created by reason of the fact that in subsequent course of events the consideration moving from one party may, either in the opinion of that party or in fact, have become excessive. No party to a contract may be relieved of obligations created thereby simply because he subsequently believes that his bargain was not so advantageous as he had supposed when entering into the agreement. This principle is elementary and without it all stability of value or contracts would end.

The rule is succinctly stated in *Mullen v. Hawkins*, 141 Ind. 363 at 366:

> "Where a party, voluntarily, and without fraud or deception enters into a contract and receives all he contracted for he can not be relieved on the ground of inadequacy or want of consideration."

Courts will not inquire into the adequacy of a bona fide consideration after it has been accepted and utilized for over twenty-three years.

When it is remembered that both the City and the Citizens Gas have defended this lease on every occasion it has been attacked during the first twenty-three years of its existence, realization is had of the actions and representations taken and made by the City from the time of the resolution of its Board of Public Works on March 29, 1929, until acceptance of the instrument assigning said lease and its taking possession of said property on the 9th day of December, 1935, this alleged "ground" of defense seems indeed amazing.

Furthermore this issue was specifically raised and adjudged in each the *Fishback* and *Williams* cases both. It was also decided by the City in determining whether it would or would not accept the trusteeship of said trust. Its decision was necessarily arrived at by weighing both the benefits and liabilities of the leasehold, as well as by determining the value of other parts of the trust estate. The action of the City on March 29, 1929, and in issuing its bond in order to effect its succession to the trusteeship is conclusive on that question.

The City's own statement as made in its brief in words to strike out (*Todd v. Citizens Gas*) is particularly pertinent.

> "Under the provision of Section 53 of the Act of 1905, the City Council has the power to determine whether to accept the trust and agree to the terms and conditions which bind the City. *It is for the City Council to determine whether the offer to the City is of value and should be accepted.*"

Having determined that the trust in its entirety was of value, and having accepted the same, the City may not now deny its acts or the legal results following therefrom.

It is therefore respectfully submitted that upon reversal of the judgment here appealed from, said reserved issue is not such a one as would require the ordering of a new trial of this cause.

Answer Brief of Defendant-Appellee City and the Individual Defendants who are Members of the Boards of Trustees and Directors of the Department of Utilities of said City in Cause No. 7143.

Filed February 29, 1940.

(pp. 118-119.)

VI. The District Court did not err in refusing to strike from the City's Answer and Counter-claim the allegations as to the burdensomeness of the lease. (Plaintiff's brief, p. 161.)

It is the well settled rule in Indiana that it is not reversible error to overrule a motion to strike out a part of a pleading.

Guenther v. Jackson, 73 Ind. App. 162, 164, citing *Woodhouse v. Jennings*, 164 Ind. 555, and also *Ohio Valley Trust Co. v. Wernke*, 179 Ind. 49.

While it is conceded that the manner of pleading is controlled by the adjective law of the state, the question of whether or not the refusal of the court to strike out parts of a pleading is erroneous is substantive law. That being true, this court is bound by the state rule.

Erie Railroad Co. v. Tomkins, 304 U. S. 64.

As the District Court reserved the question for future determination as to the burdensome of the lease, the ruling on the motion to strike could not have resulted in reversible error.

Reply Brief of Plaintiff-Appellant (Chase).

Filed March 26, 1940.

(pp. 54-55.)

VIII. THE DISTRICT COURT ERRED IN REFUSING TO STRIKE FROM THE CITY'S ANSWER AND COUNTERCLAIM THE ALLEGATIONS AS TO THE BURDENSOMENESS OF THE LEASE.

(Pl. Br. 161-8.) (Ind. Gas Br. 176-8.) (City's Br. 118-19.)

The City does not attempt to support the District Court's ruling on the motion to strike; it argues merely that the decision is not reversible error. Thus plaintiff's contentions:—(1) that the City's allegations that the Lease is burdensome are not material to the issue as to the validity of the Lease, and (2) that no evidence should be admitted in support of these allegations—stand admitted for want of any attempt to refute them. (See Pl. Br. 161-8.) Moreover, it is clear that even the argument that the District Court's error is not reversible error is not well taken.

The error in refusing to strike these immaterial allegations was not cured by the Court's order that the evidence on these allegations should be presented at a later date, and the fallacy of the City's argument that the error is not reversible because of that order (City's Br. 119) is obvious. The alleged Indiana rule that such an error as this is not reversible (City's Br. 118) has no application in a federal court. On this point the City cites *Erie Railroad v. Tompkins*, 304 U. S. 64, and asserts that (City's Br. 119) "whether or not the refusal of the court to strike out parts of a pleading is erroneous is substantive law." Of course, the City's contention that a party may escape from a contract by showing that it has become burdensome does present a question of substantive law, but one which is settled in Indiana and elsewhere against the City (Pl. Br. 165-7). However, the alleged procedural rule in Indiana upon which the City relies has nothing to do with the

merits of the question whether the Court's refusal to strike out parts of the City's answer and counter-claim was erroneous and relates solely to the question whether that error is reversible error. "The question whether an erroneous ruling on a motion to strike constitutes reversible error is a question of practice and procedure and the rule which still obtains as to such a question is clearly stated in *Dallas Ry. & Terminal Co. v. Sullivan*, 108 F. (2d) 581, 583 (C. C. A. 5th, 1940), as follows:

> "* * * all questions of preserving and assigning errors, and *whether an error is harmless or reversible*, are matters of procedure, and in regard to such matters, this court is governed by the rules of practice and procedure in the Federal Court rather than by those in the State Court."

The City does not deny that the District Court erred in refusing to strike the City's allegations as to the burdensomeness of the Lease. This error can be easily corrected merely by making a final determination of the validity of the Lease without remanding the case for evidence in support of the City's allegations that the Lease is burdensome. We submit that this Court should correct this error so that there may be a speedier determination of this already too protracted litigation and that there is no rule of law which precludes the Court from doing so.

In the Supreme Court of the United States

OCTOBER TERM—1940.

CITY OF INDIANAPOLIS, *et al.*,
Petitioners,

v.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., *et al.*,
Respondents.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc.,
Cross-Petitioner,

v.

CITIZENS GAS COMPANY OF INDIANAPOLIS, *et al.*,
Respondents.

16 11 12 13

Nos. ~~421, 422, 423, and 424~~.

SUPPLEMENTAL BRIEF OF CHASE NATIONAL BANK, TRUSTEE, RESPONDENT AND CROSS-PETITIONER.

HOWARD F. BURNS,
JOHN ADAMS,
HARVEY J. ELAM,
Counsel for The Chase National Bank of the City of New York, Trustee.

BAKER, HOSTETLER & PATTERSON,
Union Commerce Building,
Cleveland, Ohio,
Of Counsel.

THE GILBERT LEGAL PUBLISHING CO., CLEVELAND, OHIO.

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Nos. 421, 422, 423, and 424.

SUPPLEMENTAL BRIEF OF CHASE NATIONAL BANK, TRUSTEE, RESPONDENT AND CROSS-PETITIONER.

In view of the fact that the City's counsel filed an addition to the appendix of their brief during the course of the oral argument and the fact that the Court raised one or two questions which had not been raised by the City or briefed by any of the parties, we are asking leave to file this short Supplemental Brief.

1. Section 249 of Cities and Towns Act of 1905.

The City's "Addition to Appendix" sets forth Section 2 of an Act of the General Assembly of Indiana of 1911 which amended Section 249 of the Act of March 6, 1905. This is the precise section of the statute upon which the

plaintiff Todd relied in 1929 in seeking to enjoin the transfer of the Citizens Gas property to the City. In meeting this contention, the City's answer in the *Todd* case (II R. 737, Par. (1)) asserted that Section 249 of the Acts of 1905 was not applicable in view of the express provisions of Section 53 of the same Act, which authorized cities "To receive * * * public trusts and to agree to conditions and terms accompanying the same and bind the corporation to carry them out." The significance of this section of the Indiana statute and the City's contention in the *Todd* case is dealt with in our original brief (Pl. Br. 93-6).

The Circuit Court of Appeals adopted the City's construction of the Indiana statutes and held that such statutes authorized the City to take over the trust property without a popular vote. *Todd v. Citizens' Gas Co.*, 46 F. (2d) 855, 865-6 (1931).

2. Plaintiff's Independent Rights to Enforce Compliance with the Lease.

The Mortgage specifically vested all rights of action thereunder in the plaintiff (Trustee) and provided that they could be specifically enforced by any court (Section XIV, I R. 46). Also, the Lease contained this specific provision (I R. 72):

> "22. The Lessee covenants to perform and observe all the covenants and agreements of the Lessor, except those as to the payment of the principal of the bonds, contained in its *mortgage* * * *." (Emphasis supplied.)

Obviously the party entitled to enforce this obligation of the lessee must be the party who is entitled to enforce "the covenants and agreements of the Lessor [Indianapolis Gas], * * * contained in its mortgage," namely, the Trustee. One of the covenants which the lessor made expressly "to and with" the Trustee was that it would "provide for and pay" the interest on the Bonds (Section IX, I R. 44).

Under such circumstances, and particularly in view of the threat to plaintiff's rights as third party beneficiary under the Lease and to the security, arising from the agreement of March 2, 1936, between the City and Indianapolis Gas (I R. 205-7), it is clear that plaintiff had not only a separate and distinct right but an affirmative duty to protect its rights arising from the Lease.

Old Colony Trust Co. v. City of Omaha, 230 U. S. 100, 122 (1913);
Bankers Trust Co. v. Raton, 258 U. S. 328, 337 (1922);
Welden National Bank v. Smith, 86 Fed. 398, 401 (C. C. A. 2nd, 1898).

Plaintiff's independent position in this case is clear. Moreover, the City concedes that plaintiff and Indianapolis Gas are "adverse in attitude" as to a number of the issues presented (City Br. 15).

3. Effect of Amendments on Jurisdiction.

It is clear that amendments to a bill and enlargements of the original relief prayed for, in so far as they are based on facts in existence when the original bill was filed, are available in support of the jurisdiction of the court.

Norton v. Larney, 266 U. S. 511, 515-16 (1925);
Speh v. Ballard, 83 F. (2d) 809, 810 (C. C. A. 5th, 1936).

All of the conflicts between plaintiff and Indianapolis Gas enumerated in our reply brief (pp. 9-11) are based on the facts as they existed when the Bill was filed, with the possible exception of part of No. 5, namely, the right to collect unpaid interest. However, a default in the payment of interest was inevitable in view of the contract of March 2, 1936, between the City and Indianapolis Gas.

4. Certain Corrections.

A. Counsel for the City stated during the oral argument that the City had entered into possession of the Citizens Gas property, including that under lease, under a standstill agreement. It is undisputed that the City went into possession of all the property, including that under lease, on September 9, 1935 (Stip. 6 (c), II R. 622; II R. 350). In support of the statement that there was a standstill agreement on *September 9th* counsel referred to an Indianapolis Gas letter of *September 30th* in which Indianapolis Gas indicated its willingness to enter into "a mutual stipulation" (PX Stip. 66, III R. 838). When the Court inquired whether such a stipulation had been entered into, the City's counsel referred to the agreement of March 2, 1936, made more than five months later.

The only agreement between the City and Indianapolis Gas prior to March 2, 1936 is that set forth in the two letters of September 30th relating to the interest payment of October 1, 1935 (DX Stip. 64, 65, III R. 968-9). *These letters were written three weeks after the City had taken possession of the property.* The significance of these facts is discussed in our original and reply briefs (Pl. Br. 110-111; Pl. Rep. Br. 3). It is important to note in this connection that in its original brief the City claimed only that "On September 30, 1935 Indianapolis Gas agreed to make an arrangement for temporary use" (City Br. 9).

Counsel for the City argued that Finding 51 of the District Court indicated that there had been an agreement "continuously in effect since September 9, 1935" (III R. 1185). This finding was adopted substantially verbatim from the City's Requested Finding 43 (III R. 1096-7), but there is absolutely no evidence to support it and the City has never attempted to support it by any record reference.

B. In discussing the motion to strike filed by the City and Citizens Gas in the *Williams* case, counsel for the City indicated that substantial parts of the Williams complaint relating to the Lease had been stricken out. The fact is, however, as shown by the Stipulation of the parties in this case, that only a single paragraph was stricken from the complaint and that related primarily to the formation of a conspiracy to have the Public Service Commission law passed and the purposes of such conspiracy. It was affirmatively stipulated that "At the same time said court overruled all other specifications of said motion" (Stip. 14(c), II R. 631-2).

The wide scope of this motion and the limited extent to which it was granted will be apparent from an examination of the motion itself (PX Stip. 37, II R. 804-812). Only specification 2 of the motion was granted (cf. Stip. 14(c), II R. 631-2, and II R. 805-6).

After this motion to strike was granted to this limited extent, the complaint (PX Stip. 35, II R. 761-802) remained unchanged except for the elimination of the italicized language appearing on page 778.

Thus the Williams complaint still contained:

(1) The Franchise and Articles of Citizens Gas (II R. 765).

(2) The joint petition of Citizens Gas and Indianapolis Gas before the Public Service Commission (II R. 779).

(3) The full text of the Lease between Indianapolis Gas and Citizens Gas (II R. 780).

(4) The allegations relating to the invalidity of the Lease (Pars. 19, 20 (except the italicized language), 22, 23, 24, and 29) (II R. 776-791).

These were the allegations which the Supreme Court of Indiana held did not justify the admission of any evidence as to the alleged burdensomeness, improvidence, and invalidity of the Lease.

We have taken space to correct only these two of the more glaring inaccuracies in the City's oral argument.

Respectfully submitted,

HOWARD F. BURNS,
JOHN ADAMS,
HARVEY J. ELAM,
Counsel for The Chase National Bank of the City of New York, Trustee.

BAKER, HOSTETLER & PATTERSON,
Union Commerce Building,
Cleveland, Ohio,
Of Counsel.

February 10, 1941.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

CITY OF INDIANAPOLIS, et al., *Petitioners,* v. THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., et al., *Respondents.*	Nos. 10-11
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., *Petitioner,* v. CITIZENS GAS COMPANY OF INDIANAPOLIS, et al., *Respondents.*	Nos. 12-13

REQUEST FOR PERMISSION TO FILE SUPPLEMENTAL MEMORANDUM AND SUPPLEMENTAL MEMORANDUM OF CITIZENS GAS COMPANY OF INDIANAPOLIS

PAUL Y. DAVIS,
WILLIAM G. SPARKS,
Counsel for Citizens Gas Company of Indianapolis.

DAVIS, BALTZELL & SPARKS,
Indianapolis, Indiana
Of Counsel.

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REQUEST FOR PERMISSION TO FILE SUPPLEMENTAL MEMORANDUM

Citizens Gas Company of Indianapolis, respondent, respectfully asks permission of the Court to file the supplemental memorandum attached to this motion, in response

to the Supplemental Memorandum of City of Indianapolis, et al., petitioners.

Respectfully submitted,

PAUL Y. DAVIS,
WILLIAM G. SPARKS,
Counsel for Citizens Gas Company of Indianapolis.

DAVIS, BALTZELL & SPARKS,
Indianapolis, Indiana
Of Counsel.

IN THE

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SUPPLEMENTAL MEMORANDUM OF CITIZENS GAS COMPANY OF INDIANAPOLIS, RESPONDENT*

If, as the City of Indianapolis contends, Citizens Gas Company had no power or authority as Trustee to execute the 99-year lease, Citizens Gas relieved itself of all obligation to Indianapolis Gas Company, the named lessor, and to the mortgage trustee by delivering the possession

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* This memorandum is intended merely to supplement the brief heretofore filed by this respondent.

of the property to the City on September 9, 1935. Both Indianapolis Gas, as owner, and Chase National Bank, as mortgage trustee, had accepted the payments made by Citizens Gas under the lease as sufficient compensation for the use of the property by Citizens Gas. And, without seeking any agreement from Citizens Gas, Indianapolis Gas acquiesced in the transfer of possession of its property to the City by the written agreement between the City and Indianapolis Gas of March 2, 1936 (I. R. 205-208).

If, as Chase and Indianapolis Gas contend, the 99-year lease, being valid in its inception, is binding and is a charge against the trust property conveyed to the City on September 9, 1935, for the remainder of the term of 99 years, the question of the present liability of Citizens Gas has no practical importance. Since by Section 29 of the 99-year lease the liability of Citizens Gas is limited to the trust assets (I R. 78), the liability of the City and the liability of Citizens Gas coincide.

And, regardless of the liability or non-liability of the City, the liability of Citizens Gas can never exceed the limitation imposed by Section 29 of the 99-year lease (I. R. 78). Since no one denies that

(1) the Public Charitable Trust is valid,

(2) the City had the right to require the conveyance and transfer of all of the property of Citizens Gas to the City, and Citizens Gas was under the corresponding duty to convey and transfer all of its property to the City, subject to all of the legal obligations of Citizens Gas, and

(3) the conveyance and transfer were made strictly in accordance with such right and duty,

liability cannot now be imposed upon Citizens Gas without altering the plain meaning of the lease contract between the parties. No one has ever suggested that there should be a reconveyance to Citizens Gas, but unless this is ordered and the execution of the admittedly valid Public Charitable Trust completely nullified, there is no legal basis to warrant the imposition of liability upon Citizens Gas.

In other words, if the trust property now in the possession of the City is not subject to the obligation of the 99-year lease, the lease has expired by reason of the fact that Citizens Gas had no authority to contract with reference to any period beyond the term of its own trusteeship. Otherwise Citizens Gas is made liable in violation of Section 29 of the 99-year lease (I R. 78). In such case, Section 32 of the lease (I R. 79-80) comes into play, making the lease binding upon the parties only "for the longest term for which the parties might lawfully contract."

As pointed out in the original brief of Citizens Gas (page 6, paragraph (3)), both Indianapolis Gas and the purchaser of the bonds had full knowledge of the terms and conditions of the Public Charitable Trust (I R. 62; II R. 583-586). The rights of the City and the legal duty of Citizens Gas were congenital in the existence of Citizens Gas.

The City's rejection of the assignment of the 99-year lease was obviously for the purpose of disavowing any purpose to accept the obligations of the lease and to permit the City to contest its validity. The formal rejection could have no other legal effect because the statute directing the conveyance to the City and authorizing the City to accept the conveyance provided as follows:

"Whenever any instrument of transfer or conveyance shall be executed, transferring or conveying the property, either real or personal, of any such corporation to such town or city the title to such property shall vest in such town or city, subject to all outstanding legal obligations of said corporation."

Chapter 78, Acts Indiana General Assembly 1929, Section 1. (Burns' Indiana Statutes Annotated, 1933, Section 48-7218.)

Thus it is made clear again that there can be no possibility of imposing liability upon Citizens Gas separate and apart from the property conveyed and transferred to the City on September 9, 1935. This property is subject to all legal obligations of Citizens Gas presently existing under the 99-year lease.

As stated above, this memorandum is intended merely to supplement the original brief of Citizens Gas.

Respectfully submitted,

PAUL Y. DAVIS,
WILLIAM G. SPARKS,
Counsel for Respondent Citizens Gas Company of Indianapolis.

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In the Supreme Court of the United States

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THE CITY OF INDIANAPOLIS, *et al.*, *Petitioners*, v. THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, etc., *et al.*, *Respondents.*	**Nos. 10 and 11.**
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, etc., *Cross-Petitioner*, v. CITIZENS GAS COMPANY OF INDIANAPOLIS, *et al.*, *Respondents.*	**Nos. 12 and 13.**

ANSWER TO PETITION OF CITY OF INDIANAPOLIS, ET AL., RE LIMITATION OF OPENING STATEMENT AND ARGUMENT OF CHASE NATIONAL BANK.

HOWARD F. BURNS,
JOHN ADAMS,
HARVEY J. ELAM,
Counsel for The Chase National Bank of the City of New York, Trustee.

BAKER, HOSTETLER & PATTERSON,
Union Commerce Building,
Cleveland, Ohio,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

In the Supreme Court of the United States

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CITIZENS GAS COMPANY OF INDIANAPOLIS, *et al.*,
Respondents.
Nos. 12 and 13.

ANSWER TO PETITION OF CITY OF INDIANAPOLIS, ET AL., RE LIMITATION OF OPENING STATEMENT AND ARGUMENT OF CHASE NATIONAL BANK.

The City's petition asks that the Court limit the Chase National Bank in the presentation of its opening statement and argument to the facts and arguments in respect to the limited questions raised by its cross writs of certiorari.

We are entirely willing to accommodate ourselves to any arrangement which the Court considers proper or most helpful to it in the presentation of these cases. We call attention, however, to certain considerations indicating the inappropriateness of the request made by the City.

Rule 28 of this Court, in so far as material, reads as follows:

> "1. The appellant or petitioner shall be entitled to open and conclude the argument. But when there are cross-appeals or cross-writs of certiorari they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.
>
> "* * *
>
> "4. * * * The time allowed may be apportioned between counsel on the same side, at their discretion; but a fair opening of the case shall be made by the party having the opening and closing."

The first paragraph of Rule 28 is a provision which has customarily been adopted by appellate courts. Similar provisions have been adopted by each of the Circuit Courts of Appeals, including that for the District of Columbia, and are common in the courts of last resort of the several states. So far as we can discover there has never been any judicial interpretation or application of this provision in any reported decision. The purpose of the rule, however, is clear. Since both the plaintiff and defendant in the court below are objecting to the judgment under review, the plaintiff below is allowed the opening and closing arguments, just as he was in the lower court.

Since paragraph 4 of Rule 28 expressly provides that "a fair opening of the case shall be made by the party having the opening and closing," it is clear that the rule contemplates that the party entitled to the opening (the plaintiff below, in the present case) should make a full statement of the facts as a part of his opening argument.

The difficulty and confusion which would necessarily result from requiring the plaintiff below to make a restricted statement of facts, limited only to the errors upon which he relies, is too apparent to require elaboration.

Such an arrangement would entail a piecemeal statement of the facts—some by plaintiff's counsel and some by defendant's—which could hardly be helpful to the Court.

We respectfully submit that counsel for plaintiff below is entitled to make a full and fair opening of the case as contemplated by the fourth paragraph of Rule 28.

Respectfully submitted,

HOWARD F. BURNS,
JOHN ADAMS,
HARVEY J. ELAM,
Counsel for The Chase National Bank of the City of New York, Trustee.

BAKER, HOSTETLER & PATTERSON,
Union Commerce Building,
Cleveland, Ohio,
Of Counsel.

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THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, etc., *Cross-Petitioner*, v. CITIZENS GAS COMPANY OF INDIANAPOLIS, *et al.*, *Respondents.*	**Nos. 12 and 13.**

REJOINDER BRIEF OF CHASE NATIONAL BANK, TRUSTEE, RESPONDENT AND CROSS-PETITIONER.

HOWARD F. BURNS,
JOHN ADAMS,
HARVEY J. ELAM,
Counsel for The Chase National Bank of the City of New York, Trustee.

BAKER, HOSTETLER & PATTERSON,
Union Commerce Building,
Cleveland, Ohio,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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Table of Abbreviations.

In addition to the abbreviations and designations used in our original brief (see pages 1 and 2 and the page facing page 1) we shall use the following abbreviations:

Cit. Gas Br.	Brief of Respondent, Citizens Gas Company of Indianapolis.
City Br.	Brief of City of Indianapolis, et al., Petitioners and Cross-Respondents, dated December 28, 1940.
City Ans. Br.	Answer Brief of Petitioners, City of Indianapolis, et al., to Respondent Chase's Supplemental Brief, filed about February 17, 1941.
Ind. Gas. Br.	Brief of The Indianapolis Gas Company, Respondent, dated January 20, 1941.
Pl. Br.	Brief of Chase National Bank, Trustee, Respondent and Cross-Petitioner, dated December 7, 1940.
Pl. R. Br.	Reply Brief of Chase National Bank, Trustee, dated February 5, 1941.
Pl. Supp. Br.	Supplemental Brief of Chase National Bank, Trustee, dated February 10, 1941.
Supp. Mem.	Supplemental Memorandum of City of Indianapolis, et al., Petitioners, filed about September 2, 1941.

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Respondents.
Nos. 12 and 13.

REJOINDER BRIEF OF CHASE NATIONAL BANK, TRUSTEE, RESPONDENT AND CROSS-PETITIONER.

Counsel for the City have filed a Supplemental Memorandum in which they reiterate many of their previous arguments. The Supplemental Memorandum presents no arguments not fully covered by the briefs already on file, with the single exception of the contention that the so-called "findings" of the trial court are unassailable (as to this contention see p. 14, *infra*). We shall, however, briefly discuss each of the ten propositions advanced by the City, in the order and under the numbers stated in its Supplemental Memorandum.

NOTE: Emphasis appearing in quotations throughout this brief is ours unless otherwise indicated.

For the convenience of the Court we attach hereto as Appendix A (*infra*, pp. 20 to 32) an Index and Analysis of Arguments, which contains a summary statement of our position and appropriate cross references to the various briefs of all the parties. A more complete answer to the City's arguments can be found in the earlier briefs, with the aid of this Index and Analysis of Arguments.

The City's Supplemental Memorandum is another example of the tactics adopted by the City throughout this litigation of attempting to evade the simple issues involved by presenting a host of spurious and wholly immaterial arguments. This case is very simple. It presents only a single issue, namely, whether the Lease became a part of the trust *res* in the hands of the corporate trustee. The determination of that issue must necessarily result in a finding that the Lease is binding on the public charitable trust and on the City as successor trustee.

This Case Presents Only One Fundamental Issue—Whether the Lease Became Part of the Trust Res in the Hands of the Corporate Trustee.

The City has made two fundamental admissions which are sufficient in and of themselves to establish that the Lease is binding on the City as successor trustee.

First, the City admits (I R. 243):

> "that defendant Citizens Gas Company of Indianapolis conveyed and transferred all of its property to the City of Indianapolis subject to all outstanding legal obligations of that Company, * * *."

This admission establishes that the City had the power to take over *all* the trust property, subject to *all* the obligations of Citizens Gas, including those under the Lease, and that the City in fact exercised that power. It disposes of the issues raised by the City as to the effect of the statutory prohibitions on which it relies the nature

and extent of its powers in this matter and the alleged burdensomeness of the Lease.

Counsel for the City understands the effect of this admission, as shown by the following colloquy during the oral argument:

> "Mr. Justice Reed: We have here, then, at least as one phase of it, *to determine whether or not this lease became a part of the property of the corporate trustee.*
>
> Mr. Thompson: Your statement is entirely correct. *If it did, we are obligated by its terms.* If it did not, we are not obligated by it."

There is the whole case in a nut shell. As counsel admitted, *the sole issue to be determined is "whether or not this lease became a part of the property of the corporate trustee."* The City answered this question in the affirmative by its second admission.

Second, the City admits (I R. 143):

> "that as to these defendants, no controversy ever existed as to the binding force and effect of said Lease for and during the term of trusteeship of said Citizens Gas Company."

This admission, which is further reinforced by a similar admission at the oral argument,* establishes that Citizens

---

* During the first oral argument the following colloquy took place between the Chief Justice and the City's counsel:

"The Chief Justice: Are you contending the lease was invalid as between the lessor and lessee?

"Mr. Thompson: Not if viewed solely as between the lessor and lessee.

"The Chief Justice: It was the Citizens Company that was established as this Charitable Trust, was it not?

"Mr. Thompson: As the original trustee.

"The Chief Justice: But it stood as the initial trustee at the time it took this lease?

"Mr. Thompson: That is true.

"The Chief Justice: Are you contending the lease from the Indianapolis to the Citizens *in that capacity* was invalid?

"Mr. Thompson: No, sir, I have admitted in my answer to the contrary."

Gas had power to execute the Lease and make it binding on the public charitable trust.

The City takes refuge in the theory that the Lease was no longer binding after it became trustee, but the City has never been able to show how a Lease *admitted to be binding on the trust during the term of the trusteeship of Citizens Gas* could become voidable merely because of the substitution of a new trustee. There can be no doubt that the Lease was in fact "a part of the property of the corporate trustee" and that as successor trustee the City is obligated by its terms.

We ask the Court to bear in mind, during the following discussion, the simplicity of the issues here presented as demonstrating the complete immateriality of most of the arguments advanced by the City in its Supplemental Memorandum.

I.

CORRECTIONS IN THE CITY'S FACTUAL SUMMARY.

(Supp. Mem. 4.)

The City asserts that it rejected the assignment of the Lease (Supp. Mem. 4, 6, 12). There is no evidence to support this statement except the bare fact that the Board of Directors for Utilities passed a resolution *saying* it rejected the assignment. This resolution is meaningless, for at the same meeting the Board took action which had precisely the contrary effect in law (Pl. Br. 107-11), that is,

(1) It accepted delivery of the assignment (II R. 467).

(2) It had the assignment recorded (II R. 330, 467).

(3) It retained possession of the assignment (II R. 468).

(4) It took possession of the leased property (II R. 350), with no arrangement authorizing it to do so except as assignee (Pl. R. Br. 3, Pl. Supp. Br. 4).

Various other acts of the Board at this same meeting of September 9, 1935, which had the legal effect of an acceptance of the assignment are summarized in our original brief (pp. 106, 111-117).

The statement (Supp. Mem. 4, 6) that the City Council ratified this supposed rejection is only a half truth. The Council ratified "all acts, steps and proceedings whatsoever relating to such matter" (DX 8, III R. 1018; offered, II R. 429), which necessarily means that it ratified all the acts to which we have just referred (Pl. R. Br. 4-5).

II.

THE CITY'S CLAIM THAT THE LEASE WHEN EXECUTED WAS NOT BINDING ON THE CITY IS WHOLLY IMMATERIAL.

(Supp. Mem. 5-6.)

The City's argument that it did not sign the Lease and is not named as a party obligated thereby (Supp. Mem. 5-6, 8-9) is too trivial to require comment. The liability of an *assignee or successor trustee* never depends upon his signing or being named in the original lease, but upon the subsequent action by which he accepts an assignment or accepts the trust.

The City's contention that it accepted the entire trust *res* but that the trust *res* did not include the Lease (Supp. Mem. 6) is completely at variance with the admissions made in its answer (I R. 145-6) and on the oral argument (footnote, p. 3, *supra*) to the effect that the Lease was a valid obligation of the public charitable trust as long as Citizens Gas continued as trustee. The question is whether the mere substitution of a new trustee for Citizens Gas had the effect either

(a) of invalidating a Lease which had been valid and binding on the trust for 22 years, or

(b) of separating the Lease from the other trust assets of which it had theretofore been a part.

III.

NO ISSUE HAS BEEN RAISED AS TO WHETHER "MUNICIPAL AUTHORITY COULD RATIFY OR VALIDATE THE LEASE" AND THE STATUTORY PROHIBITIONS UPON WHICH THE CITY RELIES HAVE NO APPLICATION TO THIS CASE.

(Supp. Mem. 6-9.)

The argument (Supp. Mem. 6-8) that the Lease itself was prohibited by Sections 85 and 254 of Chapter 129 of the Acts of 1905 (quoted, Pl. Br. 147-9) is absurd. These statutes obviously relate solely to contracts to which a municipality is a party and the City was not a party to the contract here in question.

The issue is not whether the City had power to execute the Lease in the first place, but whether it had power to take over the trust property subject to the obligations under the Lease.

III-A.

The City Had Ample Authority to Accept the Trust and Its Accompanying Obligations, Including Those Under the Lease.

The "validating acts" of 1929 (quoted, Pl. Br. 150-5), prepared by counsel for the City for this very purpose (Pl. Br. 101-3), removed all possible doubt as to the City's power to take over the trust property subject to the obligations under the Lease (Pl. Br. 96-8). The City now admits its power to take over the leasehold estate together with the rest of the trust property* (Supp. Mem. 9-12).

---

* Thus, the City says that "a mere reading of the applicable statutes discloses that they are permissive in character and give authority to accept property or leases without the slightest indication of legislative intent that the City shall be *required* to do so." (Supp. Mem. 10, italics are the City's).

III-B.

The City Took the Necessary Action to Accept the Trust, Including the Leasehold and Its Accompanying Obligations.

The City asserts that it took no action agreeing to be bound by the terms of the Lease (Supp. Mem. 6), but the fact is that the Lease was in no way foisted on the City. The City admits that Citizens Gas "transferred *all* of its property to the City of Indianapolis subject to *all* outstanding legal obligations of that Company" (I. R. 243). In addition, as we have previously shown (Pl. Br. 98-166, 107, 111-17; *supra*, pp. 4-5), the proper agencies of the City deliberately took the appropriate steps to take over *all* the trust property subject to *all* the obligations of Citizens Gas, including those under this Lease.

IV.

THE CITY WAS REQUIRED TO ACCEPT THE LEASE IF IT ACCEPTED THE TRUST.

(Supp. Mem. 9-12.)

Section 1 of Chapter 78 of the Laws of 1929 (quoted, Pl. Br. 152-5), on which the City relies as merely permitting it to take over the Lease if it wished to do so (Supp. Mem. 10), provides (Pl. Br. 154):

> "Whenever any instrument of transfer or conveyance shall be executed, transferring or conveying the property, either real or personal, of any such corporation to such town or city *the title to such property shall vest in such town or city, subject to all outstanding legal obligations of said corporation* * * *."

Thus, when the City took over the trust property, title to that property vested in the City "subject to all outstanding legal obligations of said corporation [Citizens Gas]," including those under the Lease.

Even in the absence of this statute, the City could not legally take over the trust property without at the same

time taking *all* that property, including the leasehold, and taking that property subject to *all* the obligations incurred by the initial trustee, including those under the Lease (Pl. Br. 98-9, 111). Indeed, the City admits (I R. 243) "that defendant Citizens Gas Company of Indianapolis conveyed and transferred *all* of its property to the City of Indianapolis subject to *all* outstanding legal obligations of that Company * * *."

V.

THE CIRCUIT COURT OF APPEALS WAS CORRECT IN HOLDING THAT CITIZENS GAS HAD POWER TO EXECUTE THE LEASE AND MAKE IT BINDING ON THE TRUST FOR THE FULL TERM OF THE LEASE.

(Supp. Mem. 12-19.)

The City contends that "grants by a municipality are to be strictly construed and that nothing passes by implication" (Supp. Mem. 13, 16-18). The cases cited all deal with grants of rights to use public property, whereas the question at issue is the nature and extent of the powers of Citizens Gas arising out of its contract with the City.

As shown by *City of Vincennes v. Citizens' Gaslight Co.*, 132 Ind. 114, 31 N. E. 573, when, as in the case at bar, a franchise contains a *contract* with the municipality as well as a *grant* to occupy the streets, such *contract* is "construed and interpreted like any other written contract." The City once more disregards the *City of Vincennes* case, although we relied on it in our original brief (p. 58), and in our reply brief (p. 33) called the City's attention to its failure to mention that case. Evidently, the City cannot deny that the applicable law of Indiana is directly contrary to its contention.

The City's argument that power to make the Lease cannot be implied (Supp. Mem. 12, 16) also disregards the express statutory power of Citizens Gas to make the Lease (Pl. Br. 56). As the Supreme Court of Indiana held in the

Williams case, this statutory power supersedes the limitations, if any, arising from the trust (Pl. Br. 66-9; Pl. R. Br. 37-9).

Likewise the City has consistently ignored the fact that for 22 years it construed the powers of Citizens Gas as including the power to make this Lease. On two different occasions while this case has been pending in this Court we have called attention to the City's failure to deal with this fact (Pl. Br. 118, Pl. R. Br. 32). Under the law of Indiana, "it is the duty of a court, where the language of a contract is indefinite or ambiguous, to adopt the construction and practical interpretation which the parties themselves have put upon the contract * * *." *City of Vincennes v. Citizens' Gaslight Co.*, 132 Ind. 114, 31 N. E. 573, 576 (Pl. Br. 58, 72). Under these circumstances the City's continued silence on this subject is of great significance.

V-A.

The City Had Ample Opportunity to be Heard on the Question Whether the Alleged Burdensomeness of the Lease Would be a Good Defense if Proved and the Court of Appeals' Direction to Enter Final Judgment Without a Retrial of That Immaterial Issue Was in Full Accord With Due Process of Law.

(Supp. Mem. 14-16.)

The City is still complaining that the Circuit Court of Appeals held that the "issue of the burdensome character of the lease was *res adjudicata*" (Supp. Mem. 15). We have shown that the Court did not so hold (Pl. R. Br. 26) and that even if it did, such holding would be proper because the facts as to the *Williams* case and the legal effect thereof were fully presented to the trial court (Pl. R. Br. 28). If, as the City contends, the parties did not have an opportunity in the trial court to present all the facts as to the *Williams* case and to argue the question of their signifi-

cance, why did the City request (No. 33, III R. 1092) and the trial court grant a *finding of fact* that (No. 40, III R. 1179):

> "*None of the questions* involved in this case were actually litigated in the Williams case nor could such questions have been litigated under the issues in that case."

The City's persistence in reiterating its complaint that it has been denied due process of law makes it advisable to give further consideration to what the City is demanding and what would happen if its demands were granted.

The lack of any foundation for the City's position on this question of burdensomeness clearly appears from an analysis of what the City is asking. The City demands (IV R. 1346) "*an opportunity to prove the averments of its counter-claim and to have the lower Court determine whether when executed this lease was in fact burdensome*" (italics are the City's). What if the City were successful in proving that "*when executed* this lease was in fact burdensome"? In its answer and counterclaim the City contends that in such event the Lease "was a lease which the initial trustee had no power to make beyond the definitely fixed term of its trusteeship" and that it "did not constitute an asset of said trust which it was bound to accept" (I R. 181, 186). The alleged reserved issue which the City wants tried states the City's claim in these words (II R. 322): "that the City * * * had the right as such successor trustee to refuse and reject an assignment of such lease on the ground that such lease was burdensome and not advantageous to such trust."

Thus the City's contention is that as successor trustee the City could reject this Lease after the parties thereto had operated thereunder with its consent for a period of 22 years, on the ground that the Lease was burdensome when executed. The City has never cited, and cannot cite, a single case to substantiate its claim that a successor

trustee can refuse to take over an asset of the trust which it deems to be burdensome. Indeed, the City's only answer to the well established rule that a successor trustee must take all or none of the trust property is its assertion that it has in fact taken over the entire trust *res* (Supp. Mem. 6). Surely due process of law does not necessitate an opportunity to prove that one of the trust assets is a burden when, in any event, the City's only right was to take over *all* of the trust assets or none and it admits that it has taken them *all*.

As a matter of fact, it clearly appears that the Lease has not been the slightest burden to the City since it took over the trust property. The City has been putting in escrow sums equal to the rentals required by the Lease, and it asserts that (City Br. 26):

> "* * * From the escrowed fund, together with funds arising from the operation of the property (II R. 542, 543), *the City* will be required to and *is abundantly able to pay the entire judgment*, and Indianapolis Gas will be wholly insulated from any liability."

The leased property is two-thirds of the property which produced the escrow fund and the "funds arising from the operation of the property." (City Br. 46, Supp. Mem. 7.) Thus, the City's position is in reality that the operation of the trust property has been so successful as to leave no doubt that the obligations of the Lease can be easily met from the earnings. This reduces the City's contention to this, not that the Lease is a burden to the City, but that it would be even more profitable if more advantageous terms could be procured.

Further weaknesses in the City's position become clear when we visualize what would happen if this case were in fact sent back to the trial court for that court to ascertain whether the Lease was burdensome when executed.

(1) That court would have the practically impossible task of determining what the Indianapolis Gas properties

were worth 28 years ago. The difficulties involved in such a task are indicated by the fact that even the formal pleadings before the Public Service Commission in 1913 cannot be located at this time (PX 88, III R. 846, offered, II R. 331).

(2) That court would be required to determine the value of intangible items which cannot be evaluated. For example, how could that court determine the value of the elimination of a competitor admitted (City Br. 46, Supp. Mem. 7) to be twice the size of Citizens Gas? A contemporaneous report by Citizens Gas to its stockholders (PX 91, III R. 886, 887, offered, II R. 342) stated that the competition from Indianapolis Gas was "dangerous to the company and the community" (Pl. Br. 6). When the City was ready to take over the trust property in 1935 it clearly revealed that it too realized the great value of the elimination of this competition. Thus the Board of Directors for Utilities formally covenanted with the purchasers of the City's Gas Plant Revenue Bonds that the City "will use all reasonable efforts to resist competition and *maintain the exclusive right* to serve gas" in the City and its environs (PX Stip. 47, III R. 822, 828, offered, II R. 327).

(3) That court would be required to take due cognizance of the fact that the Lease was an act of the initial trustee in the exercise of its discretion. Courts do not interfere with the exercise of discretion by trustees except in a clear case. There has never been a suggestion throughout this case that the Public Service Commission or any director or trustee of Citizens Gas was actuated by anything but the highest motives in making and approving this Lease.

(4) That court would also have to take into account the contemporaneous decision of the Public Service Commission, which the City admits includes the determination that the Lease "was advisable *and in the public interest*" (City Br. 71, italics are the City's). Indeed, as the City

also admits, this decision "is *conclusive* upon the courts in a collateral action" (City Br. 71).

(5) That court would also be bound to give due weight to the City's own contemporaneous belief in the value of the Lease. In the case at bar all defendants have admitted (I R. 137, 149, 223) plaintiff's allegations that (I R. 10): "No objection by petition to said Commission or otherwise was ever made by said City of Indianapolis either to the execution of said lease or to the orders made by said Commission * * *."

Furthermore, all this effort would be wasted, for under the law of Indiana neither a municipality nor any other party to or assignee of a contract or lease can escape its obligations thereunder by showing that they were originally burdensome or have become burdensome (Pl. Br. 53). Due process of law does not involve the necessity of attempting to determine a question of fact which would have no legal significance when determined (Pl. Br. 55).

VI.

THE CIRCUIT COURT OF APPEALS DID NOT DEPART FROM INDIANA LAW IN DEALING WITH THE ESTOPPEL OF THE CITY TO ASSERT THE UNENFORCEABILITY OF THE LEASE.

(Supp. Mem. 19-21.)

On this subject the error assigned by the City is the supposed failure of the court below "to follow the controlling Indiana decisions on (a) the question of estoppel of a municipal corporation" (City Br. 13). The complete immateriality of this assignment is shown by the City's admission that "The Circuit Court of Appeals made no express holding on the question of estoppel * * *." (City Br. 53, footnote).

The City's arguments on this question have already been fully answered (Pl. Br. 124-9; Pl. R. Br. 43-6). If

the Circuit Court of Appeals had held the City estopped to deny the enforceability of the Lease for its full term, such holding would have been fully warranted by the facts and the Indiana law applicable thereto.

VII.

THE TRIAL COURT'S FINDINGS OF FACT AGAINST THE PLAINTIFF ARE CONTRARY TO THE FACTS ESTABLISHED BY THE RECORD AND ARE NOT BINDING ON PLAINTIFF.

(Supp. Mem. 21.)

The City now contends for the first time that the so called "findings" of the trial court in its favor are unassailable.* Most of the findings and conclusions upon which the City relies (Supp. Mem. 5, 6, 16, 20) are not findings of fact as to which there was a contradiction or dispute in the evidence, but are merely inferences of fact or law drawn by the trial court from the admitted facts.† Under such circumstances the Circuit Court of Appeals and this Court are entirely free to draw their own inferences from these undisputed facts.

Harkin v. Brundage, 276 U. S. 36, 53;
United States v. South Georgia Ry. Co., 107 F. (2d) 3 (C. C. A. 5th, 1939);
United States v. Mitchell, 104 F. (2d) 343, 346 (C. C. A. 8th, 1939);

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* The City's lack of confidence in the "findings of the trial court" is shown by the fact that its briefs heretofore filed in this Court contain only one citation to any of the trial court's findings. Even that one citation was not made until after the first oral argument in this Court (City Ans. Br. 4).

† Counsel for the City concede that this is the situation. Thus in their letter of September 23, 1941, to the Clerk of this Court with respect to the enlargement of time for oral argument they say:

"While in the main, the facts are undisputed, counsel for Indianapolis Gas, Chase and the City disagree in respect of the inferences to be drawn from the facts."

Kaeser & Blair, Inc. v. Merchants Association, Inc., 64 F. (2d) 575, 576 (C. C. A. 6th, 1933);
Bianchi v. Vere, 17 F. (2d) 22, 25 (C. C. A. 1, 1927)

The trial court's findings and conclusions (III R. 1160-92) were nearly all taken substantially verbatim from the City's requests (III R. 1078-1103). Moreover, the findings on the contested issues of fact are wholly unsupported by any evidence. Neither plaintiff nor any reviewing court is bound by such findings and we are fully warranted in making use of the facts shown by the record to substantiate our contentions.

VIII.

THE JUDGMENT IN THE WILLIAMS CASE IS A CONCLUSIVE DETERMINATION, AS RES JUDICATA AND AS AN AUTHORITATIVE STATEMENT OF THE LAW OF INDIANA, THAT THE LEASE IS BINDING ON THE TRUST AND ON THE CITY AS SUCCESSOR TRUSTEE.

(Supp. Mem. 22.)

The City's assertion that "The validity of the 99-year lease against the City as successor trustee was not actually litigated in the *Williams* case" (Supp. Mem. 22) has already been shown to be devoid of any foundation (Pl. Br. 76-9). As we have there shown, the Indiana Supreme Court refused to disturb the Lease, which Williams sought to have removed as "*an unlawful cloud upon the title of said Municipal City, as trustee*" (II R. 772). This refusal was in December, 1933, and it is clear that the court held that the Lease was binding on the trust, not only during the short period between its decision and the City's taking over of the trust property, but for the full term of the Lease. The Indiana Supreme Court thereby conclusively determined that the Lease is a binding obligation of the trust and of the City as successor trustee. This determination is binding on the parties to that case and is also an authoritative statement of the Indiana law as to the issues presented by the City in the case at bar.

IX.

THE CIRCUIT COURT OF APPEALS PROPERLY REFUSED TO REALIGN INDIANAPOLIS GAS WITH CHASE AS A PARTY PLAINTIFF.

(Supp. Mem. [illegible])

The City's theories that plaintiff cannot make Indianapolis Gas a defendant to this suit because (1) Indianapolis Gas cannot in good faith deny its liability for the unpaid interest and (2) plaintiff claims that the City is also liable for the unpaid interest, have already been shown to be groundless (Pl. Br. 38-45; Pl. R. Br. 12-14).

The alleged insulation against the liability of Indianapolis Gas, on which the City relies (Supp. Mem. 23), arises out of the judgment against the City which the City is seeking to have reversed. Under the City's theory, if it should be successful in this Court on the merits, federal jurisdiction would once more be restored by the decision of this Court. It is thus clear that the City's contention is directly contrary to the well established rule that federal jurisdiction is in no way dependent on the outcome of a case on its merits (Pl. R. Br. 12-13).

The sole authority on which the City relies is *Sutton v. English*, 246 U. S. 199, which is fully reviewed in our original brief (pp. 41-2). The City claims that this case holds that parties must be aligned according to their attitude toward "the main and the controlling controversy" (Supp. Mem. 23). Actually, in that case the alignment of the defendant, Cora Spencer, was based on *the only controversy* between her and the plaintiffs, namely, that as to the distribution of the property sought to be recovered in that suit. That controversy was not "the main and the controlling controversy," for it was one in which the other defendants had no interest whatever and one which would be material only in the event of a recovery from those other defendants.

In reality *Sutton v. English* holds that there should be no realignment if there is a *single* substantial controversy between the plaintiff and the defendant sought to be realigned. We have previously enumerated the substantial controversies between plaintiff and Indianapolis Gas (Pl. R. Br. 9-11). We repeat the statement in our original brief (p. 40) and our reply brief (p. 11) that "The City has never cited a single case in which the plaintiff had even one substantial controversy with a defendant and such defendant was realigned with the plaintiff for jurisdictional purposes."

X.

THE SIGNIFICANCE OF THE FISHBACK CASE.

(Supp. Mem. 24.)

The City still argues that the decision in the *Fishback* case is not *res judicata*, despite our statement that plaintiff does not rely on that decision as a binding adjudication between it and the City (Pl. Br. 92).

In the *Fishback* case the City and Citizens Gas upheld the validity of the Lease during the eight years the case was pending in the trial court (Pl. Br. 8-10). This is compelling evidence in support of plaintiff's claims as to laches (Pl. Br. 129), estoppel (Pl. Br. 120, 124; Pl. R. Br. 43) and practical construction of the Franchise and Charter of Citizens Gas as they relate to the power of Citizens Gas to make the Lease (Pl. Br. 70).

CONCLUSION.

As we have seen, the City concedes (1) that the City is obligated by the Lease if it was "part of the property of the corporate trustee," and (2) that the Lease was valid and binding during the trusteeship of the corporate trustee (*supra*, pp. 2-4). The City's contention is that the Lease became voidable when Citizens Gas was replaced as trustee.

The City, however, has never been able to show how a trustee's contract, admittedly valid when executed and for a number of years thereafter, becomes a nullity merely because a new trustee takes over the trust property.

We submit that the Lease is binding on the City as successor trustee and that the decision of the Circuit Court of Appeals is correct in all respects except as to the rate of interest on the unpaid coupons and on plaintiff's judgment.

Respectfully submitted,

HOWARD F. BURNS,
JOHN ADAMS,
HARVEY J. EVANS,
Counsel for The Chase National Bank of the City of New York, Trustee.

BAKER, HOSTETLER & PATTERSON,
Union Commerce Building,
Cleveland, Ohio,
Of Counsel.

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APPENDIX A.

INDEX AND ANALYSIS OF ARGUMENTS.

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I. POWER OF CITIZENS GAS TO EXECUTE LEASE AND MAKE IT BINDING ON TRUST.

(*Infra*, p. 21.)

II. POWER OF CITY TO ACCEPT TRUST AND ACCOMPANYING OBLIGATIONS, AND ACTIONS TAKEN IN EXERCISE OF POWER.

(*Infra*, p. 23.)

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(*Infra*, p. 28.)

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(*Infra*, p. 29.)

VIII. COMPLIANCE WITH INDIANA LAW.

(*Infra*, p. 30.)

ANALYSIS OF ARGUMENTS.

I. CITIZENS GAS HAD POWER TO EXECUTE THE LEASE AND MAKE IT BINDING ON THE TRUST FOR THE FULL TERM OF THE LEASE.

(Pl. Br. 56-74; Pl. R. Br. 32-41; Cit. Gas Br. 6-7; Ind. Gas Br. 62-75; City Br. 43-52; Supp. Mem. 5-6, 12-13, 16-19; *supra*, pp. 8-9.)

The City admits (I R. 145-6) that the Lease was valid during the 22 years in which Citizens Gas was trustee. The mere change in trustees could not affect the validity of the Lease.

(a) Citizens Gas Had Express Statutory Authority to Make the Lease.

(Pl. Br. 56-8; City Br. 49-50; *supra*, pp. 8-9.)

The Lease was authorized by § 95[1] of the Public Service Commission Law (quoted, Pl. Br. 144-5).

(b) The Franchise and Charter Powers of Citizens Gas Included the Power to Execute the Lease and Make It Binding on the Trust For the Full Term of the Lease.

(Pl. Br. 58-66; Pl. R. Br. 33-7; City Br. 43-52; Supp. Mem. 16-19; *supra*, p. 8.)

Since Citizens Gas was originally given *no* express powers, some powers had to be implied, such as power to lease or otherwise acquire property. Also, under Indiana law the charter powers of Citizens Gas included the express power, conferred by statute in 1913, to enter into the Lease.

(c) The Statutory Power to Make the Lease Overrode the Limitations, If Any, Arising From the Public Charitable Trust.

(Pl. Br. 66-9; Pl. R. Br. 37-9; City Br. 49-50.)

The *Williams* case established, as a matter of Indiana law, that the public charitable trust is subject to the power of the state to control as a public utility. This power was exercised by the enactment of the Public Service Commission Law and by the Commission's approval of the Lease pursuant to the provisions of that law.

(d) The Williams Case Conclusively Determined That Citizens Gas Had Power to Execute the Lease and Make It Binding on the Trust For the Full Term of the Lease.

(Pl. Br. 69-70, 75-90; Pl. R. Br. 39-40, 50-55; City Br. 75-8, 81-6; Supp. Mem. 22; *supra*, p. 15.)

The decision in the *Williams* case that Citizens Gas had power to execute the Lease is a binding adjudication between the parties and a controlling authority as to the Indiana law.

(e) The Practical Construction of the Franchise and Charter By the City and Citizens Gas Shows That Those Instruments Gave Citizens Gas Power to Execute the Lease and Make It Binding on the Trust For the Full Term of the Lease.

(Pl. Br. 70-4; Pl. R. Br. 32; *supra*, p. 9.)

For 22 years the City and Citizens Gas construed the Franchise and Charter of Citizens Gas as granting the power to make the Lease. This practical construction of the contract between the City and Citizens Gas by the parties themselves is of great, if not controlling, significance.

II. THE CITY HAD AMPLE AUTHORITY TO ACCEPT THE TRUST AND ITS ACCOMPANYING OBLIGATIONS, INCLUDING THOSE UNDER THE LEASE, AND TOOK THE NECESSARY ACTION TO EXERCISE THAT AUTHORITY.

(Pl. Br. 93-117; Pl. R. Br. 40-1; Ind. Gas Br. 70-74; City Br. 43-8; Supp. Mem. 6-9; *supra*, pp. 6-7.)

(a) The City Had Ample Authority to Accept the Trust and Its Accompanying Obligations, Including Those Under the Lease.

(Pl. Br. 93-8; Pl. R. Br. 40-1; Ind. Gas Br. 70-74; City Br. 43-8; City Ans. Br. 1-4; Supp. Mem. 6-12; *supra*, p. 6.)

The City had power to accept trusts and "to agree to conditions and terms accompanying the same." As the City admits (Supp. Mem. 9-12), the "validating acts" of 1929 (quoted, Pl. Br. 150-5) gave the City authority to accept this very trust, including the leasehold estate and its accompanying obligations.

(b) The City Took the Necessary Action to Accept the Trust, Including the Leasehold and Its Accompanying Obligations.

(Pl. Br. 98-107; Supp. Mem. 5-12; *supra*, pp. 2-4, 7.)

The City admits that it took over *all* the trust property (I R. 243). Since it also admits that the Lease was valid during the trusteeship of Citizens Gas (I R. 145-6), the leasehold was part of the trust property taken by the City.

(c) In Succeeding Citizens Gas As Trustee, the City Became Liable For All the Obligations of Citizens Gas, Including Those Under the Lease.

(Pl. Br. 111-17; City Br. 62; Supp. Mem. 9-12; *supra*, pp. 2-4, 7.)

The City admits that it took the property of Citizens Gas "subject to *all* outstanding legal obligations of that

Company" (1 R. 243) and that the obligations under the Lease were valid and binding obligations of that Company (1 R. 145-6). This necessarily means that the obligations under the Lease were among those to which the trust property remained subject in the hands of the City.

The trust property taken over by the City remained subject to the obligations under the Lease, for (1) the statutes under which the City took over the trust property expressly provided that it should remain subject to the obligations of Citizens Gas; (2) pursuant to statute and the Citizens Gas Franchise and Charter, the instruments conveying the trust property stated that it was being transferred subject to all the obligations of Citizens Gas; (3) the City gave Citizens Gas an Indemnity Agreement in which it agreed to protect Citizens Gas from all liability arising from any acts or omissions to act by Citizens Gas; (4) since Citizens Gas was left with no assets out of which to satisfy its obligations, the property of Citizens Gas taken over by the City remained subject to those obligations.

(d) The City Accepted the Assignment of the Lease and Took Possession of the Leased Property and Thereby Became Liable By Privity of Estate For the Obligations Under the Lease.

(Pl. Br. 10-11; Pl. R. Br. 3-5; City Br. 44-5, 57-62; City Ans. Br. 4-6; Supp. Mem. 4; *supra*, p. 4.)

The City's *ex parte* resolution *saying* that it rejected the assignment of the Lease is meaningless in view of the *acts* whereby it in fact accepted the assignment. Since the City had no agreement with Indianapolis Gas authorizing it to take possession of the leased property, it had the right to take possession only as assignee of the lease.

III. THE VALIDITY OF THE LEASE AND ITS BINDING EFFECT ON THE PUBLIC CHARITABLE TRUST HAVE BEEN CONCLUSIVELY ESTABLISHED BY THE JUDGMENT IN THE WILLIAMS CASE AND OTHER DECISIONS.

(Pl. Br. 74-92; Pl. R. Br. 46-55; Ind. Gas Br. 39-54; City Br. 67-86; Supp. Mem. 22, 24; *supra*, pp. 15, 17.)

(a) The Judgment in the Williams Case is a Conclusive Determination, As Res Judicata and As an Authoritative Statement of the Law of Indiana, That the Lease is Binding on the Trust and on the City As Successor Trustee.

(Pl. Br. 75-90; Pl. R. Br. 49-55; Ind. Gas Br. 51-54; City Br. 75-86; Supp. Mem. 22; *supra*, p. 15.)

The refusal of the Indiana Supreme Court to remove the Lease as an alleged "unlawful cloud upon the title of said Municipal City, as trustee" is a conclusive determination that the Lease is a binding obligation of the trust and of the City as successor trustee.

The City presents no issues which were not adjudicated in the *Williams* case and the judgment in that case would be conclusive even if the City were relying on new grounds of attack. Likewise, the mere transfer of the trust property did not affect the conclusiveness of the decision that the Lease is a binding obligation of the trust.

Williams was permitted to present the case on behalf of the trust. Hence it makes no difference what issues, if any, were raised between the trustee (the City) and its co-defendants. The City had the opportunity to support the contentions presented by Williams in behalf of the trust. It elected to oppose them.

Entirely aside from the question of *res judicata*, the *Williams* case settles the law of Indiana as to the very facts now presented to this Court.

(b) The Order of the Public Service Commission Conclusively Determined That the Lease is in the Public Interest (Consequently in the Interest of the Trust Also) and in Fulfillment of the Duties of Citizens Gas As a Public Utility.

(Pl. Br. 90-2; Pl. R. Br. 46-9; Ind Gas Br. 39-45; City Br. 67-71.)

The City admits that the Commission has conclusively determined that the Lease "was advisable *and in the public interest*" (City Br. 71). This decision is also a conclusive determination that the Lease was in fulfillment of the duties of Citizens Gas as a public utility and therefore superseded the limitations, if any, arising from the public charitable trust.

(c) The Fishback Case.

(Pl. Br. 92; Ind. Gas Br. 45-51; City Br. 72-5; Supp. Mem. 24; *supra*, p. 17.)

In this case the City and Citizens Gas upheld the validity of the Lease during the 8 years immediately following its execution, before the trial court entered judgment.

(d) The Todd and Cotter Cases.

(Pl. Br. 13-14; Pl. R. Br. 50; City Br. 79-86.)

IV. THE CONTINUED ACQUIESCENCE IN THE VALIDITY OF THE LEASE BY CITIZENS GAS AND THE CITY FOR 22 YEARS, THEIR ACCEPTANCE OF ITS BENEFITS, AND THEIR REPRESENTATIONS AS TO ITS BINDING EFFECT ON THE TRUST PRECLUDE THEM FROM ATTACKING IT AT THIS TIME.

(Pl. Br. 118-32; Pl. R. Br. 43-6; Ind. Gas Br. 56-60, 77-8; City Br. 53-66; Supp. Mem. 19-21; *supra*, pp. 13-14.)

(a) Citizens Gas Is Estopped From Denying That the Lease is Valid For Its Full Term, and the Trust Property is Subject to the Obligations Arising Out of this Estoppel.

(Pl. Br. 120-124; City Br. 54-6.)

Before the Public Service Commission, in the *Fishback* case, and in the *Williams* case, Citizens Gas insisted that the Lease was valid for its full term and in each instance this contention was sustained. Also, it represented to the investing public that it had a 99-year lease on the property of Indianapolis Gas, under the terms of which it guaranteed the interest on the Indianapolis Gas Bonds. The general public was thereby induced to buy the $2,000,000 of Indianapolis Gas Bonds sold by Citizens Gas and to continue to hold the outstanding Bonds.

The trust property is subject to all the obligations of Citizens Gas, including those arising out of this estoppel.

(b) The City is Estopped From Denying That the Lease is Valid For Its Full Term.

(Pl. Br. 124-9; Pl. R. Br. 43-6; Ind. Gas Br. 77-8, City Br. 53-66; Supp. Mem. 19-21; *supra*, pp. 13-14.)

For 22 years the City represented, and stood by while Citizens Gas represented, that the Lease was valid and binding for its full term. When beneficiaries of the trust attacked the Lease, the City affirmatively insisted that the Lease was valid. As late as June, 1935 it sold its Revenue Bonds on the representation that it was taking over the entire system operated by Citizens Gas, including the property leased from Indianapolis Gas.

(c) The City is Precluded By Its Own Laches and the Laches of Citizens Gas From Denying That the Lease is Valid and Binding For Its Full Term.

(Pl. Br. 129-132; Ind. Gas Br. 56-60; City Br. 63.)

The trust had the benefit of the Lease for a period of 22 years before the City asserted that the Lease was no longer binding. The City was a party to several proceedings in which it should have spoken if it ever intended to repudiate the Lease. In each instance the City took the position that the Lease was a binding obligation of the trust.

V. THE INTEREST RATE ON THE COUPONS AFTER MATURITY AND ON THE JUDGMENT SHOULD BE SIX PER CENT.

(Pl. Br. 134-8; Pl. R. Br. 55-6; Ind. Gas Br. 82-3.)

Under the Indiana statutes plaintiff is entitled to 6% interest on (1) the overdue coupons, from the dates of their maturities, and (2) the judgment itself. The fact that the *Bonds* bear interest at 5% is immaterial with respect to the rate on the overdue *coupons* and on plaintiff's judgment.

VI. THE CIRCUIT COURT OF APPEALS PROPERLY REFUSED TO REALIGN INDIANAPOLIS GAS WITH CHASE AS A PARTY PLAINTIFF.

(Pl. Br. 38-45; Pl. R. Br. 9-14; Ind. Gas Br. 27-9; City Br. 22-32; Supp. Mem. 23; *supra*, p. 16.)

Plaintiff has several controversies with Indianapolis Gas, in one of which it obtained a judgment which would now amount to more than $2,100,000. Plaintiff was entitled to make Indianapolis Gas a defendant in order to obtain an adjudication against it on these matters.

A defendant with whom the plaintiff has one or more controversies is not realigned with the plaintiff for jurisdictional purposes, even when plaintiff and such defendant are in accord as to some other phase of the same suit.

VII. THE CITY HAD AMPLE OPPORTUNITY TO BE HEARD ON THE QUESTION WHETHER THE ALLEGED BURDENSOMENESS OF THE LEASE WOULD BE A GOOD DEFENSE IF PROVED AND THE COURT OF APPEALS' DIRECTION TO ENTER FINAL JUDGMENT WITHOUT A RETRIAL OF THAT IMMATERIAL ISSUE WAS IN FULL ACCORD WITH DUE PROCESS OF LAW.

(Pl. Br. 45-56; Pl. R. Br. 14-31, 58-69; Ind. Gas Br. 29-61; City Br. 32-43; Supp. Mem. 13-16; *supra*, pp. 9-13.)

The complete immateriality of this question is shown by the City's admission that it took over *all* the trust property (*supra*, pp. 2-4), whether burdensome or not.

(a) The City Had Ample Opportunity to be Heard in Both Lower Courts on the Question Whether Burdensomeness Would be a Valid Defense—Moreover the Hearing in the District Court Was Not Essential to Due Process of Law.

(Pl. Br. 47-9; Pl. R. Br. 17-25, 58-69; City Br. 36-43.)

(b) To the Extent, If At All, That the Circuit Court of Appeals Based Its Decision on the Williams Case, It Was Fully Justified In Doing So, For the Parties Were Fully Heard in the District Court As to the Effect of That Adjudication.

(Pl. Br. 52-3; Pl. R. Br. 26-30; City Br. 39-42; Supp. Mem. 15-16; *supra*, p. 15.)

There is no indication that the court below held that the question of burdensomeness is *res judicata*. In any event, the facts as to the *Williams* case were fully presented to the District Court and there is no factual basis for the City's contention that it was denied a hearing in the trial court as to the effect of that case.

(c) The Decision of the Circuit Court of Appeals That the Alleged Burdensomeness Would not be a Valid Defense If Proved Is Obviously Correct.

(Pl. Br. 50-54; Ind. Gas Br. 29-61; *supra*, p. 9.)

Since the City has taken over *all* the trust property, the issue of burdensomeness is moot and wholly immaterial. The *Williams* case conclusively determined that the Lease would be binding on the trust even if it were proved to be burdensome. Further, as the City admits, the Public Service Commission has conclusively determined that the Lease "was advisable *and in the public interest.*" (City Br. 71.)

Under the law of Indiana, neither a municipality nor other party to or assignee of a contract or lease can escape its obligations thereunder by showing that they were originally or have become burdensome.

(d) The Circuit Court of Appeals Having Correctly Determined That Burdensomeness Would Not Be a Valid Defense If Proved, Its Direction to Enter Final Judgment Was In Full Accord With Due Process of Law.

(Pl. Br. 55-6; City Br. 36-7.)

The right to prove allegations which would be unavailing even if proved is not an element of due process of law.

VIII. THE RULE OF ERIE RAILROAD COMPANY v. TOMPKINS REQUIRED THE DECISION THAT THE LEASE IS VALID AND BINDING AND IN MAKING THAT DECISION THE CIRCUIT COURT OF APPEALS FULLY COMPLIED WITH THAT RULE.

(Pl. Br. 69-70, 75, 89, 132-4; Pl. R. Br. 42-55; Ind. Gas Br. 77-9; City Br. 52-86; Supp. Mem. 19-22; *supra*, p. 15.)

Every Indiana decision bearing upon the question compels the conclusion that the Lease is valid for its full term. The City's *present* contentions were all conclusively negatived, as a matter of Indiana law, in the *Williams* case.

(a) The Circuit Court of Appeals Did Not Hold That the City is Estopped to Deny the Validity of the Lease, but Under the Law of Indiana It Would Have Been Fully Warranted In Doing So.

(Pl. Br. 120-9; Pl. R. Br. 43-6; City Br. 53-66; Supp. Mem. 19-21; *supra*, p. 13.)

(b) The Order of the Public Service Commission is a Conclusive Determination That the Lease is In the Interest of the Public Charitable Trust and In Fulfillment of the Duties of Citizens Gas as a Public Utility and the Circuit Court of Appeals Did Not Deviate From the Law of Indiana in Determining the Significance of That Order.

(Pl. Br. 90-2; Pl. R. Br. 46-9; Ind. Gas Br. 39-45; City Br. 67-71.)

Under the law of Indiana as announced in the *Williams* case the public charitable trust is subject to the power of the state to control as a public utility. (*supra*, I(c), p. 22.) The act of the Public Service Commission in approving the Lease was an exercise of this power and was a conclusive determination that the Lease is in the public interest (III (b), *supra*, p. 26).

(c) The Circuit Court of Appeals Did Not Hold That the Validity of the Lease is Res Judicata, But Under the Law of Indiana It Would Have Been Fully Warranted In Doing So.

(Pl. Br. 74-90; Pl. R. Br. 49-55; Ind. Gas Br. 45-54; City Br. 72-86; *supra*, p. 15.)

The Circuit Court of Appeals did not hold that the Indiana decisions to which it referred were *res judicata*, but that those decisions sustaining the validity of the Lease are controlling under the rule of *Erie Railroad Company v. Tompkins*.

The Circuit Court of Appeals would have been fully warranted in holding that the question as to the validity and present binding effect of the Lease is *res judicata* (see point III(a), p. 25 above).

(d) The Circuit Court of Appeals' Construction of the Franchise and Charter of Citizens Gas is in Complete Accord With Indiana Law.

(Pl. Br. 56-74, 133-4; Pl. R. Br. 32-40; City Br. 49-52; Supp. Mem. 16-19; *supra*, p. 8.)

Under the law of Indiana when, as in this case, a franchise contains a contract with the municipality as well as a grant to occupy the streets, such *contract* is construed like any other contract.

The Circuit Court of Appeals' construction of the Franchise and Charter of Citizens Gas was required by the construction of the same Franchise and Charter by the Indiana Supreme Court in the *Williams* case and by the Indiana law applicable to the facts here presented (Point I, *supra*, p. 21).

(e) The Statutory Prohibitions on Which the City Relies have No Application to This Case.

(Pl. Br. 93-8, 134; Pl. R. Br. 40-1; Ind. Gas Br. 70-74; City Br. 45-8; City Ans. Br. 1-4; Supp. Mem. 6-9; *supra*, pp. 6-7.)

This matter is discussed under point II(a), page 23 above.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

THE CITY OF INDIANAPOLIS, ET AL., *Petitioners,* *v.* THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., ET AL., *Respondents.*	Nos. 10 and 11
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., *Cross-Petitioner,* *v.* CITIZENS GAS COMPANY OF INDIANAPOLIS, ET AL., *Respondents.*	Nos. 12 and 13

Supplemental answer brief of Indianapolis Gas Company, Respondent, with request for leave to file same.

LOUIS B. EWBANK,
WILLIAM R. HIGGINS,
Indianapolis, Indiana,
Counsel for The Indianapolis Gas Company, Respondent.

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Indianapolis Gas Company, Respondent, respectfully asks permission of the Court to file its supplemental answer brief hereinafter set out.

Respectfully submitted,

LOUIS B. EWBANK,
WILLIAM R. HIGGINS,

Counsel for The Indianapolis Gas Company, Respondent.

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SUPPLEMENTAL ANSWER BRIEF OF INDIANAPOLIS GAS COMPANY, RESPONDENT

[NOTE: All propositions advanced in respondents' original brief are still relied on and this memorandum is intended merely to supplement that brief by replying to the supplemental brief filed by the City, et al., September 1, 1941.]

* 1. All emphasis ours unless otherwise stated.
2. The several appendices at the end of this brief recite the language of Indiana Statutes cited.

I.

Factual Summary Correcting Statements of Petitioner City on Page 4 of Its Supplemental Memorandum.

The Todd case held only that the stockholders had created a charitable trust in their own excess profits above amounts invested plus 250% (Indianapolis Gas Brief, pp. 68, 69).

The law (Appendix A) authorized these two public utilities to execute this lease precisely as they did (I R. 116 to 122; offered II R. 327).

The "articles" (I R. 99) and stock certificates (II R. 768) and statutes (Appendices C and D) and the deed (III R. 834) and assignment (I R. 144(4)) from Citizens Gas all make the City's title "subject to legal obligations" of its grantor. Under authority of Appendix B, the City by ordinance (III R. 1018-1019, offered II R. 439) accepted the entire public trust, and also by the resolution for temporary use (I R. 200, 201; offered III R. 1037, 1042). Citizens Gas was bound to so extend its plant that all inhabitants be supplied (I R. 89(17); offered II R. 327).

The same promoters, trustees and directors who organized Citizens Gas executed this lease, doubtless for the same ultimate trust purpose (II R. 336 to 338).

II.

The Decision of the Circuit Court of Appeals.

The opinion and judgment of the Circuit Court of Appeals here for review (113 Fed. 2nd 217) is definite and unambiguous. Its *rational* may be briefly stated in the following conclusions reached by that Court:

1. The lease of 1913 between Citizens Gas and Indianapolis Gas was one for 99 years and not for an indefinite or shorter term.

2. Citizens Gas, as trustee of a trust which was a public utility, was empowered to acquire for the trust estate the leasehold interest in the property of Indianapolis Gas upon the approval of the Public Service Commission of Indiana, which was had.

3. The leasehold estate validly acquired became and remains for its term of 99 years part and parcel of the trust estate.

4. The validity of the lease for its term had been adjudged by the Supreme Court of Indiana in *Williams v. Citizens Gas Company, et al.*, and by the Superior Court of Marion County, Indiana, in *Fishback v. Public Service Commission, et al.*

5. The lease obligations of the trust are not affected or destroyed by reason of the substitution or change of trustees.

6. City in declaring its intention to succeed Citizens Gas as trustee, and in so doing, is obligated to accept the entire trust subject to all the legal obligations which had been created by Citizens Gas, initial trustee, during its period of trusteeship.

7. The liability for payment of past due bond interest on Indianapolis Gas bonds is that, of the City as present trustee and the trust, Citizens Gas and Indianapolis Gas in the order named.

8. Plaintiff below for bondholders is entitled to interest on unpaid interest coupons of Indianapolis Gas bonds from the date of their respective defaults at the rate of

5% per annum, *per* the contract rate and in accordance with Indiana statutory provisions.

Each of the above conclusions followed and is in complete accord with the settled law of Indiana, as discussed at pages 77-79 of original brief.

The statement in City's memorandum on page 15 that the Court held the lease to be enforceable against the City if not burdensome in character, but unenforceable if burdensome, is not correct. The judgment that the lease was valid and enforceable was subject to no conditions. The Court did say, as dictum in discussing generally the powers of a trustee, that "in making a long term lease a trustee is under a duty to act with prudence. If a trustee makes a lease which is unreasonable under the circumstances it thereby commits a breach of trust and incurs liability to beneficiaries who may have such a lease set aside."

This is a correct statement of a general principle; one which was not violated by Citizens Gas in the execution of the lease. By no interpretation can it be construed to mean that the lease in question was held to be enforceable only if not now burdensome. Even if the lease had been burdensome from its creation, which is judicially denied by the judgments in the Williams and Fishback cases as well as by the findings of the Public Service Commission, the Court did not hold that its validity could now be challenged by the lessee, or its successor, upon such ground after being utilized and accepted for 22 years. That such an attack would be defeated by the rule of laches is discussed in our original brief at pages 56-60.

The decision furthermore need not rest on implied powers of Citizens Gas, initial trustee, as contended in City's memorandum (p. 4). Had the Court of Appeals

held that the power in Citizens Gas, trustee, to execute the lease was one expressly given, it would have been equally sustainable. Direction was expressly given Citizens Gas in its franchise to "secure, acquire or construct" the gas plant for the purposes of supplying gas to all the citizens of Indianapolis (I R. 85).

An express direction to "secure" or "acquire" such gas property can be none other than a granting of an express power to secure or acquire such facilities. This could only be exercised by purchase or lease and in the present case the latter method was adopted as most advantageous to the trust.

III.

Citizens Gas Was a Public Utility Incorporated by General Law Which Empowered It to Execute the Lease.

Each party to the lease was a public utility gas company with the right to an indeterminate permit (Appendix G) which each took, and statutory power to make this lease (Appendix A). The City by express authority of statutes (Appendices B, C and D) took the property over subject to all the lessee's legal obligations (I R. 124; III R. 834; Indianapolis Gas Brief, pp. 32 to 38). This binds the City by such obligations to the extent of the trust property.

No. 2. The general law under which, alone, Citizens Gas could be (Const. Ind Art. 11, sec. 13) and actually (Appendix F) was incorporated (II R. 622, No. 6(a); offered R. 326) expressly limited the purpose for which it was formed "to supply the City of Indianapolis and its inhabitants with light, heat and power," and expressly authorized a lease to a competitor (Appendix A). Any-

thing in the "articles" that is not from the general law was void (Indianapolis Gas Brief, pp. 67 to 69).

The trust duty under the franchise contract, was to "secure, acquire or construct" (I R. 85, No. 3), a plant such "that all inhabitants of said City may be supplied with gas" (I R. 89(17)), and by leasing was the only way Citizens Gas could get the plant that served most of the City.

No. 7. The "trust" expressly requiring extension of the lines of Citizens Gas to "supply all the inhabitants with gas" (I R. 89(17)), subject to repaying investors 350% (I R. 84, f) and subject to all legal obligations (I R. 85 (i); 93 (22)), and it having by that means acquired lines reaching four-fifths of its customers through taking this lease (III R. 901; II R. 535), such lease is an essential part of the trust.

Section 95½ of Chapter 76, Acts 1913 (Appendix A) had authorized a lease binding on Citizens Gas and its grantee, and conferred on the Public Service Commission express power to confirm this lease (March 4, 1913) before it was executed, October 1, 1913 (I R. 116-122; offered II R. 327) and by section 130 had repealed all inconsistent laws (Appendix L). And section 53 of the City Charter (Appendix B) had empowered the City to accept this public trust and bind itself to carry out its conditions, and Chapters 77 and 78 of Acts Indiana 1929 (Appendices C and D) expressly authorized the City to accept the gas plant property from Citizens Gas subject to all legal obligations and to do all the acts which were done by the City in binding it as trustee to perform the lease.

All provisions in the franchise (I R. 93 (22)), and the stockholders' agreements (I R. 99, XII), and the convey-

ances to the City of both personal (I R. 125) and real (II R. 834) property were that the property should be taken "subject to all legal obligations" which was also named as a condition in both of the enabling statutes, Chapters 78 (Appendix C) and 77 (Appendix D) of Acts Indiana 1929, subject to which each of said instruments of conveyance recited that it was made.

How this Board of Directors for Utilities could accept the gas plant worth $13,431,230 otherwise than subject to the grantor's contract obligations, including this lease, does not appear.

"Purpose" of Organizing Citizens Gas Was Not "Competition."

Citizens Gas was organized under the general corporation laws of Indiana and its purpose as stated in its Articles of Incorporation was "to supply the City of Indianapolis and its inhabitants with light, heat and power" (I R. 95; offered II R. 327). The suggestion that its primary purpose was to provide and continue indefinitely competition with Indianapolis Gas is wholly fatuous. Competition may or may not be an incident to carrying out an avowed purpose, but it is not *per se* the end sought. Whether the objective supplying gas to a community might be more effectively obtained through competition or without it, were matters to be determined by the judgment of the corporation under all existing circumstances.

The law under which Citizens Gas was incorporated (Appendix F) only authorized its articles to contract that its purpose should be "to furnish light, heat and power" to a city "for the term of 50 years," which they did (I R.

95, III R. 99, XIII). And all "trust provisions" not authorized by the statute are void.

Indiana Bond Co. v. Ogle, 22 Ind. App. 593, 595.

It was by this lease on two-thirds of the gas mains serving for fifths of the meters (and of the proposed beneficia[illegible]s) in the City (I R. 195, 196: offered II R. 327) that competition with Indianapolis Gas was ended, being the only possible way.

IV.

City, Existing Only Under the General Law and Subject Thereto, by Accepting the Public Trust Bound Itself to Carry Out Its Terms and Conditions.

Meeting City's Supplemental Memorandum, pages 6 to 9.

Special Charters for municipal corporations as of all other corporations are forbidden by the Constitution of Indiana.

Const. Ind. Art. 11, sec. 13.

The "franchise contract" relied on was made by the City only as an agency of the State and its surrender in 1921 in exchange for an Indeterminate Permit from the State (II R. 622, f) under express legislative authority (Appendices E and G) had the effect that thereby the City franchise contract "was abrogated and rescinded *in toto* as to both parties."

Greensburg Water Co. v. Lewis, 189 Ind. 439, 454.

Sections 85 and 254 were repealed. So far, if at all, as Chapter 129, Acts Indiana 1905, sections 85 and 254, were in conflict with the Public Service Commission Act (Appendix A) they were repealed by the last section (130) of Chapter 76, Acts 1913 (Appendix L), which expressly repealed all prior legislation "so far as inconsistent therewith." This included repeal of all statutes (if any) which forbade the execution of this lease "at a price and on terms fixed by the Commission" (Appendix A).

Citizens Gas was a public utility corporation (Appendix F) formed for the sole statutory purpose "to supply the City of Indianapolis and its inhabitants with light, heat and power" (I R. 95, III). The City was a municipal corporation. Neither had or could have any *special* charter rights (Ind. Const. Art. 11, sec. 13). The law made void as against creditors any trust the stockholders might create for their own benefit (Appendix K), and this trust reserved to the creators 350% of their investment, but "subject to legal liabilities." The City could not have any rights in the trust that would violate those laws.

NOTHING WAS DECIDED AS TO RES ADJUDICATA.

The Circuit Court of Appeals did not find anything was *res adjudicata*. It only held, in strict compliance with *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, and cases following it, that the validity and binding effect of this lease upon the City being strictly a question of Indiana State law, the State decisions cited "are determinative of the immediate issue here, i. e. as to the validity of the 99-year lease" (IV R. 1300).

See Brief of Indianapolis Gas, pages 15 to 18.

The cases of *Fishback v. Public Service Commission* as decided by the Superior Court of Marion County, Indiana (II R. 648 to 668), and *Williams v. Citizens Gas Company* (II R. 761 to 812), reported on appeal in 206 Ind. 448, were cited and relied on by the Circuit Court of Appeals as determining what is the law of Indiana concerning the matters there determined when again in issue, in a Federal Court.

West v. American T. & T. Co. (Dec. 9, 1940), 311 U. S. 223;

Klaxon Co. v. Stentor Elec. Mfg. Co. (June 2, 1941), 85 L. Ed. (Adv.) 969.

In *Williams v. Citizens Gas* all parties now before the court filed demurrers to the complaint and supplemental complaint which were all sustained and final judgment entered (II R. 630 to 633, No. 14) that was affirmed on appeal as *Williams v. Citizens Gas*, 206 Ind. 448. The City's demurrer (III R. 813) and the complaint (II R. 761 to 802) and supplemental complaint (R. 802, 803) are in the record. They alleged substantially the facts proved in this case, including the City Franchise and Articles of Incorporation of Citizens Gas (II R. 765), the stock subscriptions and certificates (R. 766, 767), its acquisition of property (R. 774), the enactment of the Public Service Commission Act (R. 776 to 779), the making of this lease and its approval by the Commission (R. 779, 780), surrender of the City franchise for an Indeterminate Permit (R. 783, 784), the enactment of Chapters 77 and 78 of Indiana Acts of 1929 (Appendices C and D), and the declared purpose of the City to accept the trust property, including the leasehold (R. 791 to 793), with many allegations that the lease will be a great burden upon the trust.

The law of Indiana as declared by the State courts with reference to those facts is binding here as to the same facts (*Erie Railroad v. Tompkins*, 304 U. S. 64).

All said facts to and including the execution of the lease and its approval by the Public Service Commission were alleged in the several paragraphs of complaint by Fishback set out in the record (II R. 648 to 668) to which numerous demurrers were sustained, including those by all parties here except this plaintiff and the City (II R. 624 to 627, No. 9), which demurrers were all sustained and final judgment was rendered thereon that is in full force (II R. 625, 626, No. (e) and (i)). This also determines the law of Indiana.

West v. American Teleph. & Teleg. Co. (Dec. 9, 1940), 311 U. S. 223.

STATUTES EXPRESSLY PROVIDED FOR LEASE AFTER CHANGE OF TRUSTEES.

In the Indiana Acts of 1929, Ch. 78 (Appendix C), express provision is made for the City to succeed Citizens Gas as Trustee and to "accept, hold and own * * * any right, title or interest such transferring corporation may have in any lease upon any other property." Thus is here found a denial by the General Assembly that this lease should terminate upon the change of trustees. The mains of both Gas Companies as well as their entire facilities were intermingled and they were both equally utilized for the performance of the purposes of the trust, viz., to supply light, heat and power to the City of Indianapolis and its inhabitants.

STATUTES DIRECT THAT TITLE VESTS IN CITY "SUBJECT TO LEGAL OBLIGATIONS"

To question the power of the City to accept the lease by assignment of property subject thereto is a sheer denial of Chapter 77 of Indiana Acts of 1929 (Appendix D), and to assert that the City in taking title to property of Citizens Gas might do so without assuming the lease obligation is directly contradictory of Chapter 78 (Appendix C). The Act of 1929, Chapter 78 (Appendix C) is both mandatory and explicit. It states that when such trust property is conveyed by the Corporation to the City "the title to such property *shall* vest in such town or city *subject* to all outstanding legal obligations of said Corporation."

The express power to accept the lease was obviously provided in the Statute to ensure the effectiveness of the further provision that title to all the property and assets "*shall* vest subject to all legal obligations."

POSSESSION TAKEN OF LEASED PLANT WAS AS TRUST LESSEE.

Possession could not have been lawfully taken by the City under the Resolution of its Directors for Utilities referred to "as one for temporary use." No right exists in the Department of Utilities to take possession of property belonging to another under any such resolution, and counsel for City has offered no authority supporting such a right. City's possession of the leasehold property during the months before it had any contract with Indianapolis Gas was therefore lawfully obtained only through its undertaking to operate under the lease which necessarily accompanied the acceptance of the lessee's property "subject to all legal obligations."

V.

Relative to Issue of "Burdensomeness."

During argument counsel for City was asked: "What is the test as to burdensomeness"? The question is pertinent but no answer has been made to it by City either in argument or supplemental memorandum. Certain observations as to this issue are proper:

First. This issue was presented only as a ground for an alleged right in the City to refuse and reject an assignment of the lease (II R. 321-322). If City did in fact accept the assignment of said lease and take possession of said leased property thereunder, as has been shown was in fact done, then obviously the issue is not properly present for consideration.

Second. The time at which the test of burdensomeness is sought to be made has been definitely fixed by City both in its petition for a rehearing before the Court of Appeals (4 R. 1310) and in its petition for certiorari presented to this Court (p. 6). City seeks the right to offer evidence that the lease was burdensome, not on March 20, 1929, when it elected to succeed to the trusteeship, nor on September 9, 1935, when it took over all property and assets of the trust, but at the time the lease was executed in 1913. It now seeks in fact "to have the lower Court determine whether *when executed* this lease *was* in fact burdensome." (IV R. 1310.)

It is therefore upon refusal of the Court to order a trial of that issue, to now determine whether this lease was in fact burdensome some 28 years ago, that City predicates its contention that its constitutional rights of due process have been violated.

In view of City's admission that the lease was valid from 1913 until 1935 during the trusteeship of Citizens Gas, it may be asked how the lease being admittedly valid in the hands of one trustee for 22 years could then suddenly become invalid in the hands of a successor trustee because "when made the lease was in fact burdensome." Surely a lease, whose validity could not for 22 years be successfully attacked on the ground that it was burdensome when made, would not thereafter be subject to successful attack upon such ground.

Whatever test of burdensomeness might be urged, it is certain that no obligations under the lease are in any degree either increased or changed by the substitution of trustees. No burden is placed either upon the trust or the present trustee which was not borne and accepted by the initial trustee. Neither may the value of the property of Indianapolis Gas in 1913, upon which the lease was approved by the Commission, nor the reasonableness of the rental charges be in any wise affected by the fact that City has now succeeded Citizens Gas as trustee.

If the test of burdensomeness were whether or not the trust benefited from the lease, the record offers a definite answer.

Aside from the value of the physical property of Indianapolis Gas, undoubtedly the value to the trust of the elimination of competition was real and was given definite consideration by Citizens Gas and also the Public Service Commission in its findings that the terms and provisions were fair and equitable and that the lease itself was in the public interest.

This value, in connection with other values, may now in retrospect be more accurately appraised than it could

have been in 1913 by briefly viewing the increased annual *net* earnings of the trust following the execution of this lease.

For 1913, before obtaining this lease, Citizens Gas reported net earnings of $202,584.24 (II R. 614); for 1915, the second year of operation under the lease, net earnings had increased to $368,973.18 (II R. 605); for 1929, when City elected to succeed to the trusteeship, net earnings were $680,055.91; for the year 1934, last preceding the change of trustee, net earnings were $668,813.00 (II R. 542); and for 1935, the year of the succession, net earnings were $752,250.00 (II R. 542).

Thus is presented conclusive evidence of the soundness of the judgment of Citizens Gas in seeking a local ownership of Indianapolis Gas so that the lease might be made, securing to the trust the elimination of competition and sole control of a unified gas system for a period of ninety-nine years.

In this retrospect is also seen a factual verification of the judgment of the Public Service Commission that the rentals and terms of the lease were fair and reasonable, and that through its execution both the best interests of the trust and the public would be served. Also of its finding that

> "the two plants are so constructed and laid out as to adapt the two to a single working plant of great efficiency and under one management they can be operated at a great saving as compared with the cost of operating them as separate and competitive plants." (I R. 117; II R. 623.)

Time has also proved correct the Supreme Court of Indiana when it stated in its opinion in the Williams case at p. 457,

> "the lease was one that the Citizens Gas Company and Indianapolis Gas Company had power to execute and one which would result in great advantage to the Citizens Gas Company."

We shall not here discuss the conclusiveness of the findings of the Public Service Commission as to the fairness of the lease terms as against the present collateral attack City now seeks to make, nor the binding determination of this issue by the Supreme Court in Indiana in *Williams v. Citizens Gas Company, et al.*, and *Fishback v. Public Service Commission, et al.* These matters are discussed in original brief of Indianapolis Gas on pages 29-61.

Whatever other test of burdensomeness might be employed, it is submitted that this trust is now, after 22 years of benefit and use of the lease, precluded from attacking the same on grounds that it was burdensome either "when made," as urged by the City, or that it is so now.

CONCLUSION.

It is respectfully submitted that no error is present in the judgment of the Circuit Court of Appeals, and that it should be affirmed.

Respectfully submitted,

Louis B. Ewbank,
William R. Higgins,
Counsel for The Indianapolis Gas Company, Respondent.

APPENDIX A.

(All emphasis in these quotations is ours.)

Indiana Acts 1913, Chapter 76, Section 95½, page 199:

> "That with the consent and approval of the commission but not otherwise, any two or more public utilities, furnishing a like service or product and doing business in the same municipality or locality within this state, or any two or more public utilities whose lines intersect or parallel each other within this state may be merged and may enter into contracts with each other that will enable such public utilities to operate their lines or plants in connection with each other; and any public utility may also, with the consent of the holders of three-fourths of the capital stock outstanding, purchase or lease the property, plant or business or any part thereof of any other such public utility at a price and on terms fixed by the commission. Any such public utility may, with the consent of three-fourths of the holders of the outstanding stock, sell or lease its property or business or any part thereof to any other such public utility at a price and on terms fixed by the commission upon paying in cash to non-consenting stockholders the appraised value of their stock as fixed by the commission."

APPENDIX B.

Indiana Acts 1905, Chapter 129, Section 53 (in part), page 247; Burns' 1933, sec. 48-1407:

> "Sec. 53. The common council of every city shall have power to enact ordinances for the following purposes:
>
> First. To provide a corporate seal, with appropriate device, for such city, to be affixed to all instru-

ments or writings needing authentication. * * *"

"Sixth. To receive gifts, donations, bequests and public trusts and to agree to conditions and terms accompanying the same and bind the corporation to carry them out. * * *"

APPENDIX C.

Indiana Acts 1929, Chapter 78, Section 1, pages 268, 271:

"That if in the original articles of incorporation of any corporation organized under the laws of this state prior to May 1st, 1913 (that being the date of the creation of the public service commission of this state), for the purpose of furnishing natural or artificial gas for fuel or for illuminating purposes, or for furnishing electric lights or water to the citizens of any town or city within this state, or to furnish light, heat and power to any town or city, or the inhabitants thereof, provision is made for the transfer or conveyance of the property of such corporation to such town or city, *subject to the outstanding legal obligations of said corporation*, whenever the holders or owners of shares of stock, stock certificates or holders or owners of any beneficial interest in such capital stock shall have received the face or par value of such shares of stock, stock certificates or beneficial interest, together with the interest or dividends thereon provided for in such articles of incorporation, such provision in such articles shall be, and is hereby legalized and declared to be valid and binding upon such corporation and upon the holders and owners of any such shares of stock, stock certificates or beneficial interest therein or their assigns, and said town or city shall be authorized and entitled *to accept a transfer and conveyance of any such property* in accordance with the terms and conditions of

such articles of incorporation, without the question of the acceptance or acquisition of such property being submitted to a vote of the electors of such town or city * * *"

"Whenever any instrument of transfer or conveyance shall be executed, transferring or conveying the property, either real or personal, of any such corporation to such town or city, the title to such property *shall* vest in such town or city, *subject to* all outstanding *legal obligations* of said corporation * * *"

"Said municipal corporation shall be *authorized to accept, hold and own* all the property of such corporation so transferred to it, including that located within this state and that located in any other state and any shares of stock or other interest in any other corporation of which said corporation making such transfer shall be the owner, and *any right, title or interest such transferring corporation may have in any lease upon other property* * * *"

APPENDIX D.

Indiana Acts 1929, Chapter 77, Section 3, pages 257, 259:

"The said board of directors for utilities shall have the exclusive government, management, regulation and control of any water works, gas works, electric light works, heating and power plants, and all property relating thereto, which any such city may heretofore have acquired or may hereafter acquire or construct for the service of the public as consumers, and such board of directors shall be charged with the duty of and shall have all necessary power to make all necessary repairs, renewals, enlargements, extensions or additions to any such plant or property which in the judgment of said

board of directors is desirable or necessary for the proper serving of the inhabitants of said city and the adjacent community served with respect to any such utility from any such plant or plants. In connection with the duties devolving upon such board of directors as aforesaid, it shall have power as follows:

(1) To condemn, appropriate, *lease*, rent, purchase and hold *any real estate*, rights of way, materials *or personal property* within such city or within five (5) miles of the corporate limits thereof, needed for the proper giving of service by any such utility to the inhabitants of said city and the community contiguous thereto and served from any such utility plant. * * *"

"(7) To take over, adopt and *assume the performance of the provisions of any lease under which any utility property may be held at the time of the acquisition* of any utility by any such city, and to take any and all steps necessary to *perform* and fulfill the terms of *any such lease*, and to obtain and preserve the benefits therefrom; and in event there be any outstanding *open mortgage* upon the property *covered by any such lease* so taken over under the provisions of which bonds may be withdrawn from the trustee under such mortgage for the purpose of paying all or part of the cost of additions to the property covered by such mortgage, to do and perform all things necessary in order to secure the benefit of such mortgage provisions and to enable the escrow bonds held by the trustee under any such mortgage to be taken down and sold in order to defray the cost of any extensions and *betterments to such leased property* and, subject to the approval of the public service commission of Indiana, to sell any such bonds so taken down for the purpose of assisting in defraying the costs

of any such extensions or betterments to such *leased property.* * * *"

APPENDIX E.

Indiana Acts 1921, Chapter 93, pages 197, 198:

"Any public utility operating under an existing license, permit, or franchise, from any county, city or town, within the State of Indiana, shall upon filing at any time prior to July 1, 1923, with the auditor or clerk of any such county, city or town which granted such license, permit or franchise, and with the public service commission of Indiana, a written declaration, legally executed that it surrenders such license, permit or franchise, receive by operation of law in lieu thereof an indeterminate permit as provided in the act creating the public service commission of Indiana, entitled "An act concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission," approved March 4, 1913, and such public utility shall hold such permit under all the terms, conditions and limitations of said act as fully and completely as if the same had been done prior to July 1, 1915."

APPENDIX F.

Indiana Acts 1905, Chapter 139, Section 1, pages 434, 435:

"Whenever three (3) or more persons may desire to form a company to carry on any of the following named purposes, to wit:

(a) Any kind of manufacturing, mining, mechanical or chemical business or to furnish motive power to conduct such business;

(b) To supply any city, town, village or community with water, light, heat or power;

(c) To own, construct, operate and maintain stockyards and transit companies and conduct and transact the business incident thereto;

(d) To own, construct, maintain and operate grain elevators or flour mills or both and transact the business incident thereto, including the manufacture of flour, meal and all grain and cereal products, and the buying and selling of grain and cereals of all kinds, and the manufactured products thereof, and also including the right to own and maintain motive power to conduct such business;

(e) To buy and sell any kind or kinds of merchandise in connection with the manufacture of such merchandise, and for the sale of such merchandise when manufactured. They shall make, sign and acknowledge before some officer capable of taking acknowledgments of deeds, a certificate in writing, which shall state the corporate name adopted by the company, the object or objects of its promotion, which may include any or all of the purposes included in any one of the above named subdivisions of this section, the amount of the capital stock, the term of its existence (not, however, to exceed fifty (50) years), the number of directors and the names of those who shall manage the affairs of such company for the first year, and the name of the city or town in which its principal place of business is to be located, and file the same in the office of the recorder of such county, where it shall be recorded, and a duplicate thereof in the office of the secretary of state;

(f) To buy, sell and lease lands and buildings and other structures thereon, and to erect dwellings and other buildings and structures on lands leased or purchased."

APPENDIX G.

Indiana Acts 1913, Chapter 76, Sections 100, 101, pages 201, 202:

"Sec. 100. Every license, permit or franchise hereafter granted to any public utility shall have the effect of an indeterminate permit subject to the provisions of this act, and subject to the provision that the license, franchise or permit may be revoked by the commission for cause or that the municipality in which the major part of its property is situated may purchase the property of such public utility actually used and useful for the convenience of the public at any time as provided herein, paying therefor the then value of such property as determined by the commission and according to the terms and conditions fixed by said commission, subject to all the provisions as to hearings and appeals set out in section one hundred and five (105) and section one hundred and six (106) hereof. Any such municipality is authorized to purchase such property and every such public utility is required to sell such property at the value and according to the terms and conditions determined by the commission as herein provided. If this act should be repealed or annulled then all such indeterminate franchises, permits or grants shall cease and become inoperative and in place thereof such utility shall be reinstated in the possession and enjoyment of the license, permit or franchise surrendered by such utility at the time of the issue of the indeterminate franchise, permit or grant; but in no event shall such reinstated license, permit or franchise be terminated within a less period than five years from the date of the repeal or annulment of this act.

"Sec. 101. Any public utility operating under an existing license, permit or franchise shall, upon

filing at any time prior to the expiration of such license, permit or franchise and prior to July 1, 1915, with the clerk of the municipality which granted such franchise and with the commission, a written declaration, legally executed, that it surrenders such license, permit or franchise, receive by operation of law, in lieu thereof an indeterminate permit as provided in this act; and such public utility shall hold such permit under all the terms, conditions and limitations of this act."

APPENDIX H.

Indiana Acts 1913, Chapter 76, Section 97, page 200:

"No license, permit or franchise shall be granted to any person, copartnership or corporation to own, operate, manage or control any plant or equipment of any public utility in any municipality where there is in operation a public utility engaged in similar service under a license, franchise or permit without first securing from the commission a declaration after a public hearing of all parties interested, that public convenience and necessity require such second public utility. Any existing permit, license or franchise which shall contain any term whatsoever interfering with the existence of a second public utility is hereby declared to be against public policy and is hereby amended in such manner as to permit a municipality to grant a license, franchise or permit for the operation of such second public utility pursuant to the provisions of this act."

APPENDIX I.

Indiana Acts 1913, Chapter 76, Section 110, pages 205, 206:

"Every municipal council shall have power, (a) to determine by contract, ordinance or otherwise the quality and character of each kind of product or service to be furnished or rendered by any public utility furnishing any product of service within said municipality and all other terms and conditions not inconsistent with this act upon which such public utility may be permitted to occupy the streets, highways, or other public property within such municipality, and such contract, ordinance or other determination of such municipality shall be in force and prima facie reasonable. Upon complaint made by such public utility or by any qualified complainant as provided in sections 57 to 71 the Commission shall set a hearing as provided in sections 57 to 71, and if it shall find such contract, ordinance or other determination to be unreasonable, such contract, ordinance or other determination shall be void. (b) To require of any public utility by ordinance or otherwise such additions and extensions to its physical plant within said municipality as shall be reasonable and necessary in the interest of the public, and to designate the location and nature of all such additions and extensions, the time within which they must be completed and all conditions under which they must be constructed subject to review by the commission as provided in subdivision (a) of this section. (c) To provide for a penalty for noncompliance with the provisions of any ordinance or resolution adopted pursuant to the provisions hereof. (d) The power and authority granted in this section shall exist and be vested in said municipalities anything in this act to the contrary notwithstanding: Provided, however, Whenever after a request by petition in writing of any public utility, the city or other political subdivision or other body, having jurisdiction of the matter, shall refuse or fail for a period of thirty (30) days, to give or grant to such public utility permission and

authority to construct, maintain and operate any additional construction, equipment, or facility reasonably necessary for the transaction of the business of such public utility, and for the public convenience or interest, then such public utility may file a petition with said commission for such right and permission, which petition shall state with particularity the construction, equipment or other facility desired to be constructed and operated, and show a reasonable public necessity therefor, and also the failure or refusal of such city, political subdivision or other body to give or grant such right or permission; and the commission shall thereupon give notice of the pendency of such petition, together with a copy thereof, to such city or other political subdivision or body of the time and place of hearing of the matter set forth in such petition; and such commission shall have power to hear and determine such matters and to give or grant such right and permission and to impose such conditions in relation thereto as the necessity of such public utility and the public convenience and interest may reasonably require."

APPENDIX K.

Burns' Indiana Statutes 1933, Section 33-409:

"*Deeds in trust for grantor.*—All deeds of gift, conveyances, transfers or assignments, verbal or written, of goods or things in action, made in trust for the use of the person making the same, shall be void as against creditors, existing or subsequent, of such person."

APPENDIX L.

Indiana Acts 1913, Chapter 76, Section 130, page (167) 214:

"Sec. 130. All acts and parts of acts conflicting with the provisions of this act are repealed in so far as they are inconsistent herewith."

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In the Supreme Court of the United States

OCTOBER TERM, 1941.

THE CITY OF INDIANAPOLIS, *et al.*,
Petitioners.

v.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, etc., *et al.*,
Respondents.

Nos. 10 and 11.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, etc.,
Cross-Petitioner.

v.

CITIZENS GAS COMPANY OF INDIANAPOLIS, *et al.*,
Respondents.

Nos. 12 and 13.

ADDITIONAL AUTHORITIES OF CHASE NATIONAL BANK, TRUSTEE, ON JURISDICTIONAL QUESTION.

HOWARD F. BURNS,
JOHN ADAMS,
HARVEY J. ELAM,
Counsel for The Chase National Bank of the City of New York, Trustee.

BAKER, HOSTETLER & PATTERSON,
Union Commerce Building,
Cleveland, Ohio,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1941.

THE CITY OF INDIANAPOLIS, *et al.*, *Petitioners*, v. THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, etc., *et al.*, *Respondents.*	**Nos. 10 and 11.**
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, etc., *Cross-Petitioner*, v. CITIZENS GAS COMPANY OF INDIANAPOLIS, *et al.*, *Respondents.*	**Nos. 12 and 13.**

ADDITIONAL AUTHORITIES OF CHASE NATIONAL BANK, TRUSTEE, ON JURISDICTIONAL QUESTION.

During the oral argument, the Court inquired whether the Plaintiff's counsel had any authorities dealing with the realignment of parties to determine Federal jurisdiction where a creditor brought suit against both the principal and surety. In response to that question, we submit the following authorities.

Ayres v. Wiswall, 112 U. S. 187 (1884). This was an action by citizens of New York brought in a State Court in Michigan to foreclose a mortgage originally executed by F. S. Ayres, Learned and Wiswall. Wiswall had conveyed his interest to F. S. Ayres, who agreed to pay the mortgage debt. Learned had sold his interest to E. R. Ayres, and in this transaction, F. S. Ayres, James Ayres and E. R. Ayres agreed to pay the mortgage debt. The defendant, Wiswall, was a citizen of New York. The other defendants were citizens of Ohio and Michigan.

Defendants, Wiswall and Learned, two of the original mortgagors, admitted the mortgage and the debt but asked that their grantees be declared to be primarily responsible for the indebtedness. F. S. Ayres and James Ayres admitted part of the liability but did not agree that they were liable for the full amount claimed. The three Ayres who had agreed to pay the mortgage indebtedness removed the case to the Federal Court on the ground that they were citizens of states other than New York. The District Court remanded the case to the State Court and on direct appeal to this Court the judgment was affirmed. This Court held that, although Wiswall did not contest his liability and sought to have the Ayres adjudged primarily responsible for the indebtedness, he could not be realigned as a party plaintiff because plaintiffs were seeking judgment against him. Speaking through Chief Justice Waite, the Court said (P. 191):

> "... The matter in dispute between the parties on the opposite sides of the suit to enforce the mortgage was the amount due on the mortgage debt. The complainants, citizens of New York, and the defendant Wiswall, a citizen of New York, and the other defendants, citizens of Michigan and Ohio, on the other side, were not in dispute. The controversy is entirely between the complainants and all the defendants. It does not appear that any of the relief that was asked ... was sought by the defendant Wiswall. ... [illegible] ... [illegible]
>
> ... [illegible]
>
> ... [illegible]
>
>

Similarly, in *Coney v. Winchell*, 116 U. S. 227 (1886), the Supreme Court affirmed an order of the Circuit Court remanding the case to the State Court. The plaintiff mortgagee had sued to foreclose the mortgage and had joined both the original mortgagor, Carll, and the mortgagor's grantee, Coney, as defendants. Both the mortgagor and the mortgagee were citizens of Connecticut. The Court held that the mortgagor could not be realigned with the plaintiff for jurisdictional purposes, but must remain as a defendant, since the plaintiff was seeking a judgment against him.

The two cases cited are just the converse of the situation here before the Court. In each of these cases, the mortgagor and the mortgagee were citizens of the same state and in both cases the Court held that the mortgagor could not be aligned with the mortgagee, although the grantee was the party primarily liable and the mortgagor in one of the cases was asking the Court to determine that the grantee was primarily liable. It follows from these cases that Indianapolis Gas, against whom the Plaintiff seeks a judgment in this case, can not be realigned with the Plaintiff merely because the City or the trust property may be primarily liable.

See also *Mutual Reserve Fund Life Association v. Farmer*, 77 Fed. 926 (C. C. A. 8th 1896).

In *Feidler v. Bartleson*, 161 Fed. 30 (C. C. A. 9th 1908), the Court sustained Federal jurisdiction. Plaintiff, a nonresident of Washington, had recovered judgment against F. J. Feidler in the State Court. He thereupon brought suit in the Federal Court in Washington against F. J. Feidler and the administratrix of the Estate of Ed Feidler, claiming that the two brothers had been partners and that the partnership assets were the debtor's only assets. The bill alleged that the defendant administratrix denied the fact of the partnership.

Both of the defendants were citizens of Washington. The administratrix attacked the jurisdiction of the Court on the

ground that the plaintiff was attempting to establish a claim which his judgment debtor, F. J. Feidler, had against a citizen of Washington. Jurisdiction was sustained in the District Court and, on appeal, the judgment was affirmed. In sustaining jurisdiction, the Circuit Court of Appeals said (P. 35):

> "It is urged, further, that the demurrer should have been sustained for the reason that the appellee sought by his bill to compel the defendants therein, who are both residents of the state of Washington, to litigate in the Circuit Court a demand which one had against the other. To this it is only necessary to say that the bill is not brought to permit or to compel the defendants therein to litigate between themselves. It is a bill to establish the existence of a partnership between Ed. L. Feidler and F. J. Feidler, only for the purpose of subjecting the interest of the latter in the partnership funds to the payment of the appellee's judgment."

These cases like the cases previously cited (Pl. Br. 41-3) establish that as long as plaintiff is asserting *any* claim against a defendant that defendant will not be realigned with plaintiff in determining federal jurisdiction. The claims asserted by the *plaintiff* determine federal jurisdiction, not the attitude of the defendants among themselves.

Respectfully submitted,

HOWARD F. BURNS,
JOHN ADAMS,
HARVEY J. ELAM,
Counsel for The Chase National Bank of the City of New York, Trustee.

BAKER, HOSTETLER & PATTERSON,
Union Commerce Building,
Cleveland, Ohio,
Of Counsel.

Filed October 16, 1941.

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SEP 12

CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1940.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc.,
Petitioner,
vs.
CITIZENS GAS COMPANY OF INDIANAPOLIS, *et al.*,
Respondents.

No. 423

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc.,
Petitioner,
vs.
THE INDIANAPOLIS GAS COMPANY, *et al.*,
Respondents.

No. 424

CROSS-PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

HOWARD F. BURNS,
WILLIAM L. TAYLOR,
HARVEY J. ELAM,
Counsel for Petitioner.

BAKER, HOSTETLER & PATTERSON,
Union Commerce Building,
Cleveland, Ohio,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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In the Supreme Court of the United States

OCTOBER TERM 1940.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc.,
Petitioner,
vs.
CITIZENS GAS COMPANY OF INDIANAPOLIS, *et al.*,
Respondents.
No. .....

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc.,
Petitioner,
vs.
THE INDIANAPOLIS GAS COMPANY, *et al.*,
Respondents.
No. .....

CROSS-PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

This cross-petition of The Chase National Bank of the City of New York, Trustee, respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

The petitioner contends that there is no occasion for granting a writ of certiorari in these causes and presents its cross-petition for the sole purpose of obtaining a review of the rulings of the Circuit Court of Appeals adverse to it, in the event this Court grants the petitions for certiorari

filed by the City of Indianapolis, *et al.*, so that in such event all questions presented to the lower Court will be before this Court.

In 1902 defendant, The Indianapolis Gas Company, gave an open mortgage upon its plant and property to one of the plaintiff's corporate predecessors to secure an authorized bond issue of $7,500,000. (Bill, Exhibit A, I R. 23; Offered, II R. 327.) In 1913 The Indianapolis Gas Company leased its property to defendant, the Citizens Gas Company, as lessee, for 99 years, the lessee agreeing as part of the rental to be paid by it to pay the interest on the outstanding mortgage Bonds of The Indianapolis Gas Company and on any additional Bonds which might subsequently be issued. (Bill, Exhibit B, I R. 51; Offered, II R. 327.) Citizens Gas Company paid the interest on the mortgage Bonds from 1913 to 1935 (II R. 627, Stip.* par. 11(a)), and sold about $2,000,000 of the Bonds to the public on representations that it had a 99 year lease on the property and had agreed to pay the interest on the Bonds as part of the rental. (II R. 627, Stip. par. 10(a); II R. 573, 592-605; III R. 899-922.) On September 9, 1935 it conveyed all of its property, including the Lease in question, to the City of Indianapolis, the entire consideration being paid to the bondholders and stockholders of Citizens Gas Company, leaving it without assets. (II R. 634-5, Stip. pars. 16-17.)

The City accepted and recorded the various instruments of transfer, including an assignment of the Lease, went into possession of the Citizens Gas property, including the leased property, and has operated all of said property and received the revenues therefrom continuously since September 9, 1935. (II R. 330, 350, 467-8; II R. 622-3, Stip. par. 6(c).) The City claimed, however, that it had not

---

* The abbreviation "Stip." refers to a Stipulation of the parties introduced in evidence in the District Court as Plaintiffs' Exhibit 1. This Stipulation appears at II R. 616-639 and was introduced in evidence at II R. 326-7.

accepted a transfer of the leased property and that it was entitled to keep and operate the leased property without any liability under the provisions of the Lease which had been assigned to it. The City paid the Bond interest due on October 1, 1935 and on April 1, 1936, but no interest has been paid since April 1, 1936.

The petitioner, The Chase National Bank of the City of New York, Trustee, brought this action in the District Court of the United States for the Southern District of Indiana, suing as Trustee under the Indianapolis Gas mortgage and joining Indianapolis Gas, Citizens Gas, and the City as defendants. Plaintiff sought to recover judgment for the overdue interest on the Bonds, with interest on unpaid interest, against all the defendants and against the property once owned by Citizens Gas and transferred by it to the City of Indianapolis. Plaintiff also sought a declaratory judgment to establish that the Lease from Indianapolis Gas to Citizens Gas was and is binding on all the defendants and on the property transferred to the City by Citizens Gas. Federal jurisdiction was based on diversity of citizenship.

The District Court denied plaintiff any relief except a judgment against Indianapolis Gas alone in the amount of the unpaid coupons, but without interest on unpaid interest. The District Court held, however, that the judgment for overdue interest against The Indianapolis Gas Company bore interest at the rate of 6% per annum. (III R. 1193.)

Separate appeals were taken by plaintiff and Indianapolis Gas to the Circuit Court of Appeals for the Seventh Circuit. These two causes, Nos. 7143 and 7144, were heard together on the same record. The Circuit Court of Appeals reversed the judgment of the District Court and held that plaintiff was entitled to the relief prayed for, including interest on unpaid interest. The Court of Appeals held,

however, that the unpaid interest coupons bear interest at the rate of 5% from maturity to the date of judgment and that the judgment itself bears interest at the same rate (IV R. 1305-6), whereas plaintiff contends that the correct rate in each instance is 6%. The difference between the 5% and 6% rates up to October 1, 1940, amounts to something over $30,000.

This cross-petition is filed to the end that all the questions presented to the lower Court may be before this Court in the event it grants the City's petitions for writs of certiorari. Petitioner believes that there are no questions involved in these cases warranting the granting of a writ, either at the request of the City or this cross-petitioner, but in the event certiorari is granted it wishes to have all the questions decided by the lower Court here for decision.

The District Court made findings of fact (III R. 1160) and conclusions of law (III R. 1190) and wrote an opinion. (III R. 1122.)

The opinion of the Circuit Court of Appeals (IV R. 1281-1306) is reported in 113 F. (2d) 217.

B.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (28 U. S. C. § 347(a)).

The judgments of the Circuit Court of Appeals for the Seventh Circuit were entered on June 6, 1940. (IV R. 1307-8.) The City's petition for a rehearing and its petition for a reargument were denied July 19, 1940. (IV R. 1336.) The City's second petition for a rehearing was denied August 15, 1940. (IV R. 1405.)

C.

THE QUESTIONS PRESENTED.

This cross-petition presents the following questions for determination, in the event that the City's petitions for certiorari are granted:

(1) Are the sums due on the unpaid coupons in these cases "money due on any instrument in writing," within the meaning of the Indiana statute (§ 19-2003, *Burns Indiana Statutes*)* which provides that the rate of interest on such money shall be 6%?

(2) Do the unpaid coupons contain any agreement as to the rate of interest *thereon* which precludes the collection of interest thereon after maturity at the legal rate of 6%, in accordance with the provisions of the aforesaid statute?

(3) Do the unpaid coupons contain any agreement as to the rate of interest thereon, so as to preclude the application of the Indiana statute (§ 19-2002, *Burns Indiana Statutes*)† which provides that the rate of interest on judgments shall be 6%, if the contract sued on contains no agreement as to the rate of interest on the contract itself?

---

* Section 19-2003, *Burns Indiana Statutes*, 1933, in so far as material, reads as follows:

> "On money due on any instrument in writing, * * * interest shall be allowed at the rate of six dollars [$6.00] a year on one hundred dollars [$100.00]."

† Section 19-2002, *Burns Indiana Statutes*, 1933, reads as follows:

> "Interest on judgments for money, whenever rendered, shall be from the date of the return of the verdict or finding of the court, until the same is satisfied, at the rate per cent agreed upon in the original contract sued upon, not exceeding eight [8] per cent where the obligor in such contract is a person other than a corporation; and if there be no contract by the parties, then at the rate of six [6] per cent per annum."

(4) Is there any warrant for reading into the coupons an implied agreement that the rate of interest *on the coupons* after their maturity shall be 5%, merely because the coupons themselves represent 5% interest *on the Bonds?*

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRITS.

Plaintiff contends that these cases present no grounds for the exercise of this Court's discretionary power to grant a writ of certiorari. This cross-petition is filed for the sole purpose of anticipating the situation which would be presented if this Court grants the City's petitions for certiorari and brings these cases to this Court for review, in which event plaintiff desires a review of the rulings by the Circuit Court of Appeals which are adverse to it.

If the City's petitions for certiorari are granted, plaintiff wishes to present for consideration certain errors by the Circuit Court of Appeals as follows:

(1) Its error in holding that the rate of interest on the unpaid coupons shall be 5%, whereas the Indiana statute (§ 19-2003, *Burns Indiana Statutes*) provides that the rate of interest on "money due on any instrument in writing" shall be 6%.

(2) Its error in holding that the coupons themselves specify the rate of interest to be paid on the coupons after their maturity, and thereby preclude the collection of interest thereon at the legal rate of 6%.

(3) Its error in holding that the rate of interest on the judgment itself shall be 5%, whereas the Indiana statute (§ 19-2002, *Burns Indiana Statutes*) provides that the rate of interest on a judgment shall be 6%, if the obligation sued on contains no agreement as to the rate of interest to be paid on the obligation itself.

(4) Its error in holding that the coupons themselves specify the rate to be paid on the coupons after their maturity, and thereby preclude the collection of interest on the judgment at the rate of 6% per annum, the rate provided by statute when the obligation sued on contains no provision as to the interest to be paid on the obligation itself.

(5) Its error in holding that the coupons contain an implied agreement that the rate of interest *on the coupons* after their maturity shall be 5%, merely because the coupons themselves represent 5% interest *on the Bonds*.

WHEREFORE, your petitioner respectfully prays, in the event the petitions for writs of certiorari filed by the City of Indianapolis, *et al.*, in this Court on the 12th day of September, 1940, Nos. 421 and 422, October Term, 1940, or either of them, or any other petition for certiorari in either of these cases, is granted, and only in such event, that your petitioner may also be granted writs of certiorari to be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Seventh Circuit, requiring that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket *The Chase National Bank of the City of New York, Trustee, Plaintiff-Appellant, v. Citizens Gas Company of Indianapolis, et al., Defendants-Appellees*, No. 7143, and in the case numbered and entitled on its docket *The Chase National Bank of the City of New York, Trustee, Plaintiff-Appellee, v. The Indianapolis Gas Company, Defendant-Appellant*, No. 7144; that this Court require the United States Circuit Court of Appeals for the Seventh Circuit to modify its opinion, decision, and order in said causes so as to provide for plaintiff's recovery of interest on the unpaid coupons from the dates of their respective maturities to the date of the judgment at the rate of 6% per an-

num. and interest on the judgment itself at the rate of 6% per annum until the judgment is satisfied; and that your petitioner be granted such other and further relief in these premises as to this Honorable Court may seem meet and just.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, *Trustee*,

By HOWARD F. BURNS,
WILLIAM L. TAYLOR,
HARVEY J. ELAM,
Counsel for Petitioner.

BAKER, HOSTETLER & PATTERSON,
Union Commerce Building,
Cleveland, Ohio,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc.,
Petitioner,
v.
CITIZENS GAS COMPANY OF INDIANAPOLIS, et al.,
Respondents.
No. 423

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc.,
Petitioner,
v.
THE INDIANAPOLIS GAS COMPANY, et al.,
Respondents.
No. 424

ANSWER OF RESPONDENTS CITY OF INDIANAPOLIS AND INDIVIDUAL MEMBERS OF THE BOARDS OF TRUSTEES AND DIRECTORS TO CROSS PETITION OF PETITIONER FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

EDWARD H. KNIGHT,
Corporation Counsel,
MICHAEL B. REDDINGTON,
City Attorney,
WILLIAM H. THOMPSON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
Counsel for said Respondents.

THOMPSON, O'NEAL & SMITH,
1350 Consolidated Building,
Indianapolis, Indiana,
Of Counsel.

C. E. Pauley & Co., Inc., Indianapolis

IN THE

SUPREME COURT OF THE UNITED STATES

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No. 424

ANSWER OF RESPONDENTS CITY OF INDIANAPOLIS AND INDIVIDUAL MEMBERS OF THE BOARDS OF TRUSTEES AND DIRECTORS TO CROSS-PETITION OF PETITIONER FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The City of Indianapolis and the individual members of its Boards of Trustees and Directors of its Department of Utilities, Respondents in the above entitled causes, respectfully show to this Honorable Court:

A.

Allowance of Writs on Cross-Petition.

In view of the dissatisfaction of cross-petitioner, as expressed in Causes 423 and 424 in this Court, with the rulings by the United States Circuit Court of Appeals for the Seventh Circuit, the City of Indianapolis and the individual members of its Boards of Trustees and Directors for its Department of Utilities, Respondents, have no objection in answer to the Cross-petitions of petitioner to the granting of the writs asked for by cross-petitioner to review the decision of the United States Circuit Court of Appeals for the Seventh Circuit in the manner as prayed for in said cross-petitions.

Respectfully submitted,

Edward H. Knight,
Corporation Counsel,
Michael B. Reddington,
City Attorney,
William H. Thompson,
Perry E. O'Neal,
Patrick J. Smith,
1350 Consolidated Building,
Indianapolis, Indiana,
Counsel for said Respondents.

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In the Supreme Court of the United States

OCTOBER TERM, 1941.

THE CITY OF INDIANAPOLIS, *et al.*,
Petitioners,
v.
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, etc., *et al.*,
Respondents.
Nos. 10 and 11.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, etc.,
Cross-Petitioner,
v.
CITIZENS GAS COMPANY OF INDIANAPOLIS, *et al.*,
Respondents.
Nos. 12 and 13.

PETITION OF THE CHASE NATIONAL BANK, TRUSTEE, FOR REHEARING.

HOWARD F. BURNS,
JOHN ADAMS,
HARVEY J. ELAM,
Counsel for The Chase National Bank of the City of New York, Trustee.

BAKER, HOSTETLER & PATTERSON,
Union Commerce Building,
Cleveland, Ohio,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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Respondents.
Nos. 12 and 13.

PETITION OF THE CHASE NATIONAL BANK, TRUSTEE, FOR REHEARING.

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

Now comes the above named The Chase National Bank of the City of New York, Trustee, respondent in causes 10 and 11 and cross-petitioner in causes 12 and 13, and presents this, its Petition for Rehearing in each of the above entitled causes, and in support thereof respectfully shows:

SUMMARY OF GROUNDS OF PETITION.

FIRST: The opinion of the Court is based upon mistakes of fact as to the record and the issues presented in the trial court, and therefore overlooks the many "collisions of interest" between plaintiff and Indianapolis Gas which make a realignment wholly improper.

SECOND: The opinion of the Court is based on a manifest misapprehension of the law as laid down in the decisions of this Court and consistently followed by the lower federal courts, in that in no prior case has any federal court either

(a) required a defendant, against whom a money judgment was either sought or obtained, to be realigned with plaintiff for jurisdictional purposes, or

(b) tried to determine the most important controversy in a case involving several parties and a number of issues, and realigned the parties in accordance with their attitude toward that one controversy, without regard to their position as to the remaining controversies in the case.

THIRD: This petitioner has not had an adequate opportunity to present its position as to the authorities relied upon by the Court, almost all of which had never been cited in the briefs of any of the parties and *all* of which are clearly distinguishable from the case at bar.

FOURTH: The rule laid down by the Court—that in a case involving several parties and multiple issues an attempt must be made to determine the "primary and controlling matter" in dispute and that the various parties must be realigned in accordance with their attitude toward that single issue, without regard to their position as to the other issues in the case—is wholly impracticable and impossible of application.

GROUNDS URGED IN SUPPORT OF PETITION WITH SUPPORTING REASONS.

First: The opinion of the Court is based upon mistakes of fact as to the record and the issues presented in the trial court, and therefore overlooks the many collisions of interest between plaintiff and Indianapolis Gas which make a re-alignment wholly improper.

The Court's conclusion (Opinion, pp. 4-5) that everything in this case is merely "incidental" to the so-called "dominating controversy" between plaintiff and the City as to the validity of the Lease is based on mistakes as to the facts shown in the record and the issues presented in the lower courts. The "realities of the record" are clear. Chase, a citizen of New York, representing the bondholders for whom it was trustee, sought judgments against each of the three defendants, citizens of Indiana, aimed at:

(1) Collecting the overdue interest from each of them.

(2) Protecting the security against encroachments and other threatened encroachments by all three of the defendants.

As to each of these objects *specific relief was sought against each of the defendants*, and particularly against Indianapolis Gas and the City. Since the majority opinion refers to these objects as "window dressing designed to satisfy the requirements of diversity jurisdiction," they deserve more than passing consideration.

1. Plaintiff sought an order, pending final judgment, restraining Indianapolis Gas from interfering with the Lease in any way (Prayer 4, I R. 21). This prayer was supported by the allegations of paragraph 23 of the Bill. During the oral argument the City's counsel stated that the evidence showed these allegations to be "absolutely untrue." The facts are exactly the contrary. Let us detail some:

July 23, 1935 (III R. 836). City offered "to enter into negotiations with" Indianapolis Gas "looking toward a revision of this lease."

September 27, 1935 (III R. 967). City refers to its "repeated requests for an opportunity to negotiate a lease" and inquires whether Indianapolis Gas is "willing to undertake to negotiate such an agreement."

September 30, 1935 (III R. 838). Indianapolis Gas says that it "will, of course, be glad to take part in such a discussion."

September 30, 1935 (III R. 839). City requests Indianapolis Gas to fix time for conference.

February 8, 1936 (III R. 839). Indianapolis Gas requests City to submit specific "prices, terms and conditions."

February 10, 1936 (III R. 840-2). City offers $7,500,000 to Indianapolis Gas with interest from March 9, 1936, for Indianapolis Gas property.

In the face of such evidence it can hardly be denied that the City and Indianapolis Gas were carrying on negotiations looking "toward a cancellation of said lease and the destruction and waste" of plaintiff's security.

2. Plaintiff prayed that the Lease be declared "a valid and binding obligation in all its terms and conditions" as against Indianapolis Gas as well as Citizens Gas and the City (Prayer 2, I R. 20-21). What has just been said reveals the necessity of this relief against *all* the defendants. The rights of plaintiff and Indianapolis Gas under the Lease are separate and distinct and any new arrangement between Indianapolis Gas and the City might have sacrificed rights enjoyed by the Bondholders in order to protect the interests of the stockholders.

3. Plaintiff sought a declaration that the contract of March 2, 1936, had no effect on the rights of the bondholders under the Lease (I R. 259, Par. (4)).

The Lease required the lessee to pay the bond interest *to the bondholders* (I R. 69, Par. 21; I R. 72, Par. 22) but this contract made *all* the rent payable to Indianapolis Gas (I R. 206, Par. (b)), thus subjecting these payments, in

the hands of Indianapolis Gas, to being seized by other creditors of that company. There was no doubt in the City's mind that this contract of March 2, 1936, was disadvantageous to the Trustee and the Bondholders. Indeed, the City sought by its counter-claim to have a declaration that the agreement of March 2, 1936, was "binding according to its terms upon plaintiff" and that the resulting use of the property was binding "upon plaintiff and the bondholders represented by it" (I R. 187).

There was grave danger that performance under this agreement of March 2, 1936, would, if it were binding upon plaintiff, be a full performance of the City's obligations under the Lease. This might well have deprived the bondholders of their right to secure interest on overdue coupons, an item which now amounts to almost a quarter of a million dollars.

The Court's opinion purports to answer this argument by stating (p. 5, note 3) that the Lease contained "no provisions requiring payment of the interest direct to Chase or the bondholders." The Court of Appeals held exactly to the contrary and no party assigned any error to such holding.

As a matter of fact, the Lease provided specifically that the lessee would perform all the obligations of the mortgagor except that as to the payment of the principal of the Bonds (Lease, Par. 22, I R. 72). The mortgage contained a covenant whereby Indianapolis Gas expressly agreed "to and with" the Trustee that it would provide for and pay the principal and interest on the Bonds (I R. 44) and further provided that the Trustee could compel specific performance of all covenants of the mortgage (I R. 46). Citizens Gas admitted that while it held the mortgaged property it had paid the interest "by making payment directly to the Trustee of said bonds or to the bondholders themselves" (I R. 257, 270). The Circuit Court of Appeals specifically held that the Trustee had the right to recover the interest from Indianapolis Gas (IV R. 1362-3)

and the rent from Citizens Gas and the City (IV R. 1306). No party assigned error to this determination and yet, in deciding the jurisdictional question, this Court assumed a state of facts directly opposite to that adjudicated by the Court of Appeals.

4. Plaintiff sought a decree ordering the City to pay to *plaintiff* all the interest payments becoming due thereafter (Prayer 7, I R. 21). Since this relief directly contravened the agreement of March 2, 1936, between Indianapolis Gas and the City, by which those two defendants sought to deprive plaintiff and the Bondholders of rights secured under the Lease, Indianapolis Gas was obviously a necessary *defendant* in the securing of such relief.

5. Plaintiff sought a judgment against *all* the defendants for the unpaid interest, with interest on the unpaid interest, and for plaintiff's expenses and attorneys' fees (Prayer 8, I R. 21; Prayer 10, II R. 301). Indianapolis Gas vigorously contested plaintiff's right to any personal judgment against it and successfully contended, in the District Court, that plaintiff was not entitled to recover interest on the unpaid coupons. Indianapolis Gas appealed from the judgment against it and urged in the Court of Appeals that plaintiff, as Trustee, was not the proper party to recover a personal judgment on the unpaid coupons, that plaintiff had no right to interest on interest, that the rate of interest was in any case not more than 5%, and that plaintiff could not have both a declaratory judgment and a coercive judgment. These questions were dealt with in detail by the Court of Appeals (IV R. 1301-6) and that court sustained the position of Indianapolis Gas as to the proper rate of interest on the judgment and on the overdue coupons.

The Court states that plaintiff did not bring this suit to obtain a *declaration* that Indianapolis Gas is responsible for the interest payments (p. 5, note 3). This is true but wholly immaterial. Plaintiff did sue to obtain

judgment against Indianapolis Gas for the unpaid interest, with interest on interest, and was successful against the vigorous opposition of Indianapolis Gas. This relief, *in no way dependent upon the validity of the Lease*, was obviously of importance in plaintiff's efforts *to obtain actual payment* of those items, particularly if the Lease were held invalid, since it would then be necessary for plaintiff to reach the assets of Indianapolis Gas, such as its rights against the City for use and occupation.

6. Plaintiff sought a judgment against each of the defendants for all losses caused by the failure to make or cause to be made the repairs and renewals necessary to maintain the mortgaged premises (Prayer 10, II R. 301). In so far as these failures occurred before September 9, 1935, *the liability of the defendants did not depend in any way upon the continuing validity of the Lease*. Indianapolis Gas was liable for such failure as mortgagor. Citizens Gas was liable by the terms of the Lease (I R. 64), which it admitted to be valid as long as it held possession. The City was liable for these defaults of Citizens Gas by reason of

(a) Accepting the property of Citizens Gas subject to all liabilities of Citizens Gas;

(b) Executing the Indemnity Agreement (II R. 306-7).

Here was a direct collision of interest in which all three of the defendants had precisely the same interest, namely, to claim that the property had been properly maintained. *The determination of this issue did not depend in any way upon the continuing validity of the Lease.*

7. Plaintiff sought an order compelling Indianapolis Gas to apply to the satisfaction of any judgments recovered against it all of its assets, including its right to recover from the City for the use of its property, whether under the Lease or otherwise (Prayer 12, II R. 302). *The right thus asserted did not depend in any way upon the validity of the Lease.* If the Lease was valid, plaintiff sought to reach as an asset of Indianapolis Gas the rental due under the Lease.

If the Lease was not valid, plaintiff sought to reach any amounts which were due to Indianapolis Gas for the City's use and occupation of the mortgaged property. In this branch of the case Indianapolis Gas was the primary debtor and the City merely a garnishee and the case is governed by *Merchants' Cotton Press Co. v. Insurance Co.*, 151 U. S. 368, cited in the majority opinion, in which case the court held that the primary debtor and the garnishee were properly aligned as defendants.

The right to join in one action a claim for money and a creditor's bill to reach the assets of the judgment debtor was specifically conferred by Rule 18(b) of the new Rules of Civil Procedure and this branch of plaintiff's case was strictly in accordance with the provisions of that rule.[1]

8. Plaintiff sought a declaration that any of the assets of Indianapolis Gas remaining after the satisfaction of the judgments against it were to be treated as part of the security for the Bonds and sought a sequestration of such assets (Prayer 12. II R. 303-4). It appeared specifically from the Bill that Indianapolis Gas owned $120,000 of the Mortgage Bonds and plaintiff sought to deny Indianapolis Gas the right to participate in any distribution of funds to the Bondholders until it had fully performed its obligations under the Mortgage, including those to repair and maintain the property (Prayer 12, II R. 304).

Clearly, these various objects of plaintiff's suit presented a number of very real and significant controversies between plaintiff and Indianapolis Gas which cannot be dismissed as mere "window dressing" or "illusive artifices." The Court's opinion indicates that the majority overlooked the importance of these objects and was led to do so by

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[1] The first sentence of Rule 18(b) reads:

"Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties."

the fact that the validity of the Lease was the only important question presented to the Supreme Court. This is shown by the Court's reliance (Opinion, p. 5) on plaintiff's statement in its rejoinder brief in this Court that "This case presents only one fundamental issue—whether the lease became part of the trust *res* in the hands of the corporate trustee" (p. 2). The importance attached to this statement is warranted only on the assumption that the Court was directing its consideration of the jurisdictional question to the issues presented in the Supreme Court and not to those presented in the lower courts. Undoubtedly the issue thus stated in plaintiff's rejoinder brief was the fundamental issue between plaintiff and the City *as the case was presented in the Supreme Court*, but plaintiff never admitted, and it is not the fact, that the case contained only that issue in either of the lower courts.

That the issue thus stated in plaintiff's rejoinder brief was the principal question presented to this Court resulted from the following wholly fortuitous circumstances:

(1) That Citizens Gas filed no petition for certiorari.

(2) That Indianapolis Gas filed no petition for certiorari.

(3) That the City did not raise by its petition for certiorari many questions ruled adversely to it by the Circuit Court of Appeals.

(4) That the District Court reserved for later determination certain issues which were not dependent in any way upon the continuing validity of the Lease.

Under these circumstances, it was only natural for the Court to overlook the many important issues between plaintiff and Indianapolis Gas which were presented to the District Court for determination or were reserved by that court for later determination. The fact that the Court did overlook these issues is, we submit, a persuasive ground for a rehearing.

Second: The opinion of the Court is based on a manifest misapprehension of the law as laid down in the decisions of this Court and consistently followed by the lower federal courts, in that in no prior case has any federal court either

(a) required a defendant, against whom a money judgment was either sought or obtained, to be realigned with plaintiff for jurisdictional purposes, or

(b) tried to determine the most important controversy in a case involving several parties and a number of issues, and realigned the parties in accordance with their attitude toward that one controversy, without regard to their position as to the remaining controversies in the case.

Entirely aside from the many other conflicts of interest between plaintiff and Indianapolis Gas outlined above (pp. 3-8), which are in themselves ample to sustain jurisdiction, this case presents a simple question:

When a mortgagee sues a mortgagor and a transferee of the mortgaged property, claiming that the transferee has assumed the mortgage, and seeking to collect the indebtedness from both the mortgagor and the transferee, does the fact that the mortgagor admits or even insists upon the primary liability of the transferee require the realignment of the mortgagor as a plaintiff?

To put the question in more general terms, when a creditor sues a principal and surety, seeking to collect the debt from both, and the surety takes the position that the principal is liable *as principal*, must the surety against whom a judgment is sought by the plaintiff be realigned for jurisdictional purposes?

Until the decision of the present case no federal court had ever required such realignment. On the contrary, every decision of any federal court which has ever dealt with the problem has held that the mortgagor or the surety

cannot be realigned, since the plaintiff is seeking a judgment against him.

Ayres v. Wiswall, 112 U. S. 187 (1884);
Coney v. Winchell, 116 U. S. 227 (1886);
Mutual Reserve Fund Life Association v. Farmer, 77 Fed. 929 (C. C. A. 8th, 1896).

In the first case cited the mortgagee and mortgagor were citizens of the same state and the transferee of the mortgaged property sought removal, urging that the mortgagor, Wiswall, should be realigned with plaintiff for jurisdictional purposes, since the mortgagor was supporting the plaintiff's contention that the transferee was liable. This is precisely the same contention as to realignment which is now being advanced by the City. The court denied that contention, saying in the *Ayres* case (112 U. S. 191):

"* * * In order that the complainants may get all the relief they ask, and which, upon their showing in the bill, they are entitled to, Wiswall is a necessary and substantial party to the suit, and on the opposite side from them."

In distinguishing the *Removal Cases*, 100 U. S. 457, and *Pacific Railroad v. Ketchum*, 101 U. S. 289, relied upon in the majority opinion, in both of which no relief was asked against the party sought to be realigned, Chief Justice Waite said (p. 192):

"* * * Here, however, relief is asked against Wiswall, and it grows directly out of the subject matter of the action, to wit, the collection of the mortgage debt which Wiswall owes jointly with the other debtors."

The decision in *Coney v. Wiswall*, *supra*, was to the same effect. It follows from these cases that a party must remain as a defendant if the plaintiff asks relief against him, otherwise the relief sought could not be granted. This proposition conclusively establishes that Indianapolis Gas should remain as a party defendant.

In no case cited by this Court or the City's counsel, and so far as we know in no case decided by any federal court, has it been held that a defendant against whom a money judgment was either sought or obtained could be realigned with plaintiff for jurisdictional purposes.

Beyond that, no case has been cited by the City's counsel or the Court involving several parties and multiple issues in which the court has attempted to determine the most important controversy presented and then has realigned the parties in accordance with their attitude toward that one controversy, without regard to their position as to the remaining controversies in the case. Whenever anyone has contended that federal jurisdiction should be determined in this way the courts have denied such contention and have refused to realign a defendant against whom relief was sought, even though that defendant favored the relief asked against another defendant.

Sutton v. English, 246 U. S. 199, 204 (1918);

Republic National Bank & Trust Co. v. Massachusetts Bonding and Insurance Co., 68 F. (2d) 445, 447 (C. C. A. 5th, 1934);

Detroit Tile & Mosaic Co. v. Mason Contractors' Association, 48 F. (2d) 729, 731 (C. C. A. 6th, 1931);

Franz v. Franz, 15 F. (2d) 797, 799 (C. C. A. 8th, 1926);

Feidler v. Bartleson, 161 Fed. 30, 35 (C. C. A. 9th, 1908);

Rex Co. v. International Harvester Co., 107 F. (2d) 767, 768 (C. C. A. 5th, 1939).

The same view was adopted in the Fourth Circuit in an opinion announced between the first and second arguments of the case at bar.

Mayor of Baltimore v. Crown Cork & Seal Co., 122 F. (2d) 385, 391-2 (C. C. A. 4th, August, 1941).

The cases cited in the majority opinion are either remote from the question at issue or clearly distinguishable. They may be roughly subdivided into four categories:

(1) Those in which the realignment was based on the fact that no relief was asked against the defendant realigned and the relief sought would have benefited that defendant.[2]

(2) Those in which the court refused to realign a merely nominal defendant which had no independent interest in the controversy.[3]

(3) Those involving suits by a minority shareholder in behalf of his corporation in which the corporation, controlled by those adverse to plaintiff, was held to be a proper defendant.[4]

(4) Those in which the court refused to realign as plaintiffs defendants against whom the plaintiff sought affirmative relief.[5] These cases support rather than deny jurisdiction in the case at bar, since they recognize the impossibility of realigning as a plaintiff a defendant against whom affirmative relief is sought.

The Court has cited a number of cases in which this Court or other federal courts have referred to the "actual controversy" or the "principal purpose of the suit" or the

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[2] *Niles-Bement-Pond Co. v. Iron Moulders Union*, 254 U. S. 77; *Dawson v. Columbia Trust Co.*, 197 U. S. 178; *Pacific R. R. Co. v. Ketchum*, 101 U. S. 289; *Steele v. Culver*, 211 U. S. 26; *Lee v. Lehigh Valley Coal Co.*, 267 U. S. 542; *Pittsburgh C. & St. L. Ry. Co. v. B. & O. R. R.*, 61 Fed. 705; *Cilley v. Patten*, 62 Fed. 498; *Board of Trustees v. Blair*, 70 Fed. 434; *Allen-West Commission Co. v. Brashear*, 176 Fed. 119; *Lindauer v. Compania Palomas, etc.*, 247 Fed. 428; *DeGraffenreid v. Yount-Lee Oil Co.*, 30 F. (2d) 574.

[3] *Helm v. Zarecor*, 222 U. S. 32; *Removal Cases*, 100 U. S. 457.

[4] *East Tennessee, etc. Railroad v. Grayson*, 119 U. S. 240; *Doctor v. Harrington*, 196 U. S. 579; *Venner v. Great Northern Ry. Co.*, 209 U. S. 24.

[5] *Merchants' Cotton Press Co. v. Insurance Co.*, 151 U. S. 368; *Sutton v. English*, 246 U. S. 199.

"primary and controlling matter in dispute." This language was not used to distinguish between the relativ importance of various controversies, and if there were several issues to be determined no single controversy was selected for the purpose of determining realignment. In most of the cases such language was merely used in connection with a general statement that the formal arrangement of the parties by the plaintiff is not controlling and that jurisdiction will be determined after "arranging parties according to the actual controversy." In some of the cases cited such language has been used in determining whether there was a separable controversy between plaintiff and one or more defendants so that there could be a removal in spite of the lack of complete diversity. In no case cited has any such expression been used to determine the relative importance of the issues presented against the various defendants and to deny federal jurisdiction on the basis of such determination.

There was no realignment of the parties in *Sutton v. English*, 246 U. S. 199, relied upon in the Court's opinion, so that at most the case involves only a *dictum by implication* that parties might be realigned according to their "attitude towards the actual and substantial controversy." As a matter of fact that case demonstrates the existence of federal jurisdiction of the case at bar. In that case the single controversy between plaintiff and defendant Cora Spencer was adequate to prevent her realignment despite her unity of interest with plaintiffs as to the remaining issues.

The majority opinion (p. 6, note 4) seeks to distinguish *Sutton v. English* on the ground that plaintiffs had to establish their rights as against Cora Spencer before they had any standing in the case. The fact is, however, that plaintiff in the case at bar is in precisely the same situation with respect to Indianapolis Gas. In order to recover the sums demanded, either from Indianapolis Gas, Citizens Gas, or the City, plaintiff had to establish:

(1) that it was the proper party to sue for a personal judgment on the unpaid coupons;

(2) that it was entitled to interest on the overdue coupons;

(3) that such interest should be at the rate of six rather than five per cent.

Each of these propositions was vigorously contested by Indianapolis Gas and it prevailed as to the third contention. Every contention that Indianapolis Gas advanced necessarily inured to the benefit of the City, since plaintiff's rights against the City could not be any greater than its rights against Indianapolis Gas. As to those contentions Indianapolis Gas and the City stood in precisely the same position, both of them adverse to the plaintiff. As to those issues plaintiff was under precisely the same necessity of establishing its case against Indianapolis Gas that the plaintiffs in *Sutton v. English* were under of establishing their case against Cora Spencer.

If we look through the form and regard the realities of the record, it is clear that plaintiff was attempting to recover the overdue interest from all of the defendants and to protect the security against the encroachments of all of them. Since relief of precisely the same character was sought against all the defendants, there is no justification for realigning Indianapolis Gas with the plaintiff.

The rule laid down by the Court—that in a case involving several parties and multiple issues an attempt must be made to determine the "primary and controlling matter" in dispute and that the various parties must be realigned in accordance with their attitude toward that single issue, without regard to their position as to the other issues in the case—is a wholly new rule which is based on a manifest misapprehension of the intention of Congress as heretofore consistently interpreted by the Courts.

Third: This petitioner has never had an adequate opportunity to present its position as to the authorities relied upon by the Court, almost all of which had never been cited in the briefs of any of the parties and all of which are clearly distinguishable from the case at bar.

Although the briefs of all the parties and the arguments before the Court have been taken up primarily with the merits of the controversy, we are now advised for the first time (Opinion, p. 4) that certiorari was granted more than a year ago "because of the important jurisdictional issue involved."

When this case was first before this Court on certiorari in October, 1938, we, in effect, requested this Court to grant the City's petition for certiorari if there were any doubt as to jurisdiction.[6] In spite of this request certiorari was denied and we assumed, apparently erroneously, that this Court agreed with us that there was no doubt as to federal jurisdiction.

When this case was first argued to this Court in February, 1941, we pointed out, in answer to certain specific questions from the Court:

> (1) That plaintiff secured a judgment against Indianapolis Gas for over a million dollars;

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[6] Our brief opposing certiorari opened with the following statement (Chase's brief opposing certiorari, No. 168, October Term, 1938, pp. 1-2):

> "The decree to which the City takes exception is an interlocutory decree and this Court grants *certiorari* to review such decrees only 'in extraordinary cases.' However, the question of jurisdiction urged by the City would, if well founded, present an insuperable obstacle to plaintiff's recovery and if there were any doubt as to the jurisdiction of the Federal Court, the ends of justice would best be served by determining that question *now*, before the time of the courts and the parties has been devoted to a protracted trial. Our opposition to the petition for *certiorari* is therefore confined to the proposition that the decision of the Circuit Court of Appeals sustaining jurisdiction is unquestionably correct and is in accord with the decisions of this Court and of every Circuit Court of Appeals that has passed upon the question."

(2) That under the decision of this Court in *Re Metropolitan Railway Receivership*, 208 U. S. 90, 107 (1908), jurisdiction of a federal court is not destroyed even when there is a confession of judgment by a defendant, and that there was no confession of judgment in the case at bar.

(3) That plaintiff sought an injunction against Indianapolis Gas to prevent its interfering with plaintiff's rights under the Lease.

We assumed, apparently erroneously, from the interest thereafter displayed by the Court in the merits of the controversy, that the Court's questions as to jurisdiction had been adequately answered.

When, in May, 1941, the Court set this case down for re-argument, there was no indication that the question of jurisdiction was either uppermost in the Court's mind or considered of any particular importance. Since that question must be met at the threshold of every federal case, we assumed, again erroneously, that the jurisdictional questions were satisfactorily disposed of. This opinion was apparently shared by the City's counsel, since there was only a perfunctory discussion of the jurisdictional question in the briefs filed between the two arguments.[7]

During the second oral argument only one or two members of the Court indicated that they had any doubt as to federal jurisdiction and counsel for Chase was expressly invited by the Court to turn his attention to other questions.

In spite of this situation the majority opinion of the Court denied jurisdiction and rested its conclusion upon some thirty-six cases, only three of which had at any time been called to this Court's attention by the City's counsel.

As we have pointed out in the preceding pages, the Court's decision represents such a complete departure from

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[7] See City's Supplemental Memorandum filed about September 2, 1941, p. 23; Chase's Rejoinder Brief filed October 1, 1941, p. 16; City's Reply Brief filed October 14, 1941 (no discussion of jurisdiction).

every decision of this Court and every lower federal court in determining questions of alignment and lays down a rule which is so impracticable and impossible of application that it should be adopted only after thorough and complete consideration. We recognize, of course, that lack of federal jurisdiction was one of the grounds relied upon for certiorari, but in the effort to confine our briefs to a reasonable compass, and particularly in view of the perfunctory way in which the jurisdictional question was treated by the City, we have never done more than summarize our position as to jurisdiction. In view of the far-reaching effect of the Court's decision, the complete departure from all prior decisions, and the new cases relied upon in the opinion, we submit that a more thorough consideration of the questions presented should be accorded the parties.

Fourth: The rule laid down by the Court—that in a case involving several parties and multiple issues an attempt must be made to determine the "primary and controlling matter" in dispute and that the various parties must be realigned in accordance with their attitude toward that single issue, without regard to their position as to the other issues in the case—is wholly impracticable and impossible of application.

The rule laid down by the majority opinion is not only novel and manifestly at variance with the intention of Congress, as heretofore interpreted by the courts, but is wholly impracticable and impossible of application. The fundamental unsoundness of the rule so laid down becomes apparent when an attempt is made to apply it to specific situations involving several parties and multiple issues. The direct conflict between the unanimous decision of this Court in *Ayres v. Wiswall*, 112 U. S. 187, and the majority opinion in the case at bar is a helpful illustration. It was suggested during the oral argument that the *Ayres* case is distinguishable because the transferee of the mortgaged

property admitted his liability and merely disputed the amount thereof. Such a distinction is wholly unsound. The principal and indeed the only controversy in that case was the amount due. The mortgagor, Wiswall, admitted that plaintiff's claim as to the amount due was correct. If jurisdiction must be determined in accordance with the attitude of the parties toward the principal controversy, it should have been determined in *Ayres v. Wiswall* in accordance with their attitude as to the amount due. Chief Justice Waite, however, pointed out the impossibility of realigning as a plaintiff the mortgagor against whom the plaintiff sought a personal judgment.

In personal injury cases there are generally two principal issues or controversies—first, as to liability, and, second, as to the damage sustained. Where there are several joint tort feasors the liability may be clear as to one and doubtful as to others and the extent of the liability will probably be disputed by all. If a joint tort feasor who is clearly liable admits his liability but contends that the other defendants are also liable so that he may receive contribution, must he thereupon be realigned as a plaintiff and has the issue as to the liability of the other defendants become the "principal controversy" on the basis of which the parties must be realigned?

In every suit on a contract there are multiple issues and if there are several parties to the contract different issues may be important in determining the liability of each of the different parties. There may be issues as to:

(1) whether a particular defendant was a party to the contract;

(2) the proper construction of the contract;

(3) whether there was a breach of the contract, and this may be a separate issue as to each of the defendants;

(4) the extent of the damage suffered;

(5) which defendants are responsible for each particular item of damage.

Is it possible for any district court to determine from the pleadings which of these many issues is the "actual and substantial controversy" and what the ultimate attitude of each of the parties will be as to each of those controversies, so as to determine the proper alignment of the parties? Perhaps the majority intended that this question be determined, as actually happened in the present case,[8] only from the issues which happen to remain in the case when it finally reaches the Court of last resort? Such a rule would require that the case be tried and appealed on the merits before the jurisdictional question could be tested, and would be obviously absurd.

When a creditor's bill is filed, as in *Merchants' Cotton Press Co. v. Insurance Co.*, 151 U. S. 368 (1894) complicated questions are frequently presented as to

(1) the liability of the primary debtor,

(2) the liability of the primary debtor's debtor, and

(3) as in the *Cotton Press* case, the liability of a party who agreed to indemnify the primary debtor's debtor.

How, in such a case, is the court to determine the "primary and controlling matter in dispute"? An examination of the opinion in the *Cotton Press* case shows that the Court attempted to do no such thing, but followed the well-established practice of retaining as defendants all of the parties against whom the plaintiff sought any relief.

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[8] The statement in the Court's opinion (p. 5) that Chase admits "That the case presents 'only one fundamental issue'" is warranted only on the assumption that the Court is confining its consideration of the jurisdictional question to the issues presented in the Supreme Court. Chase never admitted, and it is not the fact, that the case contained only that issue in either of the lower courts.

In these various situations and in the many other situations in which there are multiple issues and a number of parties it is not possible for any district court to determine from the pleadings which of the many issues is the "actual and substantial controversy." Moreover, the relative importance of the various issues presented frequently varies from time to time as the case progresses and in such cases it is obviously impossible for the trial court to determine the ultimate attitude of each of the parties as to each of the various controversies. In such cases is the proper alignment of the parties to be determined, as in the present case, on the basis of the issues which happen to remain in the case when it finally reaches the court of last resort?

It frequently happens that many of the issues vigorously contested in the early stages of the case are not presented to the reviewing courts, because one or more of the litigants did not appeal from the decision of the trial court or did not ask this Court for certiorari, or because those who did seek a review omitted some of the issues decided against them, or because certain issues of fact or law have become unimportant in view of the determination of other issues.

No rule for determining federal jurisdiction can be practicable unless it is susceptible of application at the threshold of the litigation, that is, by the trial court before trial, or, at the latest, when any disputed jurisdictional facts have been determined. The rule laid down in the majority opinion is not practicable because it is not susceptible of application in this way. One or two illustrations will demonstrate this fact.

In *Sutton v. English*, 246 U. S. 199 (1918), reviewed in detail in our original brief (pp. 41-2), this Court sustained jurisdiction because there was a conflict between the seven heirs who were plaintiffs and the eighth heir, Cora Spencer, as to whether the community property, if recovered, would

be divided among the eight heirs or would go to Cora Spencer alone. Now, suppose that the plaintiffs had been successful in all four of their objects in the District Court so that they had a judgment for the recovery of the $100,000 and the distribution of it among themselves and Cora Spencer, and Cora Spencer then, either through inadvertence or otherwise, failed to appeal to the Circuit Court of Appeals or to seek certiorari in this Court. Then, the only issues remaining on appeal or on certiorari would have been the first two (relating to the recovery of the community property) and the conflict between plaintiffs and Cora Spencer would have disappeared. Could the failure of one litigant to appeal in such a situation destroy the jurisdiction which had originally existed in the District Court? It must be clear that since the jurisdiction originally existed, it could not be impaired by the failure of any party to appeal.

Let us apply a similar test in the case at bar. In the District Court Indianapolis Gas denied that plaintiff was entitled to any relief against it and prayed "that as to it the Bill of Complaint be dismissed" (I R. 140). Plaintiff recovered a judgment of more than $1,000,000 (with interest at 6% after judgment) against Indianapolis Gas in the District Court and failed to recover any judgment against either of the other defendants (III R. 1193). As pointed out above (pp. 6-7), Indianapolis Gas appealed from the judgment against it and vigorously urged in the Court of Appeals that plaintiff as Trustee was not the proper party to recover a personal judgment on the unpaid coupons, that plaintiff had no right to interest on interest, that the rate of interest was in any case not more than 5% and that plaintiff could not have both a declaratory judgment and a coercive judgment. These contentions were considered in detail and disposed of by the Court of Appeals (IV R. 1301-6). If the Circuit Court of Appeals had affirmed the judgment of the District Court and refused to render any judgment against the City or Citizens Gas, and Indianapo-

lis Gas alone had petitioned for certiorari to dispute its liability, this Court would of course have held that Indianapolis Gas, the only defendant against whom plaintiff had a judgment and the only one contesting the judgment of the lower court, should not be re-aligned with plaintiff for jurisdictional purposes.

Thus the decision of this Court means that if plaintiff had been successful as to some of the objects sought and unsuccessful as to the others there would have been jurisdiction, but that since plaintiff was successful in the Circuit Court of Appeals as to all the objects which it sought there was no jurisdiction. From the City's point of view this means that there was jurisdiction if the City won and no jurisdiction if the City lost. Any such rule would deprive the parties of the mutuality of protection which is essential to the even-handed administration of justice.

Jurisdiction of the federal courts has never depended and never should depend on success or failure on the merits of the controversy or on the controversies which happened to remain in a case when it finally reached this Court. The lower federal courts could not possibly apply any such criterion as this and it would make federal jurisdiction something shadowy and shifting, appearing and disappearing as the case progresses.

We submit that the impracticability or impossibility of any court, and particularly a trial court, applying the rule which has been laid down in the case at bar for the determination of jurisdictional questions—that the supposed dominant controversy must be found and the parties all aligned in respect of their attitude, if any, toward that controversy—is a convincing explanation as to why no such rule has been adopted during the more than one hundred fifty years since the first Judiciary Act was enacted, and furnishes a strong reason why no such rule should be adopted at this time.

CONCLUSION.

Perhaps the two most important reasons for federal jurisdiction in controversies between citizens of different states are:

> *First*, the fear that a state court might not administer justice impartially in controversies between citizens of that state and citizens of foreign states,[9] and
>
> *Second*, fears arising from the methods of selecting the judiciary in the several states.[10]

These reasons apply with peculiar force in a case such as the one at bar, in which a large municipal corporation of a state is one of the principal litigants, the issues affect in some degree practically all the residents of such municipality, and such residents constitute a large proportion of the electorate who select the judges both in the trial and appellate courts.

If, as the authority cited in the majority opinion suggests,[11] the time has come to eliminate or seriously curtail federal jurisdiction based on diversity of citizenship, such jurisdiction should be eliminated or curtailed by Congress and not gradually worn away by the uncertain and irregular erosion of judicial interpretation. The right of a mortgagee, in enforcing the mortgage obligation or protecting the mortgage security, to join both the mortgagor and a transferee from the mortgagor as defendants in a federal court and to have them treated as defendants for the purpose of jurisdiction was settled by this Court in two cases decided more than fifty years ago.[12] We submit that the

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[9] See statement of Chief Justice Marshall in *Bank of United States v. Deveaux*, 5 Cranch 61, 87 (1809).

[10] *Nevins, American States* (1924), 166-7, 364; *Purcell, Connecticut in Transition* (1918), 187, 199, 200.

[11] 41 *Harv. L. Rev.* 483, 510. See also, 40 *Harv. L. Rev.* 834, 871-3.

[12] *Ayres v. Wiswall*, 112 U. S. 187 (1884); *Coney v. Winchell*, 116 U. S. 227 (1886).

majority opinion in the case at bar is a complete departure from the fundamental bases upon which these decisions were rested and the well established rules of law applied therein.

We respectfully urge that a rehearing may be granted so that this important question of federal jurisdiction may be fully considered in the light of all the authorities.

Respectfully submitted,

HOWARD F. BURNS,
JOHN ADAMS,
HARVEY J. ELAM,
Counsel for The Chase National Bank of the City of New York, Trustee.

BAKER, HOSTETLER & PATTERSON,
Union Commerce Building,
Cleveland, Ohio,
Of Counsel.

Dated, December 3, 1941.

Certificate of Counsel.

We, Howard F. Burns, John Adams, and Harvey J. Elam, counsel for the above named The Chase National Bank of the City of New York, Trustee, do hereby certify that the foregoing petition for rehearing of these causes is presented in good faith and not for delay.

HOWARD F. BURNS,
JOHN ADAMS,
HARVEY J. ELAM,
Counsel for The Chase National Bank of the City of New York, Trustee.

p 2.1
pp3,4 + 5 dissent

SUPREME COURT OF THE UNITED STATES.

Nos. 10-13.—OCTOBER TERM, 1941.

City of Indianapolis, et al., Petitioners,
10 *vs.*
The Chase National Bank of the City of New York, Trustee, etc., et al.

City of Indianapolis, et al., Petitioners,
11 *vs.*
The Chase National Bank of the City of New York, Trustee, etc., et al.

The Chase National Bank of the City of New York, Trustee, etc., Petitioner,
12 *vs.*
Citizens Gas Company of Indianapolis, et al.

The Chase National Bank of the City of New York, Trustee, etc., Petitioner,
13 *vs.*
The Indianapolis Gas Company, et al.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[November 10, 1941.]

Mr. Justice FRANKFURTER delivered the opinion of the Court.

This is a suit instituted by the Chase National Bank, a New York corporation, in the federal District Court for the Southern District of Indiana, naming as defendants the Indianapolis Gas Company, the Citizens Gas Company of Indianapolis [redacted] (Indiana corporations), and the City of Indianapolis. (For brevity's sake the parties will be referred to as Chase, Indianapolis Gas, Citizens Gas, and the City, respectively.) The power of the District Court to entertain this litigation was sustained by the Circuit Court of Appeals for the Seventh Circuit under the provision of the Judicial Code conferring upon the district courts jurisdiction "Of all suits of a civil nature . . . where the matter in controversy exceeds . . . three thousand dollars, and . . . is be-

tween citizens of different States ' . . . .'' 36 Stat. 1091; 28 U. S. C. § 41(1). The correctness of this jurisdictional ruling must be determined before the merits of Chase's claims can be considered. The specific question is this: Does an alignment of the parties in relation to their real interests in the ''matter in controversy'' satisfy the settled requirements of diversity jurisdiction?

As is true of many problems in the law, the answer is to be found not in legal learning but in the realities of the record. Though variously expressed in the decisions, the governing principles are clear. To sustain diversity jurisdiction there must exist an ''actual'', *Helm* v. *Zarecor*, 222 U. S. 32, 36, ''substantial'', *Niles-Bement Pond Co.* v. *Iron Moulders Union*, [redacted] U. S. 77, 81, controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side. *Strawbridge* v. *Curtiss*, 3 Cranch 267. Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants. It is our duty, as it is that of the lower federal courts, to ''look beyond the pleadings and arrange the parties according to their sides in the dispute''. *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178, 180. Litigation is the pursuit of practical ends, not a game of chess. Whether the necessary ''collision of interests'', *Dawson* v. *Columbia Trust Co.*, *supra*, at 181, exists, is therefore not to be determined by mechanical rules. It must be ascertained from the ''principal purpose of the suit'', *East Tennessee, etc., Railroad* v. *Grayson*, 119 U. S. 240, 244, and the ''primary and controlling matter in dispute'', *Merchants' Cotton Press Co.* v. *Insurance Co.*, 151 U. S. 368, 385. These familiar doctrines governing the alignment of parties for purposes of determining diversity of citizenship have consistently guided the lower federal courts[1] and this Court.[2]

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[1] *E. g.*, Pittsburgh, C. & St. L. Ry. Co. v. Balt. & Ohio R. Co., 61 Fed. 705; Cilley v. Patten, 62 Fed. 498; Board of Trustees v. Blair, 70 Fed. 414; Allen-West Commission Co. v. Brashear, 176 Fed. 119; Lindauer v. Compania Palomas, etc., 247 Fed. 428; DeGraffenreid v. Yount-Lee Oil Co., 30 F. (2d) 574.

[2] In addition to the cases cited in the text, see Removal Cases, 100 U. S. 457, 468-70; Pacific R. Co. v. Ketchum, 101 U. S. 289, 298-99; Corbin v. Van Brunt, 105 U. S. 576; Evers v. Watson, 156 U. S. 527, 532; Doctor v. Harrington, 196 U. S. 579; Wanner v. Great Northern R. Co., 209 U. S. 24; Steele v. Culver, 211 U. S. 26, 29; Lee v. Lehigh Valley Coal Co., 267 U. S. 542; Sutton v. English, 246 U. S. 199.

And so we turn to the actualities of this litigation.

Chase is the trustee under a mortgage deed to secure a bond issue executed by Indianapolis Gas in 1902. In 1906 Citizens Gas was formed to compete with Indianapolis Gas in the distribution of light, heat, and power to the people of Indianapolis. Its franchise provided that after the expiration of twenty-five years and the performance of certain specified conditions, the company should be wound up and its property conveyed to the City subject to the company's "outstanding legal obligations". The competition between the two gas companies continued until 1913, when Indianapolis Gas leased all of its gas plant property to Citizens Gas for a term of ninety-nine years. Citizens Gas agreed to pay as rental (a) the interest on the lessor's outstanding bonded indebtedness, and (b) annual sums equal to a six per cent return on Indianapolis Gas's common stock. For twenty-two years thereafter Citizens Gas operated the mortgaged property and paid the interest on the bonds. In 1935, pursuant to its franchise, Citizens Gas conveyed its entire property, including that covered by its lease from Indianapolis Gas, to the City. But the City refused to regard itself bound by this lease. On March 2, 1936, the City and Indianapolis Gas agreed that, pending the settlement of the "presently existing controversy" between them as to whether the lease was valid and binding upon the City, the latter would deposit in escrow sums equal to the interest and dividend payments falling due. The agreement expressly provided that it was made without prejudice to either party's "position or rights".

Chase thereupon filed a bill of complaint in the District Court, naming as defendants Indianapolis Gas, Citizens Gas, and the City. It prayed that the lease from Indianapolis Gas to Citizens Gas be declared valid and binding upon the defendants, and as such be deemed part of the security for the performance of the mortgage obligations; that the City be ordered to perform all of the lessee's obligations in the lease and to pay directly to the plaintiff all of the interest payments as they shall become due; that judgment for overdue interest be entered against the defendants "liable therefor"; and that the plaintiff be awarded costs and attorneys' fees. The City and Citizens Gas specifically denied that the lease was valid and binding upon them; they alleged, further, that the controversy existed solely between Indianapolis Gas and the City, "citizens" of the same state. In its answer, Indianapolis Gas denied

that it had "ever contended or admitted that the said ninety-nine year lease was not and is not a valid and binding obligation" upon the defendants.

Finding "no collision between the interests of the plaintiff and the interests of the Indianapolis Gas Company", the District Court realigned the latter as a party plaintiff, and finding identity of citizenship between some of the plaintiffs and the remaining defendants, dismissed the suit for want of jurisdiction. The Circuit Court of Appeals reversed, one judge dissenting, 96 F. (2d) 363, and certiorari was denied, 305 U. S. 600.

On remand to the District Court Chase filed a supplemental bill alleging default as to interest payments falling due and praying judgment against the defendants in the amount of the unpaid coupons. It alleged that "neither The Indianapolis Gas Company nor Citizens Gas Company, nor both of them, have property sufficient to pay their interest in default on the Bonds, other than the property now in the possession and under the control of the City of Indianapolis". This was admitted by Indianapolis Gas. The District Court held on the merits that the lease was not enforceable against either Citizens Gas or the City, that the former had no power under its franchise to bind the latter to the lease, and that by conveying the leased property to the City, Citizens Gas thereby discharged itself of its lessee obligations. Accordingly, the Court ordered that judgment be entered only against Indianapolis Gas for the amount of the unpaid interest.

Asserting that the District Court erred in not holding the lease valid and enforceable against the defendants, both Chase and Indianapolis Gas appealed. The Circuit Court of Appeals sustained their position and again reversed, 113 F. (2d) 217. The Court held, further, that Chase was entitled to a judgment for unpaid interest against the parties in the following order of liability: the City, Citizens Gas, and Indianapolis Gas. We granted certiorari, 311 U. S. 636, because of the important jurisdictional issue involved in the litigation.

The facts leave no room for doubt that on the merits only one question permeates this litigation: Is the lease whereby Indianapolis Gas in 1913 conveyed all its gas plant property to Citizens Gas valid and binding upon the City? This is the "primary and controlling matter in dispute". The rest is window-dressing designed to satisfy the requirements of diversity juris-

diction. Everything else in the case is incidental to this dominating controversy, with respect to which Indianapolis Gas and the City, "citizens" of the same state, are on opposite sides.[3] That the case presents "only one fundamental issue" and that that is the obligation of the City under the lease, Chase admits and indeed insists upon in its brief on the merits. Chase and Indianapolis Gas have always been united on this issue: both have always contended for the validity of the lease and the City's obligation under it. The opinion of the District Court lays bare the heart of this controversy:

"There can be no doubt that both plaintiff and the defendant, The Indianapolis Gas Company, have at all times asserted that the lease in question is valid and is binding upon the City, as Trustee. Neither is there any doubt as to their interest in sustaining the validity of such lease at the time of the institution of this action, prior hereto, and at all times subsequent thereto, and that many conferences have been held by and between them, through their attorneys, and many letters have passed between them relating to this subject. . . . Later, when the parties [*i. e.*, Indianapolis Gas and the City] were unable to adjust their differences and arrive at an agreement, it was decided by The Indianapolis Gas Company and the plaintiff that a suit should be instituted. The common stockholders of that company, of course, had a vital interest in the question of the validity of the lease because, if the lease is valid, they are assured of a six per cent return upon their stock for many years. If, however, a foreclosure suit should have been begun, or if the lease is invalid, no such return is assured. It was natural, therefore, that the Gas Company should take an active interest in the litigation and attempt to guide it along the course that would be most advantageous to it and to its stockholders."

Plainly, therefore, Chase and Indianapolis Gas, are, colloquially speaking, partners in litigation. The property covered by the

[3] It is contended that, notwithstanding their indissoluble bond on the controlling issue, there are "sufficient matters in controversy" between Chase and Indianapolis Gas to preclude their alignment on the same side. Chase of course did not bring this suit in order to obtain a declaration that, regardless of the validity of the lease, Indianapolis Gas is still ultimately responsible for the interest payments on its bonded indebtedness. That was not really in issue, and by its answer, Indianapolis Gas took it out of the case. The further argument is made that, by entering into the escrow agreement with the City, Indianapolis Gas has asserted a claim to the interest payments adverse to that of Chase and the bondholders. But the facts are against this contention. The agreement deals merely with the disposition of the interest falling due during the pendency of the litigation. Moreover, the lease between Indianapolis Gas and Citizens Gas contains no provisions requiring payment of the interest direct to Chase or the bondholders. Nor can diversity jurisdiction be rested upon so flimsy a basis as Chase's prayer for reimbursement of costs and attorneys' fees. The tail flies with the kite.

lease is now in the City's possession; Chase is simply acting to protect the bondholders' security. As to Indianapolis Gas, if the lease is upheld, it will continue to receive a six per cent return on its capital, and the burden of paying the interest on its bonded indebtedness will be not upon it but upon the City. What Chase wants Indianapolis Gas wants and the City does not want. Yet the City and Indianapolis Gas were made to have a common interest against Chase when, as a matter of fact, the interests of the City and of Indianapolis Gas are opposed to one another. Therefore, if regard be had to the requirements of jurisdictional integrity, Indianapolis Gas and Chase are on the same side of the controversy not only for their own purposes but also for purposes of diversity jurisdiction. But such realignment places Indiana "citizens" on both sides of the litigation and precludes assumption of jurisdiction based upon diversity of citizenship. We are thus compelled to the conclusion that the District Court was without jurisdiction.[4] And, of course, this Court by its denial of certiorari when the case was here the first time could not confer the jurisdiction which Congress has denied.

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[4] Compare Dawson *v.* Columbia Trust Co., 197 U. S. 178, a suit by a Pennsylvania mortgagee of a Georgia waterworks company to restrain a Georgia city from building a new waterworks and to compel specific performance of the city's contract with the waterworks company. The latter was joined as a defendant, on the theory that it was a party to the contract sought to be enforced. The Court held that the bill should be dismissed for lack of jurisdiction: "... the courts will look beyond the pleadings and arrange the parties according to their sides in the dispute. When that is done, it is obvious that the waterworks company is on the plaintiff's side." 197 U. S. at 180. Ayres *v.* Wiswall, 112 U. S. 187, and Coney *v.* Winchell, 116 U. S. 227, are not applicable here. They hold merely that in a foreclosure suit the mortgagee may join the mortgagor and his assignee as defendants; they did not involve any controversy between the mortgagor and the "assignee" as to whether the assignment is binding upon the latter.

Sutton *v.* English, 246 U. S. 199, clearly holds that the parties must be aligned according to their "attitude towards the actual and substantial controversy". 246 U. S. at 204. The plaintiffs, who included all of the heirs of Mary Jane except Cora, sought to establish their right to certain property claimed to have belonged to Mary Jane. The claimants could not recover unless they proved that a residuary bequest to Cora was invalid—and with respect to this issue, their position was completely adverse to Cora's. "But, as already pointed out, even could complainants succeed in showing that Mary Jane Hubbard at the time of her death was entitled to the community property, her will giving all the residue of her property to Cora D. Spencer still stands in the way of their succeeding to it as heirs-at-law, and hence their prayer to have that will annulled with respect to the residuary clause is essential to their right to any relief in the suit." 246 U. S. at 207. If the plaintiffs prevailed on this issue of the validity of the residuary gift to Cora,

This is not a sacrifice of justice to technicality. For the question here is not whether Chase and Indianapolis Gas may pursue what they conceive to be just claims against the City, but whether they may pursue them in the federal courts in Indiana rather than in its state courts. The fact that Chase prefers the adjudication of its claims by the federal court is certainly no reason why we should deny the plain facts of the controversy and yield to illusive artifices. Settled restrictions against bringing local disputes into the federal courts cannot thus be circumvented.

These requirements, however technical seeming, must be viewed in the perspective of the constitutional limitations upon the judicial power of the federal courts,[5] and of the Judiciary Acts in defining the authority of the federal courts when they sit, in effect, as state courts. See *Madisonville Traction Company* v. *Mining Company*, 196 U. S. 239, 255, and *Ex parte Schollenberger*, 96 U. S. 369, 377. The dominant note in the successive enactments of Congress relating to diversity jurisdiction is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of "business that intrinsically belongs to the state courts" in order to keep them free for their distinctive federal business. See Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483, 510; *Shamrock Oil Corp.* v. *Sheets*, 313 U. S. 100, 108-09; *Healy* v. *Ratta*, 292 U. S. 263, 270. "The policy of the statute [conferring diversity jurisdiction upon the district courts] calls for its strict construction. The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Healy* v. *Ratta*, *supra*, at 270. In defining the boundaries of diversity jurisdiction, this Court must

their interests and hers would then be the same with respect to the remaining issues in the case. But the Court held that in relation to the "actual and substantial controversy", Cora and the plaintiffs were on opposite sides, thereby sustaining diversity jurisdiction. In Sutton v. English, alignment of the parties with respect to their real interests sustained diversity; such alignment here precludes jurisdiction. That case and this are applications of the same principle.

[5] Cf. Strawbridge v. Curtiss, 3 Cranch 267; California v. Southern Pacific Co., 157 U. S. 229, 261; Tennies v. Sunshine Mining Co., 308 U. S. 66, 71.

be mindful of this guiding Congressional policy. See *Hepburn & Dundas* v. *Ellzey*, 2 Cranch 445; *New Orleans* v. *Winter*, 1 Wheat. 91; *Morris* v. *Gilmer*, 129 U. S. 315, 328-29; *Coal Co.* v. *Blatchford*, 11 Wall. 172; *Shamrock Oil Corp.* v. *Sheets*, 313 U. S. 100; and compare *Grant* v. *M'Kee*, 1 Pet. 248; *Elgin* v. *Marshall*, 106 U. S. 578; *Healy* v. *Ratta*, 292 U. S. 263; *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

Nos. 10-13.—October Term, 1941.

City of Indianapolis, et al., Petitioners,
10 *vs.*
The Chase National Bank of the City of New York, Trustee, etc., et al.

City of Indianapolis, et al., Petitioners,
11 *vs.*
The Chase National Bank of the City of New York, Trustee, etc., et al.

The Chase National Bank of the City of New York, Trustee, etc., Petitioner,
12 *vs.*
Citizens Gas Company of Indianapolis, et al.

The Chase National Bank of the City of New York, Trustee, etc., Petitioner,
13 *vs.*
The Indianapolis Gas Company, et al.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[November 10, 1941.]

Mr. Justice Jackson.

The Chief Justice, Mr. Justice Roberts, Mr. Justice Reed and I are unable to concur in this disposition of these writs, in view of what we consider to be the controlling facts of this controversy.

Chase is trustee under a mortgage executed in 1902 by Indianapolis Gas to secure a bond issue. The mortgage covered a public utility gas plant and distribution system, together with after-acquired property, including intangibles.

In 1913 Indianapolis Gas turned the mortgaged utility system over to Citizens Gas, a competitor, under a lease for a term of ninety-nine years. Citizens Gas undertook among other things to pay the interest "as the same shall from time to time fall due"

on the bonds secured by the mortgage and also to pay certain sums, subject to some variation by reference to the price received for gas, to the stockholders of Indianapolis Gas. Citizens Gas unified this leased plant with its own, and in 1935 conveyed to the City the entire property in conformity to statute which it is contended obligates the City to assume the obligations of the lease. The City took possession of the property but refused to accept the obligations of the lease. The City and Indianapolis Gas then agreed that pending settlement of the controversy thus precipitated, sums payable under the lease as interest should be deposited in escrow, instead of being paid to Chase. Accordingly there was default in the payment to the trustee of interest on the bonds.

For jurisdictional purposes Indianapolis Gas, the mortgage debtor, and the City, whose possession of the property under the circumstances was alleged to result in an assumption of the debt, as well as Citizens Gas, the intermediate owner (who seems of no consequence to the issues under discussion), were all citizens of the State of Indiana, while Chase, the trustee, was a citizen of New York. Under these circumstances Chase began an action in the federal District Court for the Southern District of Indiana, joining Indianapolis Gas, Citizens Gas, and the City as defendants. It asked that the interest of Indianapolis Gas in the lease be adjudged a part of its security for the performance of the mortgage obligations; that the lease be declared valid and binding upon all the defendants; that the City be ordered to pay directly to the trustee all of the interest payments as they fell due; that judgment for overdue interest be entered against the defendants liable therefor, including Indianapolis Gas; and that plaintiff be awarded costs and attorneys' fees.

This Court now destroys federal jurisdiction of the case by a transposition of parties, the radical nature of which appears most clearly from the judgments rendered below. It forces into the position of co-plaintiff one party which the District Court adjudged entitled to recover over a million dollars and another which the District Court adjudged solely liable to pay that sum. This same adversity was found by the Circuit Court of Appeals, which held the one entitled to receive and the other obligated to pay this sum with increase due to the lapse of time. It modified the judgment only by including two additional judgment debtors on whom it fixed primary and secondary liability, but continued the judg-

ment against Indianapolis Gas with a tertiary liability for its satisfaction. The subtlety by which a judgment debtor is transfigured into a creditor for jurisdictional purposes deserves analysis, if for no other reason than because of its novelty.

The Court cannot resort to a decision of the merits of the case over which it holds itself to be without jurisdiction in order to justify its characterization of some of the trustee's claims as "window dressing" and "artifice." The measure of jurisdiction should be taken from the pleadings unless the claims are frivolous on their face. That is not the case here. In ultimate effect Chase alleged a cause of action and sought judgment against the City upon its personal undertaking to assume and pay the indebtedness upon the mortgage given by Indianapolis Gas to the plaintiff. It also alleged a cause of action and sought judgment against Indianapolis Gas for the amount of the coupon interest. Both demands were in excess of $3,000. If the plaintiff had asserted these demands in two separate actions, no one would doubt that both were within the jurisdiction of the District Court. In each there is an adequate diversity of citizenship and each involves the requisite jurisdictional amount and each is "actual" and "substantial" enough to support the jurisdiction, if this means anything more than that a demand for $3,000 must be involved. A United States district court is not without jurisdiction to render a judgment for $3,000 on confession if there is the requisite diversity of citizenship. *Re Metropolitan Railway Receivership*, 208 U. S. 90 at 108. The trustee's right to judgment against the mortgagor, even though uncontested, is a matter of substance, for the judgment is the important—indeed indispensable—means of pursuing the mortgaged property into the hands of the City in the event that it should turn out in the suit against the City that it had not become personally liable for any part of the mortgage debt.

Jurisdiction of the federal courts is indeed a variable and illusory thing, if the jurisdiction which a District Court admittedly has of two separate causes of action is lost when they are united in one, agreeably to the federal rules of procedure, because the one defendant as a surety seeks to enforce its equitable right to be exonerated by the other who is alleged to be the principal debtor.

The doctrine of realignment permits and requires a nominal defendant to be treated as a plaintiff for the purpose of defining the real controversy where no real cause of action is asserted against him by the plaintiff, but it does not admit of such treatment

of a defendant against whom the plaintiff asserts a cause of action within the jurisdiction of the court. The plaintiff cannot rightly be deprived of the benefit of that jurisdiction, conferred upon him by laws enacted pursuant to the Constitution of the United States, because the court may think that such a cause of action is relatively less important than that asserted against another defendant or because one action "dominates" the other or because one is more "actual" or "substantial" than the other. The statute itself sets up the criterion of substantiality by fixing the jurisdictional amount at $3,000. Moreover, in this case whether either of the rights asserted is more substantial than the other depends on the outcome of the litigation, which can hardly be used to determine jurisdiction which must exist at the beginning of the litigation.

If we examine this controversy in detail it appears that the conflicts between the trustee and its mortgagor were not feigned or merely formal. While the mortgage and the debt, which created the opposition inherent in the relation of mortgagor and mortgagee or between debtor and creditor, were undenied, Chase was asking that its lien be judicially construed to cover not merely the physical property described therein but also the entire interest of Indianapolis Gas in the lease which required payments to stockholders over and above the interest payments for the bondholders. Furthermore, Chase asked the Court to set aside the escrow agreement by which Indianapolis and the City had assumed to exclude Chase from dominion over the escrow funds. Chase demanded that Indianapolis Gas be denied future control over such funds and that they be paid directly to itself. These were conflicts as to the extent of its interest in and control over any cause of action against the City. They existed betwen Chase and the defendant Indianapolis Gas and concerned them alone.

There was also an issue as to the aggregate amount of the trustee's claim, which all defendants had a common interest in minimizing. The trustee claimed to be entitled to interest at 6% after default on coupons which bore a 5% interest rate, and it also claimed interest on overdue interest. This Court has held that where the only issue concerns the amount of the debt, as to which a mortgagor agrees with the plaintiff, but the issue is contested only by another mortgagor who has assumed the entire mortgage debt, the mortgage and the debt are the real subject matter of the controversy; that the decree when the amount is ascertained must

run against all debtors; and that the uncontesting mortgagor is a necessary party on the side opposite the mortgagee. *Ayres* v. *Wiswall*, 112 U. S. 187.

There were other issues on which the defendants were in sharp conflict between themselves. Indianapolis Gas and Chase both served their respective interests by contending against the City that its acts had the legal effect of binding it to the terms of the lease. But their common attitude in relation to this issue sprang from different legal origins. The rights of Chase had their source and their measure in the mortgage. The mortgage might or might not, depending upon the outcome of the litigation, be construed to give Chase a right to enforce for its own benefit the lease terms as against the City. Indianapolis Gas, on the other hand, derived no rights against the City from that instrument and was not, like Chase, limited by it. Indianapolis Gas's rights had no other measure than that found in the terms of the lease itself.

We would be diligent no less than the majority to prevent imposition on the jurisdiction of the federal courts by means of "window dressing" or "artifice." We find in this case nothing that warrants either characterization, and we think that the precedents invoked to support today's action reveal the gap which divides the doctrine of realignment as heretofore applied by this Court from the application made of it today.

The majority opinion leans heavily on *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178. Mr. Justice Holmes in that case said: " . . . it is obvious that the water works company is on the plaintiff's side and was made a defendant solely for the purpose of reopening in the United States Court a controversy which had been decided against it in the courts of the State." And he said again: " . . . when the arrangement of the parties is merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist, the device cannot be allowed to succeed." And so say we, but there is not the slightest indication of this kind of connivance in the case before us.

In *Helm* v. *Zarecor*, 222 U. S. 32, this Court refused to align with the plaintiff a corporation although its board and officers were in entire agreement with the position of complainants on the merits of the case. Another of the cases invoked is *Niles-Bement Co.* v. *Iron Moulders Union*, 254 U. S. 77. Here a New Jersey corporation sought to break a strike by filing a bill in an Ohio District Court against labor unions, individual strikers, and an Ohio cor-

poration, all citizens of Ohio. The New Jersey plaintiff owned a controlling interest in the Ohio defendant, the two had common officers and directors, and no relief whatever was asked against the Ohio company, which the bill alleged was being delayed in delivery of goods because of the strike. The Court refused to allow such an imposition on its jurisdiction. In *Sutton* v. *English*, 246 U. S. 199, this Court held it to be error to align one of the defendants with the plaintiff for jurisdictional purposes where her interest was adverse to plaintiff on one out of four issues, although with plaintiff as to three of the four.

We take the statement in the opinion of the Court that its basis is "not in legal learning but in the realities of the record" to be another way of saying that it disagrees with the lower court's view of the facts rather than with its view of the law. Review of facts is not the conventional function of this Court, and resort to it at this stage of this litigation is somewhat less than fair to the courts below as well as to the litigants.

Three years ago this Court refused to review the decision of the Circuit Court of Appeals that this controversy was within the federal jurisdiction. *City of Indianapolis* v. *Chase National Bank*, 305 U. S. 600. Of course a denial of certiorari is not to be taken as a ruling on the merits of any question presented. However, where the case is again brought here after some years of litigation, jurisdiction ought not to be overturned on light or inconsequential grounds or on disagreements with the court below on matters of fact. To do so here is likely to result in further and, as we see it, needless delay in settling the status of an important utility and the obligations and rights of a populous municipality. We think it the duty of the Court to end this controversy by proceeding to judgment on the merits and that nothing in this record justifies ousting these parties from the federal courts. If, as the opinion intimates, the forefathers are thought to have been unwise in creating a federal jurisdiction based on diversity of citizenship, we would think the remedy of those so minded would be found in Congressional withdrawal of such jurisdiction rather than in the confusing process of judicial constriction.

We would follow the words of the jurisdictional statute when it is sought to restrict its application, quite as faithfully as when the effort is to enlarge it by recourse to doctrines which conflict with its words. Compare *Healy* v. *Ratta*, 292 U. S. 263, 270.